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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Ronald D. Williams	)	
	)	
PLAINTIFF,	)	
	)	
v.	)	
	)	
City of Cheyenne, Wyoming;	)	Civil Case No. 14-CV-06
Richard Kaysen, Mayor of Cheyenne, in	)	
his official capacity;	)	
Matthew Ashby, Planning Services	)	
Director, in his official capacity	)	
	)	
DEFENDANTS.	)	

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

INTRODUCTION

"A special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person's ability to *speak* there." *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994). Unfortunately, this wisdom has been lost upon the City of Cheyenne, which bans one of the most effective ways to speak: the American yard sign.

In 1995, Plaintiff Ron Williams sued the Defendant City of Cheyenne for unconstitutionally restricting his ability to speak out about political candidates at his home through this very method. One year later, the District Court for the First Judicial District of Wyoming granted summary judgment and struck down the ordinance, which limited displaying election signs to 45 days before an election and 10 days afterward. The Cheyenne Unified Development Code ("UDC"), which became law in 2012, vaguely restricts not only the time Williams can speak out about candidates and political issues, but even limits the number of signs Williams can display to merely two. *See Arlington County Republican Cmte. v. Arlington County, Va.*, 983 F.2d 587, 594 (4th Cir. 1993). The UDC also threatens Williams with the same fine as the former zoning ordinance, up to $100 per violation. Williams seeks a preliminary injunction against the time and quantity provisions of the UDC to immediately secure his First Amendment rights, as his claims have a substantial likelihood of once again succeeding against the City of Cheyenne's censorship.

To place a sign in one's own yard in Cheyenne, a citizen must abide by UDC rules and, in some instances, acquire a permit to do so. Any speaker wishing to place a sign on his yard must submit a "sign plan" to the City of Cheyenne unless it falls under an exempted category. UDC § 6.5.2(c). This particular permitting process suffers from three constitutional maladies. First, speakers communicating certain messages are exempt from the permitting process entirely. Those wishing to promote "Frontier Days," for example, do not require any permit to place signs in their lawns. Second, individuals wishing to communicate non-temporary messages, such as "Protect Gun Rights," are entirely banned from placing non-temporary signs in their lawns. This is because every proposed sign, unless exempted, must fall under the proposed regulations.

Speech outside of those regulations is banned. Third, those lucky enough to find their speech "permitted" by the City of Cheyenne in the form of a temporary sign must communicate their message during a government-approved miniscule timeframe, lest their message violate the law.

Citizens, including Williams's legal counsel, worked diligently with members of the City Council to amend the provisions in question at the close of 2013. These efforts failed. Although the Cheyenne City Council may still remedy the UDC sign provisions, this is far from certain and some proposed amendments will not actually remedy the UDC's constitutional maladies. *See* Lucas High, *Council to reconsider sign regs*, WYO. TRIB. EAGLE, Jan 14, 2014, at A1, *available at* http://www.wyomingnews.com/articles/2014/01/14/news/19local_01-14-14.txt. With the 2014 election cycle well under way, and numerous political issues always concerning Williams and many other Cheyenne residents, the time to end the chill of the unconstitutional restraints in the UDC is now. *See* Ver. Compl. ¶¶ 12–13.

I. Williams has Demonstrated a Substantial Likelihood of Success on the Merits

Any system of prior restraint comes before a court "'bearing a heavy presumption against its constitutional validity.'" *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975) (quoting *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963)). Cheyenne's UDC bans all yard signs not expressly regulated or exempted in its governing provisions. For those residents wishing to communicate about political issues or candidates, the City ensures that speech is limited to a radically shortened timeframe and with a maximum of two signs per lot. This issue is hardly novel. Courts nationwide have routinely stricken substantially similar schemes time and time again. *See Williams v. City of Cheyenne*, Doc. 139, No. 215 (Dist. Ct. for the 1st Dist., May 17, 1996) (Ver. Compl. EXHIBIT 1); *City of Ladue*, 512 U.S. 43.

a. The UDC's Political Speech Ban Cannot Survive Constitutional Review

Government may impose reasonable time, place, and manner restrictions against protected speech as long as they are content-neutral, "narrowly tailored to serve a significant government interest, and . . . leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The UDC's sign regulations are irredeemably constitutionally flawed and cannot survive constitutional review

applying either a content-based or content-neutral analysis because the Cheyenne ordinance sweeps too far and is discriminatory in its reach. "Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent-by eliminating a common means of speaking, such measures can suppress too much speech." *City of Ladue*, 512 U.S. at 55. In this instance, the City of Cheyenne bans one of the most effective means to communicate political messages—the American yard sign—thus infringing on Williams's First Amendment rights.

