No. 16-3055

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LEIBUNDGUTH STORAGE & VAN SERVICE, INC.,

Plaintiff-Appellant,

v.

VILLAGE OF DOWNERS GROVE,
an Illinois municipal corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois
Case No. 1:14-cv-09851
The Honorable Edmond E. Chang, Judge Presiding

BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFF-APPELLANT

Jacob H. Huebert
Jeffrey M. Schwab
LIBERTY JUSTICE CENTER
190 S. LaSalle Street, Suite 1500
Chicago, Illinois 60603
(312) 263-7668

Counsel for Plaintiff-Appellant, Leibundguth Storage & Van Service, Inc.

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-3055

Short Caption: Leibundguth Storage & Van Service, Inc. v. Village of Downers Grove

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Leibundguth Storage & Van Service, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: s/ Jeffrey Schwab Date: August 5, 2016

Attorney's Printed Name: Jeffrey Schwab

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

Address: 190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603

Phone Number: 312-263-7668 Fax Number: 312-263-7702

E-Mail Address: jschwab@libertyjusticecenter.org

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None

Attorney's Signature: s/ Jacob Huebert Date: August 5, 2016

Attorney's Printed Name: Jacob Huebert

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: 190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603

Phone Number: 312-263-7668 Fax Number: 312-263-7702

E-Mail Address: jhuebert@libertyjusticecenter.org

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant Leibundguth Storage & Van Service, Inc. – an Illinois corporation with its sole place of business in Illinois – brought this civil action under 42 U.S.C. § 1983 seeking declaratory and injunctive relief against Defendant-Appellee Village of Downers Grove for violating its right to freedom of speech secured by the First Amendment of the U.S. Constitution and Article I, Section 4 of the Illinois Constitution. The district court had subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343 and supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367(a).

This Court has jurisdiction under 28 U.S.C. § 1291. This appeal seeks review of the district court's December 14, 2015 order granting the Village's motion for summary judgment and denying Leibundguth's motion for summary judgment, A-1, and its January 7, 2016 entry of judgment, A-42. Leibundguth filed a motion to alter or amend the judgment on February 3, 2016, which the district court denied on June 29, 2016, A-44. This appeal also seeks review of that order and the district court's June 29, 2016 entry of amended judgment, A-69, which was a final judgment as to all parties and issues. On July 28, 2016, Leibundguth filed a timely notice of appeal and docketing statement.

STATEMENT OF THE ISSUES

(i) Did the district court err in declining to apply strict scrutiny to the Village of Downers Grove's sign ordinance, which imposes different regulations on signs based on their purpose or the message they convey? And, if so, has the Village proven that

the regulations in the sign ordinance are narrowly tailored to achieve a compelling governmental interest?

(ii) In the alternative, under intermediate First Amendment scrutiny, did the district court err in concluding that the evidence that the Village provided here – photographs of signs in and near Downers Grove and various statements by Village officials – sufficed to show that the Village's ban on signs painted directly on a wall is narrowly tailored to serve the Village's interest in improving aesthetics?

(iii) Under intermediate First Amendment scrutiny, did the district court err in concluding that the evidence that the Village provided here – photographs of signs in and near Downers Grove and various conversations with several citizens – sufficed to show that the Village's restrictions on the size and number of wall signs that a property may have are narrowly tailored to serve the Village's interest in improving aesthetics?

STATEMENT OF THE CASE

Plaintiff-Appellant Leibundguth Storage & Van Service, Inc. ("Leibundguth") is a moving and storage business located in a building at 1301 Warren Avenue in Downers Grove, Illinois. SA-285-286. Its sole owner, Robert Peterson became part owner of Leibundguth in 1971 and sole owner in 1985. SA-3, 244-253, 285.

I. Leibundguth's Signs

For years before Peterson became part owner of Leibundguth in 1971, and until February 2016, Leibundguth's building had a sign painted directly on its rear

exterior wall, (shown in the photo below) [1], which runs parallel to the BNSF railroad tracks, advertising to train commuters riding Metra commuter trains to and from Chicago. SA-286. This sign was crucial to Leibundguth's business, as thousands of Metra rail commuter passengers saw it every day. SA-5. According to Peterson, customers who found Leibundguth because of this sign accounted for approximately 15 to 20 percent of revenue. SA-261.

When Leibundguth filed this lawsuit, in addition to this sign, the building displayed three other signs advertising Leibundguth's services.[2] SA-286.

