No. 26-1133

In the United States Court of Appeals

For the Seventh Circuit

Mark Brandon Hamman,

Plaintiff-Appellant,

v.

City of Carbondale, Illinois, an Illinois Municipal Corporation; Leonard Jamie Snyder, in his individual and official capacities; John Lenzini, in his individual and official capacities,

Defendants-Appellees

On Appeal from
United States District Court for the Southern District of Illinois
3:25-cv-00736-NJR

REPLY BRIEF OF APPELLANT MARK BRANDON HAMMAN

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INTRODUCTION

The City of Carbondale has enacted a sign ordinance that no one — not the officers who enforce it, not the City Attorney who defends it, not the district court that upheld it — can consistently define. Its operative term, "public right of way," carries three different contrary meanings in the municipal code. The official charged with daily enforcement offered a fourth of his own invention. When the district court asked the City Attorney where the Ordinance defined its key term, he pointed to a provision that Defendants' own response brief does not use. A law this opaque cannot constitutionally regulate speech.

But the Ordinance does not merely fail for vagueness. It discriminates. While it categorically bans political and religious signs from the public right of way, it expressly permits commercial and social signage through an encroachment-permit regime for sidewalk restaurants, block parties, and sidewalk sales. This is a content-based distinction that triggers strict scrutiny.

Even on its own terms, the Ordinance is not narrowly tailored. Defendants claim a traffic-safety interest, but they produced no experts, no studies, and no empirical evidence to justify a blanket ban on all temporary signs of whatever size, however far from the road. This Court made clear in *Luce v. Town of Campbell* that such restrictions require evidentiary support. Defendants offered none. Worse, the only traffic-safety testimony in the record came from Hamman himself, who explained that he used staked signs precisely because carried signs blow into traffic.

The Ordinance bans the safer method while permitting the dangerous one. That is not narrow tailoring.

What happened on April 16, 2025, was the predictable result of an ordinance that gives officials broad discretion. Vague laws do not merely confuse. They invite precisely this kind of selective, viewpoint-driven enforcement.

ARGUMENT

I. DEFENDANTS FAIL TO UNTANGLE THE ORDINANCE'S VAGUENESS.

Section 15.4.10.8 of the City of Carbondale's Revised Code (the "Ordinance") is riddled with vagueness, unconstitutionally so. The record confirms it. Multiple police officers testified to not understanding the Ordinance. The district court interrupted the City Attorney's own testimony to ask where the Ordinance defined its operative term, observing that "there isn't anything in there that says anything about private property." A. 115, 9–10. The City Attorney himself, when pressed for the controlling definition of "right of way," pointed to a section of the Code — § 17-12-2 — that Defendants' response brief does not even cite. Moreover, the Ordinance's many exceptions are rendered indeterminate by Defendants' interpretation. When officials charged with enforcing the Ordinance cannot agree on its specifics, it fails to give ordinary citizens the notice the Constitution demands.

A. Defendants' "Vague-in-All-Applications" Argument Should Be Rejected.

Defendants did not present any "vague-in-all-applications" argument to the court below. *See generally* Doc. 17. The district court's decision does not even hint at it. Defendants have waived this argument.

To the extent it has not been waived, it is not relevant. First, Defendants' claim that Hamman knew that the Ordinance prohibited his intended conduct cannot be squared with the record. Yes, Hamman knew generally that other individuals had been told they could not have signs. A. 60, 15–18. But as he made clear in his answer to the *very next question in his examination*, he understood that the Ordinance's exception applied to his particular conduct: "I read the ordinance myself, I saw the exemption and that – and the other signs that are displayed across the street, right next door that had signs in the ground. I believe that I fell into that exemption that it was ok." *Id.* 60, 22–25. As Hamman further explained: "my understanding of that section . . . that doesn't apply to those that are participating in demonstrations or similar events – I believe that the code section allowed me to do that." *Id.* 69, 18–25. Far from being aware that the Ordinance prohibited his conduct, and certainly in no way "conceding" that point, *contra* Appellees' Br. 19, Hamman expressly believed that the Ordinance permitted his actions.

Defendants' response on this point depends on the premise that Hamman's conduct was so clearly within the prohibition that he had no reasonable basis to contest it. But if that were true, the enforcement action of April 16 would not have required three separate interpretations from multiple officials, repeated consultation with the City Attorney, and the senior officer on scene describing the situation as "a very gray and touchy area." A. 193, 11–17.