In direct contravention of the Constitution, the City decides which types of speech are best for citizens in Cheyenne. Under UDC § 6.5, signs communicating a non-commercial message are only permitted on private residential lots if those signs are temporary signs. Temporary signs are defined at UDC § 6.5, Table 6-14 and must be "associated with an event or distinct time period." Ver. Compl. EXHIBIT 2. The City thus attempts to distinguish between the relative value of noncommercial messages based on whether the issue can be limited to a distinct time period or event. Under the UDC, one resident may post a sign that advocates for or against a particular optional sales tax ballot issue while a neighboring resident may not post a sign that addresses broader fiscal policy concerns that remain relevant beyond the next election day. The City does not possess the constitutional authority to treat these two message types differently or to permit residents to speak about one and forbid speaking about the other. Still, the City of Cheyenne carries on in exactly this fashion.

Whatever interest the City may have in limiting yard signs, protecting aesthetics and ensuring traffic safety have never been deemed compelling. *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267 (11th Cir. 2005). Further, a wide host of less restrictive options exists to achieve these concerns that are constitutionally preferable to a ban. Pedestrian and vehicle safety may be promoted by minimizing obstructions from views for travelers through setback provisions. The City has applied setback restrictions to other types of signs to accomplish these goals. For example, the City requires that portable signs, which are allowed in certain commercial zones, to be located within 25 feet of the principal entrance to the building where the business is located. UDC § 6.5.7(f). Similarly, the support column of a billboard may

not be constructed within 150 linear feet from the property line of specified residential dwelling types. UDC § 6.5.8(g). These two examples alone demonstrate that the City is able to devise and apply less restrictive means to achieve safety goals and protect the property rights of landowners adjacent to signs without limiting speech. Therefore, the numeric and temporal limits on noncommercial speech by residents is not the least restrictive means available, or even used, by the City to achieve safety and aesthetic goals.

As a matter of law, any government-imposed limit on the number, type, or duration of signs placed by Williams on his own residential property cannot be the least restrictive means to achieve aesthetic interests. The Supreme Court has already explained that "individual residents themselves have strong incentives to keep their own property values up and to prevent 'visual clutter' in their own yards." *City of Ladue*, 512 U.S. at 58. Therefore, the City of Cheyenne's broad prohibition on many signs that might be placed by residents in their own yards based on aesthetic considerations must fail because it is not narrowly tailored or the least restrictive means available to address those aesthetic concerns.

Like the City of Ladue's sign regulations that prohibited residential signs apart from a few, narrow exceptions, the City of Cheyenne's sign ordinance effectively prohibits residential signs other than those that are specifically allowed under UDC § 6.5.4(a) or expressly exempted from the permitting requirements under § 6.5.5(b). Even if a resident may seek to place additional signs not specified under the UDC § 6.5.4 by resorting to the sign plan procedure identified at UDC § 6.52, that procedure constitutes a prior restraint on protected speech. "Government regulation constitutes a prior restraint if it makes enjoyment of protected expression contingent upon obtaining permission from government officials." *Franken Equities, LLC v. City of Evanston*, 967 F. Supp. 1233, 1236 (D. Wyo. 1997). The sign plan requirement, which appears to be the only alternative to the specific allowances, does not contain specific standards constraining a decision maker in determining whether to issue a license, it does not guarantee that a decision will be made within a specified brief period, either to permit the sign or prohibit it, nor does the code also assure a prompt final judicial decision by the Board of

Adjustment or another body as required by *Freedman v. State of Md.*, 380 U.S. 51, 58–59 (1965) governing censorship of speech.