[1] The pictures contained in this brief are taken directly from Leibundguth's Complaint, SA-1, 5, 6, and the district court's December 14, 2015 order. A-3-4.

[2] After the district court's judgment granting the Village's motion for summary judgment, Leibundguth was forced to paint over its two hand-painted wall signs or risk the Village's enforcement of the Ordinance, which calls for a minimum fine of $75 per day and a maximum fine of $750 per day per offense. A-8. (*citing* SA-39). Because the Village maintains that Leibundguth's signs gave rise to three violations, the fines the Village would have imposed would have been between $225 and $2,250 per day – or $82,125 and $821,250 per year. The district court denied Leibundguth's motion for stay pending its decision on Leibundguth's motion to alter or amend judgment and pending appeal. (The Village had previously agreed not to enforce the Ordinance against Leibundguth during the pendency of the case before the district court, but would not do so during the pendency of Leibundguth's motion to alter or amend judgment and this appeal.) A-8.

At the time Leibundguth filed this lawsuit and until February 2016, the building also bore a sign that was painted directly on the front exterior wall:

SA-287. The front of the building displays two additional signs:[3]

[3] The Village maintains that these two signs on the front of the building should actually be counted as one big sign; Leibundguth disagrees. SA-286. As a result, the parties also dispute the total area of Leibundguth's signs. Because both parties agree that

SA-287-288.

One of the signs, erected in 1965, states "Leibundguth Storage & Van Service" in red and white hand-painted block letters. SA-287. Directly below it is another sign that says "Wheaton World Wide Moving," advertising Leibundguth's relationship with its long-distance mover. SA-288. That sign was erected in 1987, replacing a similar sign with Wheaton's previous business name. *Id.*

All four of Leibundguth's signs are truthful and not misleading. A-29-30; SA-289. The signs communicate only the name of the business, the telephone number of the business, and Leibundguth's relationship with Wheaton World Wide Moving. *Id.* All four signs advertise a lawful activity – moving and storage – for which Leibundguth is licensed. SA-289.

II. The Signs' Illegality Under the Village's Sign Ordinance

In May 2005, the Downers Grove Village Council adopted a major rewrite to its sign ordinance ("Ordinance"),[4] which imposed numerous new restrictions on signs in Downers Grove. SA-260. The Village required all existing signs to comply with the new restrictions by May 2014, *id.*, unless (1) the sign was located in one of several business zoning districts and was in place before January 1, 1965 (Section 9.060(K)), or (2) the owner obtained a variance (Section 9.090(H)). Leibundguth's signs were subject to the Ordinance because Leibundguth's property is not located

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Leibundguth's signs constituted more than 500 square feet, however, these disputes are not material to the parties' motions for summary judgment. A-5.

[4] The Village sign ordinance is contained in Article 9 of the Village of Downers Grove Zoning Ordinance, which is itself located in Chapter 28 of the Village of Downers Grove Municipal Code. SA-23. This brief refers to Chapter 28, Article 9 of the Village Municipal Code as the "Ordinance" and any reference to a "Section" is a reference to a section in the sign ordinance, Chapter 28, Article 9. SA-23-38, as amended by SA-233, 282.

in one of the business zoning districts, and the Zoning Board of Appeal denied Leibundguth's request for a variance on November 19, 2014. SA-262-269, 290-291.

The Ordinance contains four provisions that affect Leibundguth's signs.

First, Section 9.020(P) prohibits "any sign painted directly on a wall, roof, or fence." Thus, Leibundguth's painted wall signs on the front and back of its building violated Section 9.020(P)'s prohibition on painted signs. SA-286-287. Initially, this prohibition did not apply in the several business zoning districts the Village exempted, though it still applied to Leibundguth's painted signs. SA-25. On July 21, 2015, however – after Leibundguth filed this lawsuit and after the parties had completed discovery – the Village amended Section 9.020(P) to extend the ban on painted signs to all of Downers Grove. SA-234, 256-257.

Second, Section 9.050(A) regulates a property's maximum total sign area, which may not exceed the lesser of 300 square feet or 1.5 square feet per linear foot of tenant frontage (or two square feet per linear foot for buildings set back more than 300 feet from the abutting street right-of-way), not including any signs the Ordinance expressly excludes from maximum sign area calculations (discussed below). Collectively, the wall signs on the front of Leibundguth's building violated Section 9.050(A)'s limitation on the total aggregate size of signs. SA-288.