But more fundamentally, the vagueness in all applications doctrine does not apply to First Amendment challenges. *United States v. Williams*, 553 U.S. 285, 304

(2008). In *Kolender v. Lawson*, 461 U.S. 352 (1983), the Supreme Court invalidated a criminal identification statute. Though the statute could be clear in some instances, the Court invalidated it because of its potential to infringe First Amendment rights. The Supreme Court expressly rejected the argument Defendants make here, advanced by Justice White in dissent, that the standard should be "all of its possible applications." *Id.* at 358 n.8 (quoting *id.* at 370 (White, J., dissenting)). On the contrary, the Court emphasized its willingness to invalidate a law "on its face even when it could conceivably have had some valid application." *Id.* In *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999), the Court rejected the *Salerno* "no set of circumstances" standard.

> To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself (even though the defendants in that case did not claim that the statute was unconstitutional as applied to them, *see id*. at 745, n. 3, the Court nevertheless entertained their facial challenge). Since we, like the Illinois Supreme Court, conclude that vagueness permeates the ordinance, a facial challenge is appropriate.

Id.

The Supreme Court has rejected the position Defendants advance. Applying an "all applications" test to a First Amendment challenge of this kind cannot be reconciled with *Williams*, *Kolender*, or *Morales*. The argument fails on its merits.

B. Defendants Have Failed to Resolve the Ordinance's Vague Language.

Turning to the Ordinance itself, the Ordinance suffers from a basic and fatal flaw: because "public right of way" is undefined, the scope of its prohibition on temporary signs is unknown and unknowable.

1. Defendants Fail to Supply Clarity of Meaning to "Right of Way."

Regarding the meaning of "right of way," Defendants make the same mistake as the district court, citing various cases that do not implicate First Amendment rights. They argue that "public right of way" is a commonly understood term that requires no formal definition, citing dictionary definitions and cases upholding ordinances that use terms without exhaustive definition. Appellees' Br. 20–21. That argument might be persuasive in an ordinary regulatory context. In the First Amendment context, it is not enough. The vagueness doctrine "demands a greater degree of specificity" when a statute's scope can reach First Amendment expression. *Smith v. Goguen*, 415 U.S. 566, 573 (1974). Uncertainty at the margins of a prohibition chills protected expression: speakers who cannot determine whether their conduct falls within a prohibition will often decline to engage in expression rather than risk enforcement. *Brown v. Kemp*, 86 F.4th 745, 771 (7th Cir. 2023).

In a First Amendment case, the constitutional inquiry is designed to prevent the chilling of fundamental rights. Here, the Ordinance lacks clear definitions for key terms, failing to define "public right of way" in its prohibition against signs "erected on, suspended over, or encroach[ing] upon the public right of way." § 15.4.10.8(A)(1). Carbondale's municipal code contains three materially different definitions of "right of way." Rather than invoking those definitions, Defendants use dictionary definitions: "the area over which a right-of-way exists", "the strip of land over which is built a public road", and "the land used by a public utility." Appellees' Br. 21. The problem, of course, is that even these definitions differ from one another. An area

including a public road is different from land involving a public utility, and vice versa. Public utilities even run onto privately owned land. It does not appear that Defendants contend that private landowners are banned from posting signs just because the City is running a pipe on the property, but the actual prohibition is unknowable.

At the hearing, Lenzini offered one very different working definition of right-of-way: "any property owned by the City[.]" A. 164, 4–5. Government-owned property encompasses far more than the ordinary meaning associated with a public right of way or the definitions Defendants provide. *See* Appellant's Br. 16–17. When the official charged with enforcing an ordinance daily cannot produce a definition of its operative term that appears anywhere in the text, and instead offers a definition of his own invention, that ordinance fails to provide fair notice.

