IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No.________________

ALAN JENSEN
MELINDA MCWILLIAMS
Plaintiffs,

v.

TOWN OF FRASER,
Defendant.

MOTION FOR PRELIMINARY INJUNCTION

The Town of Fraser is unconstitutionally restricting its residents' constitutional rights with vague, content-based regulations on speech contained in an ordinance that regulates signs. Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs Alan Jensen and Melinda McWilliams move the Court for a preliminary injunction enjoining Fraser from enforcing provisions of Chapter 19, Article 6 of its municipal code ("Code") pending the resolution of this case on the merits.

STATEMENT OF CONFERRAL

The parties conferred about the motion by telephone at 9:00 am on July 24. The Defendant's attorney requested a copy of the draft Complaint; Plaintiffs sent a copy of the Complaint and have not yet heard back. Plaintiffs therefore assume that the Defendant opposes the motion.

INTRODUCTION

Alan Jensen, a resident of the Town of Fraser, wishes to display three pieces of political art created by Melinda McWilliams in Mr. Jensen's front yard to protest President Donald Trump and draw attention to global warming. According to the Town, the proposed displays violate the Code challenged in this case, and it has threatened to prosecute the Plaintiffs if they put up the art—thereby chilling their constitutionally protected speech.

The Code is expansive and applies to all signs erected on private property within the Town. It prescribes myriad regulations for certain signs, including limits on the size, placement, type, duration, and number. But critically, the Code imposes restrictions on signs based on their content and, in doing so, fails to narrowly tailor the restrictions to any compelling interest. For that reason, the Code is an unconstitutional content-based restriction that violates the Free Speech Clause of the First Amendment and article II, section 10 of the Colorado Constitution—both on its face and as applied to Plaintiffs. The Code's categories of different types of signs are also poorly defined and substantially overlap, leaving residents in the dark as to whether a particular sign will trigger prosecution. As a result, the Code is also impermissibly vague in violation of the Due Process Clause of the Federal Constitution and article II, section 25 of the Colorado Constitution.

STATEMENT OF FACTS

I. *The challenged code.*

Chapter 19, article 6 of the Town of Fraser Municipal Code regulates signs. Under the Code, Town officials must issue a permit before residents may post a sign on their property. (Ex. K, Fraser, Colo., Mun. Code § 19-6-210.) Officials review a proposed sign for compatibility

with the Code, conformation with "size, height and location requirements" for the applicable zoning district, and potential interference with "pedestrian or vehicular safety." (*Id.* § 19-6-220.) There is also a $40 fee. (*Id.* app. a.)

The Code, however, exempts certain types of signs from regulation entirely, including (1) town, country, state, or federal government signs; (2) signs related to public purposes or safety required by law; (3) signs on parked motor vehicles; (4) athletic scoreboards; (5) "[t]emporary decorations or displays, if they are clearly incidental to, customarily, or commonly associated with any national, state, or local holiday or religious celebration; (6) "[s]igns being carried by a person;" (7) flags on a flagpole or "[d]ecorative flags, banners or pennants … constituting an architectural feature which is integral to the design of a project;" (8) works of art and murals; and (9) tethered balloons. (*Id.* § 19-6-250.) Exempt signs do not have any number, size, placement, or material restrictions, nor are they subject to the Code's permitting requirement. (*See, e.g.*, *id.* §§ 19-6-250, -330.) "Permanent signs," which are affixed to non-portable structures and use durable materials, are subject to specific criteria and must receive a permit. (*Id.* § 19-6-320.) "Temporary signs," such as yard signs and swing signs, are subject to specific criteria, including numerical and size restrictions, but do not require a permit. (*Id.* § 19-6-330.)