Third, Section 9.050(C)(1) permits only one wall sign per tenant frontage along a public roadway or drivable right-of-way. Thus, the wall signs on the front of Leibundguth's building violated Section 9.050(C)'s limit on the total number of wall signs per tenant frontage. *Id*.

Finally, Section 9.050(C) allows lots with frontage along the BNSF railroad right-of-way to have one additional wall sign displayed on the wall facing that right-of-way, but it limits such a sign to 1.5 square feet per lineal foot of tenant frontage along the right-of-way. Section 9.050(C) further provides that the maximum allowable sign area, including all signs allowed under Section 9.050, may not exceed 300 square feet, excluding any signs that the Ordinance expressly excludes from the maximum sign area calculations. Previously – at the time Leibundguth filed this lawsuit – the Ordinance did not allow any signs facing the BNSF railroad right-of-way unless such a sign was also along a roadway or driveable right-of-way. SA-30-31. That meant that Leibundguth's wall sign on the back of its building, which was along the BNSF railway and not along a roadway or driveable right-of-way, was prohibited by the Ordinance. But on July 21, 2015 – after discovery in this case had closed – the Village amended Section 9.050(C) to allow a single wall sign along the BNSF railroad right-of-way. SA-234-235, 258-259. But the size limits for such signs still rendered Leibundguth's sign on its back wall – the only such sign in Downers Grove at the time the Village amended Section 9.050(C) – illegal. SA-286.

III. Additional Provisions of the Ordinance

Section 9.080 of the Ordinance requires a property owner to obtain a permit for any sign, except those exempted elsewhere in the Ordinance. Section 9.030 allows certain signs to be erected in the Village without a permit, subject only to specific restrictions in that section, including:

- "Street address signs up to 4 square feet in area," Section 9.030(C);

- "'No trespassing' or similar signs regulating the use of property, provided such signs are no more than 2 square feet in area," Section 9.030(F);
- "Garage sale, rummage sale, yard sale and estate sale signs," provided that such signs are only placed in the public right-of-way "between the hours of 5:00 a.m. Friday to 10:00 p.m. on Sunday," do "not exceed 4 square feet in area," are "freestanding," and not placed "within 150 feet of another [sale] sign that relates to the same address," Section 9.030(J);
- "Real estate signs," which "may not exceed 5.5 square feet in area" in residential zoning districts and "may not exceed 36 square feet in area" in nonresidential zoning, "may not exceed 10 feet in height," and are limited to one sign per lot per street frontage per use, Section 9.030(H);
- "Open house signs" placed in the public right-of-way "between the hours of 5:00 a.m. Friday to 10:00 p.m. on Sunday," which "may not exceed 4 square feet in area," "must be freestanding," and may only be placed "within 150 feet of another sign that relates to the same address," Section 9.030(H);
- "'Help wanted' signs up to 2 square feet in area," which must have their "help wanted" text as "the predominant text on the sign" and "may only be located on a window or door," Section 9.030(L);
- "Political signs and noncommercial signs" that do not "exceed a maximum area of 12 square feet per lot" and are not "placed in the public right-of-way," Section 9.030(I);

- "Governmental signs, public signs and other signs incidental to those signs for identification, information or directional purposes erected or required by governmental bodies," which have no restrictions on their size, location, or number, Section 9.030(A);
- "Decorations temporarily displayed in connection with a village-sponsored or approved event or a generally recognized or national holiday," which have no restrictions on their size, location, or number, Section 9.030(D);
- "Temporary signs at a residence commemorating a personal event, such as a birth, birthday, anniversary or graduation," which have no restrictions on their size, location, or number, Section 9.030(E);
- "Noncommercial flags of any country, state or unit of local government," which have no restrictions on their size, location, or number, Section 9.030(G);
- "Memorial signs and tablets, names of buildings and date of erection when cut into masonry surface or inlaid so as to be part of the building or when constructed of bronze or other noncombustible material," which have no restrictions on their size, location, or number, Section 9.030(K).

Section 9.110 of the Ordinance provides a maintenance requirement:

> All signs must be properly maintained, which includes repair or replacement of all broken or missing parts, elimination of rust or oxidation, elimination of faded or chipped paint, and correcting all similar conditions of disrepair. If a sign is illuminated, the source of such illumination must be kept in a state of safe working order at all times. Failure to properly maintain any sign constitutes a violation of this zoning ordinance.

IV. Exceptions to the Village's Sign Rules

The Ordinance and the Village have made numerous exceptions to the restrictions that apply to Leibundguth's signs.