Defendants rely, like the district court, on § 17-1-5, stating, "the Ordinance explicitly incorporates by reference § 17-1-5, which defines 'public right of way' as a 'public highway, street, sidewalk, alley, or publicly owned common area.' § 17-1-5(A)(1). (A.1.)." Appellees' Br. 22. But as Hamman pointed out in his opening brief, the cross-reference does not actually supply a definition. The Ordinance states that no sign may be erected in the right of way "except as provided for under section 17-1-5." § 15.4.10.8(A)(1). That clause identifies the circumstances in which encroachments are permitted; it directs the reader to § 17-1-5 to determine permitted encroachments, not to determine what "right of way" means. Treating the exception as the source of the definition for the prohibition that references it is not a step an

ordinary reader would have reason, or notice, to take. Nothing in the text indicates that the Ordinance incorporates § 17-1-5's definition. Defendants respond to this argument by stating it "strains credulity," Appellees' Br. 22, without further argument in response.

What strains credulity is the City's failure to explain why its own City Attorney, when asked directly by the district court to provide the definition of "right of way" applicable to the enforcement action, cited § 17-12-2 — not § 17-1-5. A. 115, 121–22. Defendants spend multiple pages explaining why § 17-1-5 is the obvious and authoritative definition. They do not spend a single sentence explaining why the attorney who enforces the ordinance and who was present at the evidentiary hearing did not know that. § 17-1-5's definitional provision is not obviously incorporated by the cross-reference because the cross-reference identifies circumstances in which encroachments are permitted, not the definition of the right of way. An ordinary citizen reading the Ordinance is entitled to read it the same way the City Attorney did — and to receive fair notice of what it means.

Even accepting § 17-1-5(A)(1) as the operative definition of "public right of way," the vagueness problem is only displaced, not resolved. That provision defines the term to include "any public highway, street, sidewalk, alley, or publicly owned common area." *Id.* The first four categories—highway, street, sidewalk, alley—carry reasonably determinate meanings. "Publicly owned common area" does not. It is an open-ended residual that adds no limiting principle beyond public ownership. That reading collapses the distinction between the right of way and public property

generally, converting a prohibition on signs in transit corridors into a prohibition on signs on all public land.

2. The Ordinance's Other Terms Exacerbate the Vagueness.

The unknowability of "right of way" in the Ordinance's text is exacerbated by the confusion created by the Ordinance's other terms. Section 15.4.10.8(A)(3) provides that "[n]o temporary sign shall be erected within twenty feet (20') of the curb line of any adjoining street surface." That provision appears in the same subsection as the general right-of-way prohibition. Its existence creates a textual problem that Defendants have never adequately explained: if § 15.4.10.8(A)(1) categorically prohibits all signs on a broadly and categorically defined public right of way, as Defendants contend, the twenty-foot rule is superfluous. It would add nothing that the categorical prohibition did not already require — indeed, it would add less, since the categorical prohibition covers the entire right of way, while the twenty-foot rule covers only a fixed distance from the curb. Statutory provisions are not surplusage. It is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988). This principle is "one of the most basic interpretive canons, that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]'" *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

A reading of the Ordinance that renders § 15.4.10.8(A)(3) meaningless cannot be correct. The only reading that gives § 15.4.10.8(A)(3) independent operative effect

is that it addresses a zone distinct from the "public right of way" covered by § 15.4.10.8(A)(1), such that a sign beyond twenty feet from the curb might fall outside the twenty-foot rule while still being subject to the general prohibition.

Defendants argue that § 15.4.10.8(A)(3)'s twenty-foot setback rule applies only to signs on private property, purportedly to reconcile it with the general right-of-way prohibition. There is no language in § 15.4.10.8(A)(3) that limits it to private land. None. The district court noted as much when it interrupted Snyder's testimony to observe: "How do you get — there isn't anything in there that says anything about private property." A. 115, 9–10. Defendants' interpretive move requires reading a limitation into the provision's text that the text does not contain. A citizen reading § 15.4.10.8(A)(3) has no reason to know that its twenty-foot rule has been administratively limited to private property.