Size, number, type, material, and placement restrictions are determined by the property's zoning area. (*Id.* tbl. 6.1.) Residential zoning area property owners are permitted:

1. One permanent sign per street frontage, which can be either (1) a wall sign under 6 square feet and placed below the eave or parapet line or (2) a projecting sign under 6 square feet, placed no higher than the wall, and at least 8 feet above the ground;

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2. One swing sign per street frontage, which must be under 6 square feet and placed no higher than 6 feet off of the ground; and
3. One yard sign per street frontage, which must be under 6 square feet, must be placed no higher than 4 feet off of the ground, and may be posted for a maximum of 90 days. (*Id.*)

Violations of the Code are punishable by a fine of no more than $2,650 or up to a year in jail. (*Id.* § 1-4-10.) Each day that a violation persists constitutes a separate violation. (*Id.*)

II. *Mr. Jensen and Ms. McWilliams' interactions with Town officials.*

Alan "AJ" Jensen lives in Fraser. (Ex. I., Jensen Decl., ¶ 2.) Melinda McWilliams, who is Mr. Jensen's partner, frequently stays with Mr. Jensen. In January 2017, Mr. Jensen created and erected communicative displays on a pole in Mr. Jensen's yard that protested the election of President Trump and called for action on global warming. (Ex. I, ¶ 3; Ex. J., McWilliams Decl., ¶ 2.) Over the following year and a half, Mr. Jensen added additional displays until there were eight politically expressive, two-sided communicative displays on the property. (Ex. I, ¶ 3; Ex. J, ¶ 2.) Neither Mr. Jensen nor Ms. McWilliams heard anything from the Town during those eighteen months. (Ex. I, ¶ 3; Ex. J, ¶ 2.)

On September 17, 2018, Mr. Jensen received a letter from Fraser Town Manager Jeffrey Durbin. (Ex. A, Sept. 17, 2018 Town letter; Ex. I, ¶ 4; Ex. J, ¶ 3.) The letter stated that Mr. Jensen had violated the Town's Code by erecting the eight displays and that the Town was taking action after it received what it characterized as "multiple complaints." (Ex. A; Ex. I, ¶ 4; Ex. J, ¶ 3.) The letter demanded that Mr. Jensen remove the signs or face fines or jail time. (Ex. A; Ex. I, ¶ 4; Ex. J, ¶ 3.)

On October 26, Mr. Jensen and Ms. McWilliams met with Mr. Durbin and other Town officials. (Ex. I, ¶ 6; Ex. J, ¶ 5.) The group discussed the complaint and why Mr. Jensen and Ms. McWilliams believed that Mr. Jensen's displays qualified as "works of art" under the Code and were therefore exempt from regulation. (Ex. I, ¶ 6; Ex. J, ¶ 5.) Mr. Durbin conceded that their "Toxic Trump" sign might be a "work of art," but maintained that the other displays violated the Code. (Ex. I, ¶ 6; Ex. J, ¶ 5.) He told Mr. Jensen and Ms. McWilliams that if Mr. Jensen did not comply with the letter, the Town would issue a citation and send Mr. Jensen to court. (Ex. I, ¶ 6; Ex. J, ¶ 5.) Mr. Durbin set a follow-up meeting for November 12, 2018. (Ex. I, ¶ 6; Ex. J, ¶ 5.)

At that follow-up meeting, Mr. Jensen and Ms. McWilliams again met with Mr. Durbin and other Town officials. (Ex. I, ¶ 7; Ex. J, ¶ 6.) Ms. McWilliams stated that Mr. Jensen would remove the displays under the threat of prosecution and that he would work with Ms. McWilliams to convert the displays into something the Town would consider a "work of art." (Ex. I, ¶ 6; Ex. J, ¶ 6.) Mr. Jensen and Ms. McWilliams presented four conceptual sketches ("Proposed Works"), designed and drawn by Ms. McWilliams:

(Exs. B, C, D, E, Proposed Works; Ex. I, ¶ 7; Ex. J, ¶ 6.) Mr. Durbin said that Mr. Jensen could not post the Proposed Works on his property because they "will just attract more attention." (Ex. I, ¶ 8; Ex. J, ¶ 7.) Ms. McWilliams then stated that they considered the issue to implicate freedom of speech. (Ex. I, ¶ 9; Ex. J, ¶ 8.) Mr. Durbin said that if Mr. Jensen and Ms. McWilliams "were going there, the meeting was over." (Ex. I, ¶ 9; Ex. J, ¶ 8.) As he left the room, Mr. Durbin told Mr. Jensen and Ms. McWilliams to submit a letter detailing their concerns to him by Friday, November 16. (Ex. I, ¶ 9; Ex. J, ¶ 8.)

On November 16, Mr. Jensen and Ms. McWilliams submitted their letter to Mr. Durbin, which discussed why the Proposed Works were "works of art" under the Code and protected expression under the First Amendment. (Ex. F, Nov. 16, 2018 Pls.' Letter; Ex. I, ¶ 10; Ex. J, ¶

9.) The letter also identified other Fraser properties with similar signs that the Town apparently regarded as "works of art" because they would otherwise violate the Code's size, number, and placement restrictions on signs. (Ex. F; Ex. I, ¶ 10; Ex. J, ¶ 9.) The letter informed Mr. Durbin that Mr. Jensen had removed the original signs from the flag pole due to the Town's threats of prosecution and that Mr. Jensen had erected the original 'Toxic Trump' sign on the shed wall as a "work of art." (Exs. F, G, ; Ex. I, ¶ 10; Ex. I, ¶ 9).

On November 26, Mr. Jensen received a letter from Mr. Durbin saying that he disagreed that Mr. Jensen's original displays on the flag pole constituted "works of art," but that Mr. Jensen had corrected the Code violation by removing all of the signs from the pole. (Ex. H, Nov. 26, 2018 Town Letter; Ex. I, ¶ 11; Ex. H, ¶ 10.) Mr. Durbin stated the letter would serve as a permit for the "Toxic Trump" sign as a wall sign, not a "work of art."[1] (Ex. H; Ex. I, ¶ 11; Ex. J, ¶ 10.)

III. *Plaintiffs request relief from this Court.*

Mr. Jensen and Ms. McWilliams have now removed all of their displays, except for one, due to the Town's threat of jail time or a fine for Mr. Jensen. (Jensen Decl. Ex. I, ¶ 10; McWilliams Decl. Ex. J, ¶ 9.) Mr. Jensen and Ms. McWilliams wish to post the remaining three Proposed Works and want to be free to post additional artful communicative displays on Mr. Jensen's property, but have not yet done so because the Town has threatened Mr. Jensen with prosecution. (Jensen Decl. Ex. I, ¶¶ 13-14; McWilliams Decl. Ex. J, ¶¶ 12-13.) The Town of Fraser, as represented solely by Mr. Durbin, has determined that (in Mr. Durbin's opinion) the

[1] This "permit" is inconsistent with the Code. The "Toxic Trump" sign exceeds the Code's six-square-foot limit for wall signs, and Town did not ask the Plaintiffs to pay the $40 fee for the permit.

Proposed Works violate the Code. The penalties for violating the Code are harsh: up to a $2,650 fine or a year in jail. (Ex. K, § 1-4-10.) Without this Court's intervention, Plaintiffs will be forced to choose to either violate the challenged Code as the Town interprets it or forgo their constitutionally protected communicative activities.