While the Ordinance purports to prohibit any signs painted directly on a wall, the Village itself has acknowledged that it allows certain signs to be painted on a wall. The Village staff report accompanying the July 21, 2015 amendment to Section 9.020(P) stated: "There are instances of flags and murals painted on buildings and these are permitted by the code on the basis that they are decorative, and do not convey constitutionally protected commercial or non-commercial speech." SA-238, 292-293.

The Ordinance does not count certain signs toward Section 9.050(A)'s limit on total aggregate sign size. Properties abutting the right-of-way of I-88 or I-355 are allowed an additional monument sign of 225 square feet or less, which does not count in calculating the lot's total sign area. (Section 9.050(B)(3).) A building of four stories or more is allowed one wall sign of 100 square feet or less on no more than three sides of the building, which is not counted against the maximum allowable sign area. (Section 9.050(C)(4).) The Village also does not count a panel sign in a multi-tenant shopping center (Section 9.050(B)(2)), window signs (Section 9.050(H)), or menu boards (Section 9.050(D)) in calculating a lot's sign area.

In contrast with its treatment of wall signs, the Ordinance does not limit the number of window signs or shingle signs a property may have (Section 9.050(H), (B)(4)). In addition to a wall sign, the Ordinance allows a lot to display a shingle

sign or a monument sign (Section 9.050(B)), a menu board (Section 9.050(D)), a projecting sign, (Section 9.050(E)), an awning sign, (Section 9.050(F)), and an under-canopy sign (Section 9.050(G)).

The Village has made at least one notable exemption from its sign rules for a business other than Leibundguth. On November 18, 2014, the Village Council approved a Planned Development Amendment to grant the Art Van Furniture store at 1021 Butterfield Drive three variations from sign regulations: to increase the total sign area from 300 square feet to 990 square feet; to permit a sign on the east façade of the building with no frontage where no sign is allowed; and to allow two signs each on the north, south, and west façades of the building where only one sign each would otherwise be permitted. SA-278-281, 296. During the discussion on the Planned Development Amendment for Art Van Furniture at the Village Council meeting on November 11, 2014, the Mayor stated that these variances would improve the aesthetics of the Village. SA-278-280, 297.

V. Proceedings Before the District Court

On December 8, 2014, Leibundguth filed its complaint in this action, challenging the Ordinance's restrictions on its signs under the free-speech guarantees of the United States Constitution and the Illinois Constitution. A-8. It amended the complaint on January 30, 2015. SA-1. Rather than contest a preliminary injunction motion that Leibundguth otherwise would have filed, the Village agreed not to enforce the Ordinance – and agreed that fines would not accrue – against Leibundguth until the district court decided the parties' cross-motions for summary

judgment. A-8. The parties eventually filed their cross-motions for summary judgment, and on December 14, 2015, the district court issued its order granting the Village's motion for summary judgment and denying Leibundguth's motion for summary judgment. A-1-41. The district court entered a stay of enforcement of the Ordinance against Leibundguth until December 28, 2015, *id*., and the parties agreed that the Village would not enforce the Ordinance against Leibundguth until February 4, 2016, so that the parties could file briefs on whether the district court should retain jurisdiction over the Village's state law counterclaim for enforcement of the Ordinance and while Leibundguth filed a motion to stay enforcement of the Ordinance pending appeal and pending its Rule 59(e) motion to alter or amend judgment. A-48-49. On February 4, 2016, the district court entered an order denying Leibundguth's motion to stay and dismissing the state law claims in the Village's counterclaim. A-49. On June 29, 2016, the district court entered an order denying Leibundguth's motion to alter or amend judgment. A-44-68. However, the district court did amend its judgment on June 29, 2016, A-69-70, to deny Leibundguth's claims that Section 9.050(C)'s restriction on the size and number of wall signs along the BNSF railway violated the First Amendment, where it had previously found those claims to be moot. A-68. Leibundguth filed a notice of appeal in this action on July 28, 2016.

SUMMARY OF THE ARGUMENT

The Ordinance imposes content-based restrictions on speech in violation of the First Amendment of the U.S. Constitution and Article I, Section 4 of the Illinois

Constitution. Both the painted sign ban in Section 9.020(P) and the limits on the size and number of wall signs in Section 9.050 of the Ordinance are content-based restrictions on speech, and therefore the Court must apply strict scrutiny in determining whether they violate the First Amendment. As the district court recognized, Sections 9.020(P) and 9.050 cannot survive strict scrutiny because the interests the Village has cited to justify them, traffic safety and aesthetics, are not compelling government interests. A-40.