Likewise, Section 15.4.10.8 (A)(5)(b)(2) of the Ordinance provides that "[e]ach individual 501(c) not for profit organization will be allowed to display a temporary sign" and that a new permit "shall be issued each time the temporary sign is to be displayed." That language is mandatory. It does not identify any geographic limitation on where the permitted display may occur. On its face it says: you have a legal right to display a temporary sign, and the City must issue you a permit when you seek one. Defendants' answer is that the permit provision authorizes signs only on private property, because the general right-of-way prohibition applies regardless of permit status. Appellees' Br. 26. That reading renders the permit provision entirely superfluous. If the 501(c)(3) permit authorizes nothing that the permittee could not

do without a permit, the provision has no operative legal effect. This language comes, not in an unrelated provision, but as part of the Ordinance itself. The surplusage canon prohibits that reading. *Corley*, 556 U.S. at 314. The only reading that gives the provision operative effect is that the permit authorizes a temporary sign somewhere it would otherwise be impermissible. But that reading, in turn, means the general prohibition is not categorical, and the relationship between the two provisions is opaque from the Ordinance's text.

Finally, Defendants argue that the demonstration exception in § 15.4.10.8(A)(5)(a)(4) is limited to the commercial sign subsection in which it appears and has no bearing on the general right-of-way prohibition. Appellees' Br. 27–28. That interpretation is itself a legal conclusion that requires reading the two provisions in relation to each other — a step an ordinary citizen has no way of knowing to take. Read naturally, that language could be understood to exempt the staked signs of a pro-life demonstrator from whatever prohibition might otherwise apply. Whether it does or does not requires legal analysis of the relationship between two provisions that neither references the other, and the ordinary reader cannot understand the meaning.

C. The Ordinance Vests Arbitrary Discretion in City Officials.

The Ordinance suffers from a fatal problem of discretion: Section 15.4.10.8(A)(5)(a)(4) allows non-profit organizations to apply for permits to display temporary signs. It fails to articulate, however, any standard by which permit requests are reviewed and approved. Without objective limits, approval depends entirely on the subjective judgment of City officials, creating the very risk of arbitrary

or viewpoint-based enforcement that the First Amendment forbids. Defendants, to try to resolve this problem, appear to take the position that no permits actually exist, and all temporary signs are categorically prohibited. But refusing to grant any of the permits that an Ordinance requires does not fix the Ordinance's vagueness.

Defendants claim that the permit provision imposes no discretion on the City because the Ordinance's general prohibition applies to all signs in the right of way, including those for which a permit has nominally been issued, so there is nothing for the discretion to operate on. Appellees' Br. 26–27. But if the permit is a nullity, authorizing nothing, then the permit provision is constitutionally vague for a different reason: it creates the false impression of a lawful pathway to exercise First Amendment rights that does not in fact exist, deterring speakers who might otherwise engage in protected expression without a permit while providing no genuine avenue for relief.

II. DEFENDANTS HAVE FAILED TO JUSTIFY THE ORDINANCE'S UNCONSTITUTIONAL BREADTH.

Defendants concede that the Ordinance regulates speech in a public forum and, as such, must be narrowly tailored and leave open ample alternatives for communication.

A. The Ordinance Is Not Narrowly Tailored.

In this context, "the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation," and does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v.*

Rock Against Racism, 491 U.S. 781, 799 (1989) (quotation marks and citations omitted). Defendants' interpretation of the Ordinance effectively prohibits all signs on public property. Defendants rely heavily on the existence of their government interest in ensuring safe traffic and visual aesthetics. The existence of those interests is not in dispute. What is in dispute is Defendants' failure to provide the necessary empirical proof to justify how the Ordinance addresses those interests.

This Court has made clear that a City must justify, via affirmative, empirical proof, most regulations it wishes to impose on speech. *Luce v. Town of Campbell*, 872 F.3d 512 (7th Cir. 2017), is instructive on this point. In *Luce*, a closely comparable case, this Court reversed the grant of summary judgment in favor of an ordinance banning signs within 100 feet of overpasses. That ordinance applied "whether or not the sign is large enough to attract drivers' attention." *Id.* at 518. This Court emphasized that "It is hard to see why signs off the highway, and too small to cause drivers to react, should be banned." *Id.* This Court required empirical proof before the ban could be sustained: "Perhaps the Town has some justification for the 100-foot rule, but unless it produces one the district court should ensure that political demonstrations and other speech that does not jeopardize safety can proceed." *Id.* *Luce* is dispositive on the narrow tailoring question.