ARGUMENT

The Court should enter a preliminary injunction prohibiting the Town of Fraser from enforcing the Code, either facially or as applied to the Plaintiffs. This Court applies a four-prong test in evaluating whether an interim injunction is warranted. The moving party must demonstrate "(1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction is in the public interest." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009). The Plaintiffs easily satisfy all four factors.[2]

I. Plaintiffs are substantially likely to succeed on the merits.

The Code violates both the Federal and Colorado Constitutions. As a content-based restriction on speech, it violates the First Amendment and section 10 of Colorado's Bill of

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[2] There are three types of "disfavored" injunctions that require a heightened standard: "(1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1259 (10th Cir. 2005); *see also Free the Nipple-Ft. Collins v. City of Ft. Collins*, 916 F.3d 792, 797 (10th Cir. 2019). Plaintiffs' proposed injunction is clearly prohibitory rather than mandatory. The proposed injunction would not give Plaintiffs all the relief they would be entitled to if they prevailed in a full trial: it would merely provide temporary protection for their First Amendment rights until this Court can issue a final judgment on the merits. *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1247-48 (10th Cir. 2001). To the extent that awarding interim relief to the Plaintiffs would alter the status quo, this Court must apply "close[] scrutin[y]" and Plaintiffs must make a "strong showing" that they are likely to succeed on the merits and that the balance of harms favors the requested interim relief. *Schrier*, 427 F.3d at 1261. Plaintiffs meet this heightened standard here.

Rights. Moreover, the Code's loose and overlapping definitions of "sign" and "work of art" fail to provide a person of ordinary intelligence with a reasonable opportunity to understand what is prohibited and invite arbitrary enforcement—thereby violating due process.

A. *The Code facially violates the First Amendment and article II, section 10 of the Colorado Constitution.*

The First Amendment—incorporated against the States by the Fourteenth Amendment—bars the government from "abridging the freedom of speech." U.S. CONST. amend. I. Likewise, the Colorado Constitution prohibits the government from "impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject …." COLO. CONST., art. II, sec. 10. Thus the State "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

i. The Code is a content-based restriction on speech.

The Code subjects signs to different levels of regulation depending on their content, and is therefore a content-based restriction on speech. "Government regulation is content based if a law applies to particular speech because of the topic discussed or the message expressed." *Id.* at 2227. "Some facial distinctions based on message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Id.* However, "[b]oth are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.*; *see also Wilson v. City of Bel-Nor*, 924 F.3d 995, 999 (8th Cir. 2019) (reversing denial of preliminary injunction after determining "that the content of a flag or sign determines whether it" is regulated).

In this case, the Code exempts two types of signs from regulation based on their content. *First*, the Code exempts "[t]emporary decorations or displays, if they are clearly incidental to, customarily, or commonly associated with any national, state, or local holiday or religious celebration" from the permitting requirements *and* allows such signs to "be of any type, number, area, height, location, illumination or animation" as long as they are "maintained and do not constitute a fire hazard." Fraser, Colo., Mun. Code § 19-6-250(5). Thus, a sign celebrating Labor Day is essentially unrestricted, while the Plaintiffs' Proposed Works are subject to a myriad of regulations on size, number, and placement. *Id.* § 19-6-320, fig. 6.9. The difference in restrictions stems solely from the content of the sign: the restrictions fall away if the sign is "clearly incidental to, customarily, or commonly associated with any national, state, or local holiday or religious celebration." *Id.* "Without question, then, a City official would be required to consider the content of the sign to determine whether the sign complied with the applicable size limitation [or any other restriction on wall signs] set forth in the ordinance." *Quinly v. City of Prairie Vill.*, 446 F. Supp. 2d 1233, 1239 (D. Kan. 2006) (ordinance's size limits on signs were content based because an official would have to review a sign's content to determine which restrictions to apply); *see also Central Radio Co. v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016) (sign code was content based because it "exempted governmental or religious flags and emblems, but applied to private and secular flags and emblems").

Second, the Code exempts "works of art" from permitting requirements. Fraser, Colo., Mun. Code § 19-6-250. The Code defines "works of art" as "[(1)] a sculpture, painting, graphic or other type of art that [(2)] does not advertise or promote a particular business, service or product." *Id.* § 19-6- 510. Both criteria force Town officials to evaluate the work's content.