The City has gone to great lengths to ensure that one of the most effective avenues of speech, yard signs, is prohibited in Cheyenne. And while it offers residents the narrowest windows of time to communicate some political messages, these slivers are insufficient to save the ordinance on its face. *City of Ladue*, 512 U.S. at 53 ("if the prohibitions in [the city's] ordinance are impermissible, resting [a] decision [upholding a regulation] on its exemptions would afford scant relief for respondent"). UDC § 6.5.4 must be recognized for what it is—a speech ban—necessitating immediate relief here.

b. The UDC's Vague and Content Based Treatment of Speech is Invalid

Content-based restrictions on speech and bans are subject to strict scrutiny, requiring a regulation to be narrowly tailored and furthering a compelling government interest. *Burson v. Freeman*, 504 U.S. 191, 197–98 (1992) (plurality opinion). Content-neutral restrictions of this type must serve a substantial interest, be carried out in a narrowly tailored manner, and leave open ample alternative means of communication. *Arlington County Republican Cmte.*, 983 F.2d at 593. Here, the UDC fails under either form of review.Section 6.5.4(a) provides for "Sign Allowances" where, among other things, citizens may place no more than two signs per lot and may only be placed 10 days prior to and following an "event or distinct time period addressed by the sign." Only the City of Cheyenne knows what current incidents qualify as an "event or distinct time period" and when those timeframes run. Speakers wishing to discuss upcoming elections might enjoy a window of speech between August 9 (10 days before the slated 2014 Wyoming primaries) and August 29 (10 days after) and a similar window might exist around the general elections slated for November 4, 2014. Or, the City of Cheyenne might grant a more extensive time window. If one wishes to speak out about a proposed state legislative bill scheduled for a vote on February 12, 2014, one might enjoy a window 10 days prior and 10 days post to do so. Perhaps that window will be extended by the City of Cheyenne if the state legislature extends debate. Perhaps not. And if the speaker wishes to continue communicating about the issue beyond (or before) the "distinct time period," he is completely foreclosed from

doing so, at least by means of yard signs, by the City of Cheyenne. Similarly, any speaker wishing to support more than two candidates or temporary political issues must ration his speech to two candidates or issues.

Under the controlling regulations, the City of Cheyenne must examine the message conveyed by speakers to decide if speech is subject to regulation and restriction. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428-430 (1993). Simply put, it is the City of Cheyenne that must decide whether particular messages trigger distinct events or time periods (and determine what those time periods exactly are) to decide how long speakers may communicate messages. The only manner in which the City of Cheyenne can accomplish this task is to evaluate the content of the messages communicated using no discernible standards while subjecting similar forms of speech to unequal and likely discriminatory treatment under the law. *See Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) (a "vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis"). This means that the City of Cheyenne could decide that speech about "Preserving the Legacy of Cheyenne" relates to several distinct events, allowing yard signs for a great period of time celebrating Cheyenne. Likewise, the City of Cheyenne might decide that speech critical of its City Council members targets a very narrow time period and limit it accordingly. Under such an open and discriminatory scheme, the City is free to permit a wide host of innocuous and mundane speech while limiting other speech critical of the City. It is this chill that must be stopped well before the 2014 elections. *See, e.g.*, *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048–51 (1991); *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965).

Because yard signs represent a uniquely effective and important way of expressing one's views, content restrictions applicable to them are subject to strict scrutiny. *City of Ladue*, 512 U.S. at 59 (O'Connor, J., concurring) (with "rare exceptions, content discrimination in regulations of the speech of private citizens on private property or in a traditional public forum is presumptively impermissible, and this presumption is a very strong one"). Unsurprisingly, courts nationwide have stricken similar content-based restrictions on yard signs without exception. *See, e.g.*, *Williams* (Ver. Compl. EXHIBIT 1); *Arlington Co. Republican Cmte.*, 983

F.3d 587; *Whitton v. City of Gladstone, Mo.*, 54 F.3d 1400 (8th Cir. 1995); *Solantic*, 410 F.3d 1250; *McFadden v. City of Bridgeport*, 422 F.Supp.2d 659 (N.D.W.Va. 2006). Further, any interests the City may have in aesthetics or traffic safety, while important, are not compelling for purposes of strict scrutiny. *See, e.g.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 512-16 (1981) (plurality opinion); *Whitton,* 54 F.3d at 1408.