Defendants try to distinguish *Luce* in two ways: that it involved summary judgment, and that it included credibility issues with a witness. Appellees' Br. 33 n.6. Defendants do not, however, identify why either distinction matters. Defendants take the position that they need not justify their regulation with any evidence at all: "The

City also need not adduce empirical proof of the connection between regulating the posting of temporary signs in the public right of way and traffic safety." Appellees' Br. 33. *Luce* says the opposite. A municipality that "has not even tried to justify" its sign restriction cannot prevail on narrow tailoring. *Luce*, 872 F.3d at 518. This Court emphasized that while *extensive* evidence may not be necessary, evidence of some kind always is.

> The cases we have been discussing do not excuse the absence of a good reason for regulating; *every* time, place, and manner regulation requires that. So if a law were to forbid the use of a megaphone near Times Square at noon on a weekday, a court would insist that the city or state have some evidence to overcome the common understanding that the din there (and then) is already so great that a megaphone may be needed for speech to be heard at all[.]

Id. at 516–17.

At a basic level, *Luce* draws a distinction. Common sense is relevant, and a ban on large signs that physically block a roadway may not need extensive record evidence. But other signs, where the justification is less obvious, do require direct, empirical justification. And *Luce* put the restriction at issue here, a ban on all signs of whatever type near the roadway, explicitly in the second category, casting doubt on whether the City *could* justify it at all. *Id.* at 516–18. Defendants here presented no experts, no studies, no empirical justifications. And *Luce* makes clear that if the City wants to ban all two-foot signs, no matter how far they are from the road, as somehow a danger to safety, that is exactly the justification it must provide.

The fact that *Luce* was a summary judgment decision doesn't change the analysis. "[T]he burdens at the preliminary injunction stage track the burdens at

trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006); *see United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.") (citations omitted). *Luce*'s analysis of summary judgment is not qualitatively different from the analysis of an injunction; in both cases Defendants have failed to provide empirical justification of their broad, across-the-board ban.

Defendants rely on the district court's use of Hamman's testimony. Hamman testified that he had seen *carried*-signs blow into traffic on windy days in Carbondale, and that this was precisely why he preferred to stake his signs in the ground. A. 92, 18–19. The district court acknowledged this crucial safety concern and then used the testimony as "evidence of a traffic risk created by temporary signs near a roadway," SA. 29 — the exact opposite of the point Hamman was making. Simply put, evidence that carried signs are dangerous is not evidence that they should be required to be carried: The City *currently* allows the carrying of signs, which Hamman testified was unsafe and a traffic risk. The undisputed evidence showed that the City's preferred method is more dangerous, by the district court's own reasoning, than the *prohibited* method.

B. The Ordinance Burdens More Speech Than Necessary.

First, while the district court rejected the alternative channels of communication argument, that argument was in fact raised below and properly preserved. Plaintiff argued below at the preliminary injunction hearing, citing to

Ladue — an "ample alternative" case — that the City's Ordinance does not "leave open any alternative forms of communication." A. 205, 19–20. Plaintiff's briefing below cited to and emphasized both aspects of the standard, including the ample alternatives requirement, Doc. 8 at 12, Doc. 20 at 4. Indeed, throughout this litigation, Hamman has argued that the Ordinance does not leave open alternatives for communication. Doc. 41 at 12, 15–16; Doc. 42 at 15. In short, Plaintiff expressly preserved his claim based on alternative channels of communication.

In *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), the Supreme Court held that an ordinance which prohibited signs placed into the ground did not leave open ample alternative means of communication, emphasizing that requiring residents to communicate through other means was not an adequate substitute because placed signs constitute a distinct communicative medium that cannot be replicated by alternatives. Forcing a person to hold a sign for extended periods of time to convey his message is distinctly different from allowing signs to be, albeit temporarily, laid on or placed in the ground. Defendants never reckon with *Ladue*, but it is dispositive here. Requiring Hamman to choose between speaking with individuals and maintaining his public message does not leave open an ample alternative channel of communication.

III. DEFENDANTS FAIL TO REBUT THE ORDINANCE'S CONTENT-BASED DISCRIMINATION.

Defendants fail to address Plaintiff's argument that the Ordinance is not content-neutral. While purpose is controlling, it is not known by secret inquiry into motive, but by the statute's text itself: Government regulation of expressive activity

is content-neutral so long as it is "*justified* without reference to the content of the regulated speech." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (emphasis added). A law is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed," and an official enforcing it must examine a sign's content to determine which regulatory category governs it. *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015). The Court invalidated Gilbert's sign code because the scheme subjected different categories of speech — temporary directional signs, ideological signs, political signs — to different treatment based on what the signs said. The City has erected a system in which commercial signage reaches the public right of way through § 17-1-5's encroachment permits while core political and religious speech is categorically excluded. That inversion of constitutional priority is content-based on its face and fatal regardless of subjective intent.