The Code does not make any distinctions between non-sculptural "works of art" and "signs" based on form or material. Under the Code, both a "work of art" and a "sign" could include just text, just illustration, or a combination of text and illustration; both could be a design on some sort of board affixed to a wall. *Cf id.* (defining "signs" as "any written copy, display, illustration, insignia or illumination used to communicate a message or idea which is displayed or placed in view of the general public ….."). As a result, a Town official must look at the content to determine whether it counts as a "painting, graphic or other type of art" and not just a "sign." In a similar vein, a government official must look at the content to determine whether the piece advertises or promotes a particular business, service, or product. If Town officials deem the piece to fail to meet the "work of art" definition, the piece is subject to the Code's requirements and permitting process. For a wall sign, that includes number, size, placement, material, and durational restrictions. But if the piece is a "work of art," it escapes all such restrictions and does not need a permit. Thus, "[t]he restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign." *Reed*, 135 S. Ct. at 2227. And indeed, the federal courts have recognized that a municipal code that imposes different degrees of regulation on different types of expression using the same medium is a content-based restriction. *E.g.*, *Linkmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 93-94 (1977) (ordinance prohibiting the posting of "For Sale" or "Sold" signs was a restriction "based on their content"); *Central Radio*, 811 F.3d at 633 (code was content based because "it exempted 'works of art' that 'in no way identif[ied] or specifically relate[d] to a product or service,' but it applied to art that referenced a product or service").

ii. The Code cannot survive strict scrutiny.

"Content-based laws … are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226. To survive strict scrutiny, the Town must prove not only that the challenged restrictions are the least restrictive means of furthering a compelling government interest, *McCullen v. Coakley*, 573 U.S. 464, 478 (2014), but also that the restrictions are "actually necessary" to achieve that interest, *United States v. Alvarez*, 567 U.S. 709, 726 (2012). "There must be a direct causal link between the restriction imposed and the injury to be prevented." *Id.* at 725.

The Town claims in the Code that it has a compelling governmental interest in aesthetics and pedestrian or vehicular safety. Fraser, Colo., Mun. Code § 19-6-110 (purpose of Code is to "[p]romote the safety of persons and property by ensuring that signs do not create a hazard" and "[p]rotect the public welfare and enhance the appearance and economic value of the landscape …."). But these are not compelling interests, especially where the Ordinance subjects only certain content-based categories of signs to regulation. *See, e.g.*, *Wilson*, 924 F.3d at 1001 ("Bel-Nor argues the Ordinance is justified by traffic safety and aesthetics. These interests here are not compelling.") (citations omitted); *Central Radio*, 811 F.3d at 633 ("Although interests in aesthetics and traffic safety may be 'substantial government goals,' neither we nor the Supreme Court have ever held that they constitute compelling government interests.") (citations omitted); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1268 (11th Cir. 2005) (interests in aesthetics and traffic safety were not compelling as "[t]he City has provided no justification, other than its general interests in aesthetics and traffic safety—which are offered abstractly and

applied inconsistently—for exempting certain types of signs but not others"); *Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (8th Cir. 1995) (city's interest in traffic safety has never been held to be compelling); *Rappa v. New Castle Cty.*, 18 F.3d 1043, 1082 (3d Cir. 1994)) ("[C]ourts have been reluctant to find compelling a municipality's interest in traffic safety as a basis to uphold content-based sign regulations"); *Quinly*, 446 F. Supp. 2d at 1240; *McCormack v. Township of Clinton*, 872 F. Supp. 1320, 1325 n.2 (D.N.J. 1994) ("[N]o court has ever held that [aesthetics and traffic safety] form a compelling justification for a content-based restriction on political speech").