The City of Cheyenne does not need to impose a sweeping speech ban to protect aesthetics or to ensure traffic safety. As the Supreme Court has instructed, "individual residents themselves have strong incentives to keep their own property values up and to prevent 'visual clutter' in their own yards and neighborhoods." *City of Ladue*, 512 U.S. at 58. Further, the City might "regulate the design and condition" of the signs or "prevent posting signs within a certain distance of the street." *Arlington Co. Republican Cmte.*, 988 F.2d at 594–95. Indeed, in this instance, counsel for Williams provided testimony to the City Council about less restrictive means to achieve its goals. *See* Ver. Compl. ¶18. Because of these reasons, UDC § 6.5.4(a) must fail to survive strict scrutiny.

Even if this Court were to view UDC § 6.5.4(a) as a content-neutral approach to yard signs, it still fails constitutional review because it bans speech. *See* Section I.a, *supra*. Political speech discussing issues, ideologies, and candidates are of utmost importance under the First Amendment. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1984) (political speech "occupies the core of the protection afforded by the First Amendment"); *Connick v. Myers*, 461 U.S. 138, 145 (1983) (political speech "occupies the 'highest rung of the hierarchy of First Amendment values' and is entitled to special protection"). Thus, imposing an outright ban against most speech while allowing dwarfed timeframes to express political views is insufficient to save this ordinance. UDC § 6.5.4(a) almost completely forecloses a venerable form of expression—the American yard sign—and offers but the thinnest opportunity to speak subject to timeframes the government deems best. Under this alternative analysis, the distinct injury worked is not one of government manipulation of ideas, but simply the suppression of too much speech related to the City's interests in promoting aesthetics or ensuring traffic safety. *City of Ladue*, 512 U.S. at 54–55.

The City's UDC is Cheyenne's attempt at an end run around the First Amendment. No matter how concerned the City may be with visual clutter, aesthetics, and the like, it enjoys no constitutional authority to selectively ban one of the most respected forms of ordinary speech—the American yard sign. Because the City has been recalcitrant to constitutional concerns and because Williams seeks to speak now, injunctive relief is needed to preserve his First Amendment rights.

II. Williams Will Be Irreparably Harmed if an Injunction Does Not Issue

Where First Amendment rights are at issue, irreparable harm is established: "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976); *see Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001) (meeting irreparable injury requirement due to deprivation of speech rights). Williams has silenced himself this election cycle, under threat of criminal penalties. He has missed a number of opportunities to speak out about candidates and important political issues. If injunction is not issued, it will only result in further irreparable harm.

III. The Balance of Harms Tips in Williams's Favor

The balance of harms requirement is usually met once a First Amendment plaintiff demonstrates a likelihood of success on the merits. A threatened injury to plaintiff's constitutionally protected speech will usually outweigh the harm, if any, the defendants may incur from being unable to enforce what appears to be an unconstitutional statute. *See American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999). Currently, Williams is either entirely prohibited from speaking out about candidates and issues through yard signs or severely limited to two political signs on his lot. Any harm the defendants may suffer is limited to a hindered ability to promote "visual quality (aesthetics)," "property values," and other non-compelling interests. The balance of harms overwhelmingly weighs in Williams's favor.

IV. Issuing the Injunction Works in Favor of the Public Interest

Vindicating First Amendment liberties is "clearly in the public interest." *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005); *Christian Legal Soc'y v. Walker*,

453 F.3d 853, 859 (7th Cir. 2006) ("injunctions protecting First Amendment freedoms are always in the public interest"). Thus, permitting Williams to speak freely serves the important goal of protecting an "essential mechanism of democracy" and our safeguard to "hold officials accountable to the people." *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 339 (2010). Furthermore, this injunction would protect the First Amendment rights of all Cheyenne residents. *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) ("When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may be adversely impacted by the statute in question.")

CONCLUSION

For the foregoing reasons, the Court should grant Williams's motion for preliminary injunction. Williams requests an expedited hearing on this matter pursuant to the goals of FED. R. CIV. P. 1. The Court should also waive the bond requirement under FED. R. CIV. P. 65(c).

Dated: January 22, 2014

Respectfully submitted,

/s/ Stephen Klein

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2014, the below listed persons received copies of this document by electronic mail pursuant to FED. R. CIV. P. 5(b)(2)(E):

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