Defendants argue the Ordinance is "facially content neutral because it applies to all temporary signs in the public right of way, regardless of message." Appellees' Br. 29. That position cannot be reconciled with the text of § 15.4.10.8(A)(1) (the general prohibition on signs), with the structure of its cross-reference to § 17-1-5 (dealing with encroachments), or with the City's own testimony and argument below.

Defendants assert that the encroachment permits under § 17-1-5 do not allow "***erecting temporary signs*** on the public right of way." Appellees' Br. 26 (emphasis in original). Incorrect. The exception clause necessarily authorizes signs. Section 15.4.10.8(A)(1) is a prohibition: "No sign may be erected on, suspended over, or

encroach upon the public right of way, except as provided for under section 17-1-5." The "except" clause is only meaningful if § 17-1-5 authorizes something that § 15.4.10.8(A)(1) would otherwise prohibit. What § 15.4.10.8(A)(1) prohibits is signs in the public right of way. It follows that the exception must authorize some form of sign in the public right of way; otherwise, the cross-reference is superfluous, exempting from a prohibition nothing the prohibition would have reached. *See Bennett v. Spear*, 520 U.S. 154, 173 (1997) ("It is the cardinal principle of statutory construction that it is our duty to give effect, if possible, to every clause and word of a statute[.]" (cleaned up)). In short, if encroachment permits under § 17-1-5 do not allow for signs, as Defendants assert, the "except" clause does no work and makes no sense.

Defendants' own counsel confirmed this below. In closing argument, counsel for Defendants told the district court that § 17-1-5 is "***the one and only exception*** to the rule that you can't put a sign in a right-of-way." A. 211, 17–19 (emphasis added). An "exception" must be an exception to something, and counsel identified what that is: "the rule that you can't put a sign in a right-of-way," *i.e.*, the general prohibition of § 15.4.10.8(A)(1). That rule does not regulate restaurants, block parties, or sidewalk sales as such; it regulates signs. Whatever § 17-1-5 exempts from that rule must therefore be a sign because a rule about signs would not contain an exception that does not concern signs. Defendants appear to treat § 17-1-5 as authorizing only the underlying activities (sidewalk restaurants, sidewalk sales, block parties), Appellees' Br. 26, 30, ***but those activities are not prohibited by § 15.4.10.8(A)(1) in the first place***.

The only coherent reading of the general prohibition's "except" clause and counsel for Defendants' argument to the court below is that § 17-1-5 authorizes signs associated with the four permitted categories of encroachments. Every one of those categories functions with signage: a temporary encroachment for a sidewalk sale can have banners, pricing placards, and sale notices; a sidewalk restaurant can have menu boards and signs with specials of the day; a residential block party can have directional and informational signs. None of the four categories of permitted encroachments accommodates religious or political speech. The line between what § 17-1-5 authorizes and what § 15.4.10.8(A)(1) prohibits is a line between commercial and social speech on one side and religious and political speech on the other.

Defendants argue that the Ordinance, like the on-/off-premises distinction upheld in *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. 61 (2022), "draws a regulatory line based on location, not communicative content." Appellees' Br. at 30 (quoting *Adams Outdoor Advert. Ltd. P'ship v. City of Madison*, 56 F.4th 1111, 1119 (7th Cir. 2023) (emphasis omitted)). The analogy fails on the facts and on the law. In *City of Austin*, the regulatory distinction was purely geographic: a sign was regulated differently depending on whether it advertised an activity at the location where it was posted or at some other location. 596 U.S. at 69–70. The § 17-1-5 exceptions are categorically different. A City official must instead determine whether the sign is incident to a permitted encroachment activity — a restaurant, a block party, a sidewalk sale — and that determination unavoidably requires examining the content and purpose of the sign and the activity it serves.