Even if the Court were to find these interests compelling, the Code's underinclusiveness demonstrates that the laws are not narrowly tailored to achieve these interests. The Code restricts some signs while not regulating others that would presumably create the same harms: it permits an unlimited number of works of art and holiday/religious celebration signs, but limits all other signs—including political ones. As the Supreme Court recognized in *Reed*, "The Town cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem." 135 S. Ct. at 2231; *see also Central City*, 811 F.3d at 634 ("There is no evidence in the record that secular flags were any more distracting than religious ones, or that a large work of art displaying a reference to a product threatened the safety of motorists any more than any other large, exempted pieces of artwork."). This is particularly true when the restriction implicates private property: the Supreme Court has recognized that property owners have a personal interest in preserving the aesthetics of their property that further undercuts the Town's claim. *See City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) ("[I]ndividual residents themselves

have strong incentives to keep their own property values up and to prevent 'visual clutter' in their own yards and neighborhoods . . . [which] diminishes the danger of the 'unlimited' proliferation of residential signs.").

Similarly, the Town cannot meet its burden to prove that the Code is narrowly tailored to promote the interests of traffic safety or aesthetics. For example, according to the Code, traffic safety and aesthetics are threatened by a wall sign that "obstruct[ed] any portion of a window, doorway or other architectural detail," extended above the wall, projected out more than 12 inches, exceeded 80% of the building front, "extend[ed] above the eave or parapet line of any building," or exceeded 6 square feet. But those interests are not threatened if the sign happened to be "clearly incidental to, customarily, or commonly associated with any national, state, or local holiday or religious celebration." Fraser, Colo., Mun. Code, §§ 19-6-250, 19-6-320(a)(5). Common sense would say that if a driver would be distracted by a large political sign, she would be equally distracted by a large religious sign. A narrowly tailored law to promote traffic safety would address *all* such potential distractions regardless of the content. As the Supreme Court has stated, "a 'law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.'" *Reed*, 135 S. Ct. at 2232 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002)). The Colorado Supreme Court has invalidated a similar sign code on precisely this basis. *City of Lakewood v. Colfax Unlimited Ass'n*, 634 P.2d 52, 69 (Colo. 1981) (preferential treatment of certain categories such as flags, holiday decorations, and religious symbols rendered municipal code unconstitutional).

B. *As applied to the Plaintiffs, the Code violates the First Amendment and article II, section 10 of the Colorado Constitution.*

The Code is not only facially unconstitutional, but also unconstitutional as applied to the Plaintiffs. Town officials indicated in their letters and meetings with the Plaintiffs that they were using previously undisclosed, content-based criteria to determine whether the Proposed Works were "works of art."

To begin with, in his initial September 17, 2018 letter, Mr. Durbin made clear that the Town's decision was based on the content of Plaintiffs' displays because the Town wrote that it was taking action after it received what it characterized as "multiple complaints." Moreover, when the Plaintiffs showed Mr. Durbin the four Proposed Works, Mr. Durbin rejected them all, saying that they "will just attract more attention"—confirming that the Town's decision was based on the content of these particular signs. (Ex. I, ¶ 8; Ex. J, ¶ 7.) The Supreme Court has recognized that enforcement of a law is content-based if it is "concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or 'listeners' reactions to speech.'" *McCullen*, 573 U.S. at 481 (a government justification that "the speech outside Massachusetts abortion clinics caused offense or made listeners uncomfortable" would not be "a content-neutral justification to restrict the speech"). Moreover, regardless of the words Mr. Durbin used, it is clear that the Town's decision was content-based: the Town only made its decision after viewing the Proposed Works, and it used non-published criteria to determine that the displays—rich with color, imagery, text, and meaning—were not "art" under the Code.

Because the enforcement of the Code was content-based, the Town must satisfy strict scrutiny. *E.g.*, *Reed*, 135 S. Ct. at 2227. And for substantially same reasons discussed above, the Town cannot rely on aesthetics or traffic safety. *See supra* Section I.A.ii. That is, if the Town

were concerned about visual clutter or distractions, it could have enacted certain content-neutral limitations on works of art, including on their number, size, and placement. And in fact, the Code already includes regulations that do not suffer from the vice of content discrimination: it bars moving, noisy, animated, and flashing signs and signs that obstruct drivers' eye-lines. But the Town cannot impose *ad hoc*, content-based restrictions limiting political expression under the guise of preventing too much "attention."