Defendants rely heavily on the City's stated traffic-safety purpose. The City's purpose tells us why it prohibits staked signs generally. It does not explain why the exception structure of § 17-1-5 accommodates commercial and social signage while excluding political and religious expression. A law is not content-neutral merely because the government's general motive is neutral; it is content-based if the exceptions it carves out favor some messages over others.

Because the Ordinance, as applied through § 17-1-5's exceptions, is content-based under *Reed*, it is subject to strict scrutiny. 576 U.S. at 171. Defendants have offered no compelling governmental interest that would justify the asymmetry between commercial and social signage on the one hand and political and religious expression on the other. They have made no effort to explain why commercial and social signs present a lesser traffic hazard than Hamman's two-foot yard signs staked twenty feet from the curb. Nor have they attempted to show that the exception structure of § 17-1-5 is narrowly tailored to serve any compelling interest.

IV. DEFENDANTS HAVE FAILED TO REBUT THE EVIDENCE OF VIEWPOINT DISCRIMINATION.

While it is true that the district court's factual findings are given deference, the question of whether those factual findings are sufficient to show viewpoint discrimination is a question of law applied to those facts. As this Court emphasized in *Christian Legal Society v. Walker*:

> In a First Amendment case, we are required to make an independent review of the record because "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace," and the reviewing court must decide independently whether "a given course of conduct falls on the near or far side of the line of constitutional protection."

453 F.3d 853, 859 (7th Cir. 2006) (quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 567 (1995)). The record before this Court contains something rarely present in viewpoint discrimination cases: direct, on-the-record testimony from a supervising City official that Carbondale's enforcement priorities disfavor right-leaning speech as an institutional practice. That testimony stands uncontradicted.

Defendants rely heavily on Lenzini's claim that he removes all signs in the public right of way regardless of content. Appellees' Br. 38. That claim is contradicted by the record. Hamman submitted five photographs showing three different signs in the public right of way that were not removed in the days following Lenzini's enforcement action against Hamman's signs. One of the photographed signs was located less than a block from the site where Lenzini personally conducted his April 16 enforcement action. A. 50–52. Lenzini was not unaware of that area. He had been present there days before, actively enforcing the Ordinance at the request of the City Manager, in a zone he patrols "pretty much daily." *Id.* 134, 10–25.

Defendants' explanation is implausible when applied to a sign one block from Lenzini's own active enforcement zone, left undisturbed in the days immediately following an enforcement action he personally conducted. The geographic proximity to Lenzini's active patrol area, combined with the temporal relationship between his enforcement against Hamman and his non-enforcement against signs with different messages nearby, creates an inference of selective enforcement that required a specific, credible explanation. Defendants offered none. Additionally, a sign for

"Freddy's" business across the street from CHOICES was visible during the April 16 action and was not addressed until Hamman himself raised it. A. 150, 11–25.

More fundamentally, the question in this case is not whether the City sometimes enforces the ordinance against other signs — Lenzini's 150-to-200-sign annual removal count is uncontested. The question is why the City Manager personally directed enforcement against this specific demonstration on this specific morning, why the City Attorney texted to ask whether the demonstrators were "Coalition for Life personnel," and why Lenzini removed Hamman's signs within forty-five minutes while leaving signs with different content undisturbed one block away for days afterward. A neutral enforcement program that removes 200 signs a year does not answer the question of why this enforcement action was initiated top-down by the City Manager rather than through Lenzini's normal reactive patrol. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977), holds that departures from normal procedural sequence are probative of discriminatory intent precisely because they cannot be explained by reference to the general enforcement program. Defendants' brief does not address the City Manager's email and does not address the City Attorney's text.

Sergeant Murray delivered a considered assessment to directly affected parties — Hamman and Pastor Sparks — in the midst of an active City enforcement action, explaining why that action was occurring. His words were these: City officials "would not condone this because ideologically, I would guess they would not allow these here. But you could say something that was completely different, and I'm sure they would

be all for it." SA. 14. Defendants claim that Murray also testified that the Police Officers "were unaware of any instance in which the City removed or targeted signs based on their content rather than their placement in the public right of way." Appellees' Br. 38. The citation given points to a much narrower and more precise testimony. Murray testified to not being aware of a "specific occasion" when the City removed a sign based on its content. A. 184, 14–17. This is not in tension with his other testimony. An institution can maintain a facially neutral enforcement practice while simultaneously deploying that practice selectively when politically motivated actors prompt it to do so. Murray's observation of systematic viewpoint bias in the City's enforcement priorities does not require that every enforcement action be facially discriminatory. It requires exactly what the record shows here: that when the City Manager decided to make a call, the call went against the pro-life demonstrators. What makes Murray's testimony particularly powerful is what the City chose not to do in response. Not one City official testified that Murray was wrong about Carbondale's institutional priorities. Not one official testified that the City treats left-leaning and right-leaning speech identically in its enforcement decisions.