C. *The Code is unconstitutionally vague.*

In addition to its unconstitutional limits on the freedom of speech, the Code is also fatally vague. In particular, its definitions of "sign" and "work of art" do not provide sufficient notice as to what is permissible and what is prohibited, burdening vast swaths of constitutionally protected in relation to its legitimate sweep.

"To mount a facial vagueness challenge, the litigant must show that the potential chilling effect on protected expression is 'both real and substantial.'" *Jordan v. Pugh*, 425 F.3d 820, 828 (10th Cir. 2005) (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975)). "Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974). A statute is impermissibly vague if either of two tests is met: the law (i) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or (ii) "authorizes or even encourages arbitrary and discriminatory enforcement.'" *Faustin v. City & Cty. of*

Denver, 423 F.3d 1192, 1201 (10th Cir. 2005) (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2002)). The Code fails both tests.

Under the first test, the Code fails to provide a reasonable opportunity to understand what conduct is prohibited. The Code's loose and overlapping definitions of "sign" and "work of art" mean that "no standard of conduct is specified at all." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). The Code defines "work of art" as "a sculpture, painting, graphic or other type of art that does not advertise or promote a particular business, service or product." Fraser, Colo., Mun. Code, § 19-6- 510. It defines "sign" as "any written copy, display, illustration, insignia or illumination used to communicate a message or idea which is displayed or placed in view of the general public . . . ." *Id.* But critically, there isn't any objective basis to determine whether a "sign" is a "work of art" (and thus exempt from regulation).

The distinction between a "sign" and a "work of art" cannot be the absence of text: The Code's definition of "work of art" includes "graphics" and "other type[s] of art." *See Graphic*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/graphic (last visited June 27, 2019) ("graphic" is "a product of graphic art"); *Graphic Arts*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/graphic%20arts (last visited June 27, 2019) ("graphic arts" are "the fine and applied arts of representation, decoration, *and writing* or printing on flat surfaces together with the techniques and crafts associated with them) (emphasis added). Museums have long deemed works that incorporate text and pictures to be art. *See, e.g.*, *Louise Bourgeois, No (2)*, MoMA, https://www.moma.org/collection/works/61722 (last visited June 27, 2019); *Louise Rive*, ImageVault, https://imagevault.co.nz/nz-artists/louise-rive/ (last visited June 27, 2019); *Roy Lichtenstein, One Cent Life*, Artsy,

https://www.artsy.net/artwork/roy-lichtenstein-one-cent-life (last visited June 27, 2019). Similarly, the distinction cannot be the presence or absence of imagery because under the Code, a sign can be a "display" or "illustration." And finally, the distinction cannot be the communication of a message or an idea: the Supreme Court has consistently recognized that art communicates ideas and is a form of protected expression. *See, e.g.*, *Hurley v. Irish-American Gay*, 515 U.S. 557, 569 (1995) (noting that art, such as Jackson Pollock's paintings, the "music of Arnold Schoenberg" and "Jabberwocky verse of Lewis Carroll," is "unquestionably shielded" by the First Amendment). Here, Plaintiffs' displays include graphics, imagery, colors, and the expression or communication of a message or idea, but the Town still does not consider them "works of art." (Exs. B, C, D, E, G; Ex. I, ¶¶ 6, 8; Ex. J, ¶¶ 4-7.) Because the Code offers no clear distinction between displays that are "works of art" and displays that are not, it provides no "reasonable opportunity to understand what conduct [the Code] prohibits" and is thus impermissibly vague. *Faustin*, 423 F.3d at 1201.