Defendants appear to argue that, even taking Murray's testimony as true, the City remains free to engage in viewpoint discrimination. Appellees' Br. 38. That remarkable assertion is unsupported by the case Defendants cite. The quoted language — that "[t]he Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about [the government's] venture" — comes from the government speech portion of *Matal v. Tam*, 582 U.S. 218,

234 (2017). That doctrine has nothing to do with this case. Murray was not speaking on behalf of the City; he was describing what *private speech* City officials would allow — and which they would not. *Matal* itself reaffirms that discrimination against private speakers "based on viewpoint is an 'egregious form of content discrimination,' which is 'presumptively unconstitutional.'" *Id*. at 248 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995)).

The Supreme Court established in *Arlington Heights* that "[d]epartures from the normal procedural sequence" and "[s]ubstantive departures" from established practice are among the most probative indicia of discriminatory governmental intent. 429 U.S. at 267. The enforcement action of April 16, 2025, departed from normal practice in distinct ways, none of which Defendants have addressed.

First, the action was initiated from the top down, not from the bottom up. Lenzini testified that his normal enforcement sequence is reactive: he or his inspectors observe noncompliant signs in the course of their regular duties and remove them. A. 134, 10–22. The April 16 action was different in kind. Lenzini did not stumble upon Hamman's signs during a routine patrol. He was dispatched to the site by an email from the City Manager. *Id.* 137, 3–7. An email from a city's chief executive personally directing code enforcement against a specific demonstration, on the morning of that demonstration, is strong evidence that something other than routine code compliance motivated the action. *Arlington Heights*, 429 U.S. at 267.

Second, before the officers on scene could decide how to respond, the City Attorney sought to identify the demonstrators by their organizational affiliation. The

City Attorney texted to ask whether the participants were "Coalition for Life personnel" — the pro-life organization that had previously sued Carbondale over a different ordinance. A. 124–25. That question had no relevance to whether signs were lawful. The City Attorney's inquiry reveals that enforcement officials were not thinking neutrally about sign placement; they were thinking about the identity of the speakers and their viewpoint.

Third, the City consulted its City Attorney multiple times before, during, and after the enforcement action, departing from a process that, if the Ordinance is as clear and consistently applied as Defendants claim, should have required no legal guidance at all. If removing signs from the right of way is as routine and unambiguous as "pretty much daily," this particular enforcement action should not have needed repeated consultation with the City's chief legal officer.

V. REMAINING PRELIMINARY INJUNCTION FACTORS SUPPORT A PRELIMINARY INJUNCTION.

The remaining preliminary injunction factors follow from Hamman's likelihood of success on the merits. The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" for purposes of a preliminary injunction. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Constitutional freedoms, once lost for a period of time, cannot be recovered by a damages award or any other form of retrospective relief. The ongoing suppression of Hamman's preferred mode of expression is a present, continuing constitutional injury that money cannot remedy, the definition of irreparable harm.

Defendants' response that Hamman can simply carry his signs relocates the

constitutional injury rather than answering it. The question is not whether Hamman has some avenue of expression remaining to him — virtually every First Amendment plaintiff has some residual avenue of expression. The question is whether the specific expressive activity the government has suppressed caused irreparable harm by being suppressed. It did. Every day that Hamman returns to the location outside CHOICES and must choose between maintaining a visible message for passing drivers and engaging in personal counseling conversations with individual women is a day on which the Ordinance's enforcement has caused an irreparable loss of constitutionally protected expression.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court, with instructions that the district court enter a preliminary injunction while the case proceeds to the merits.

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Circuit Rule 32(c) because it contains 6,614 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) and Circuit Rule 32(b) because it has been prepared in Microsoft Word using a proportionally spaced typeface, 12-point Century Schoolbook.

Dated: May 11, 2026

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2026, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

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