Under the second test, the Code affirmatively encourages arbitrary and discriminatory enforcement. *See id.* at 1201. Because the definition of a "work of art" is impossibly elastic, the Town has unbridled discretion to determine, on a case-by-case basis, whether a display qualifies—based entirely on whether the particular official believes the display is "art." The Court need look no further than the facts of this case: Mr. Durbin himself determined, without reference to any objective standard, that the Proposed Works were not "works of art." The determining factor appears to be Mr. Durbin's personal belief that the Proposed Works would attract attention, though nothing in the Code itself suggests that attention-getting pieces are more or less likely to qualify as art. This kind of limitless discretion leaves Fraser residents to guess at

what the Town will do. If they guess incorrectly, they will be subject to a substantial fine and jail time. Faced with that ambiguity, many Fraser residents—including the Plaintiffs—give up on speaking at all.

II. Plaintiffs will suffer irreparable harm in the absence of preliminary relief.

"A plaintiff suffers irreparable injury when the court would be unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain." *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012) (quoting *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1156 (10th Cir. 2001)).

A law that chills or suppresses expression protected by the First Amendment is a classic example of a case where monetary damages are both inadequate and difficult to ascertain. "When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Id.* (quoting *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001)). More specifically, "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Pac. Frontier v. Pleasant Grove City,* 414 F.3d 1221, 1235 (10th Cir. 2005) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); s*ee also Heideman v. South Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003) (even a "minimal restriction" on the manner in which dancers may convey their artistic message constitutes irreparable injury). Accordingly, when government action threatens First Amendment rights, as in this case, there is a presumption of sufficient irreparable injury to warrant interim injunctive relief. *Cmty. Commc'ns Co. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981).

III. The balance of equities tips significantly in the Plaintiffs' favor.

The Town's challenged campaign of enforcement heavily burdens First Amendment rights—a burden that constitutes irreparable injury as a matter of law—and the Town is violating both the Federal and Colorado Constitutions. Accordingly, the balance of equities tips sharply in the Plaintiffs' favor. *See Awad*, 670 F.3d at 1131 ("[W]hen the law that voters wish to enact is likely unconstitutional, their interests do not outweigh Mr. Awad's in having his constitutional rights protected"); *Am. Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999) ("[T]he threatened injury to Plaintiffs' constitutionally protected speech outweighs whatever damage the preliminary injunction may cause Defendants' inability to enforce what appears to be an unconstitutional statute").

IV. The injunction is in the public interest.

Finally, the temporary injunction the Plaintiffs seek, which protects the First Amendment, is clearly in the public interest. "It is always in the public interest to prevent the violation of a party's constitutional rights." *Awad*, 670 F.3d at 1131. "[A]s far as the public interest is concerned, it is axiomatic that the preservation of First Amendment rights serves everyone's best interest." *Local Org. Comm., Denver Chap., Million Man March v. Cook*, 922 F. Supp. 1494, 1501 (D. Colo. 1996); *see also Elam Constr. v. Reg. Transp. Dist.*, 129 F.3d 1343, 1347 (10th Cir. 1997) ("The public interest . . . favors plaintiffs' assertion of their First Amendment rights").

CONCLUSION

Political speech "is central to the meaning and purpose of the First Amendment." *Citizens United v. FEC*, 558 U.S. 310, 329 (2010) (citation omitted). "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to

enlightened self-government and a necessary means to protect it." *Id.* at 339. And if the government can censor unpopular political views through the arbitrary enforcement of a municipal ordinance, those constitutional protections become meaningless. The Court should grant the Plaintiffs' request for a preliminary injunction and enjoin the Town of Fraser from enforcing the Code until this Court enters a final judgment on the merits of Plaintiffs' claims.

Dated: July 25, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 25, 2019, I filed the foregoing Motion for Preliminary Injunction and all supporting materials via CM/ECF and, in addition, I sent copies of the filing by email and first-class mail to the following parties:

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