Section 9.050 is content-based for two reasons. *First*, the Ordinance exempts some noncommercial signs from the general regulations of Section 9.050, which apply to other noncommercial signs as well as commercial signs like Leibundguth's. The Supreme Court recently held that a restriction on speech is content based if it applies to particular speech because of the topic discussed or the idea or message expressed. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). Because Section 9.050's restrictions on the size and number signs do not apply to certain noncommercial signs because of the topic and message expressed in such signs, Section 9.050 is content-based under *Reed*. *Second*, Section 9.050 is content-based because the Ordinance applies the size and number restrictions in Section 9.050 to some noncommercial signs but not others based solely on the content of those signs. The Ordinance exempts governmental signs, temporary decorations, temporary signs at a residence commemorating a personal event, noncommercial flags, and memorial signs and tablets from the requirement to obtain a permit and does not place size or number restrictions on such signs. The Ordinance allows other political

and noncommercial signs without a permit so long as such signs are limited to 12 square feet total. Political and noncommercial signs in excess of 12 square feet require a permit and are subject to the size and number restrictions of Section 9.050. Leibundguth can assert an overbreadth challenge on behalf of noncommercial speakers for Section 9.050's content-based treatment of some political and noncommercial signs. *Bd. of Trs. of State Univ. of New York v. Fox*, 492 U.S. 469, 481 (1989).

Section 9.020(P)'s ban on signs painted on a wall, roof, or fence also is a content-based restriction on speech because the Village admits that it allows flags and murals to be painted on a wall and does not enforce Section 9.020(P) against painted flags and murals. That is, the Village allows some painted wall signs, but not others, based on their content.

In the alternative, even if the Court were to find Sections 9.020(P) and 9.050 are not content-based restrictions on speech, those sections still could not survive lesser First Amendment scrutiny. The Village has failed to provide sufficient evidence to support its assertions that the ban on painted signs advances its interests in traffic safety and aesthetics, let alone that is narrowly tailored to do so. Similarly, the Village has failed to provide sufficient evidence to support its assertions that the restrictions on the size and number of wall signs contained in Section 9.050 are narrowly tailored to advance an interest in traffic safety or aesthetics.

This Court should therefore hold that Sections 9.020(P) and 9.050 are content-based restrictions on speech and cannot survive strict scrutiny. In the alternative,

the Court should hold that the Village has failed to provide sufficient evidence to support its assertions that Sections 9.020(P) and 9.050 serve its interest in traffic safety and improving aesthetics in a narrowly tailored manner. Accordingly, this Court should reverse the district court's decision granting the Village's motion for summary judgment and denying Leibundguth's motion for summary judgment.

STANDARD OF REVIEW

This Court reviews an order granting summary judgment under Fed. R. Civ. P. 56 de novo. *Grieveson v. Anderson*, 538 F.3d 763, 767 (7th Cir. 2008). Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the evidence and draw inferences in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

ARGUMENT

I. The Ordinance imposes content-based restrictions on speech that cannot survive strict scrutiny.

The Supreme Court recently held that a restriction on speech is content based if it applies to particular speech because of the topic discussed or the idea or message expressed. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015); *see also Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015) (explaining that, after *Reed*, "[a]ny law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification"). When the government imposes a

content-based restriction on speech, the Court must apply strict scrutiny, "'which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Reed*, 135 S.Ct. at 2231 (citation omitted).

Here, the painted sign ban in Section 9.020(P) of the Ordinance, and the limits on the size and number of wall signs in Section 9.050, are content-based restrictions on speech that cannot survive strict scrutiny – and therefore violate the First Amendment of the U.S. Constitution and Article I, Section 4 of the Illinois Constitution – because the Village has not shown that they serve a compelling governmental interest, let alone that they are narrowly tailored to do so.

A. Section 9.050 is a content-based restriction on speech and cannot survive strict scrutiny.

Section 9.050 is a content-based restriction on speech for two reasons. First, it treats noncommercial speech more favorably than commercial speech. Second, it treats some kinds of noncommercial speech more favorably than other noncommercial speech.

1. The Ordinance treats commercial signs less favorably than certain noncommercial signs and is therefore content-based.

Under the Ordinance, all signs require a permit and are subject to the general regulations of Section 9.050, except that certain types of noncommercial signs – based upon their content – are not required to obtain a permit, nor are they subject to the general regulations of Section 9.050.

Section 9.080 of the Ordinance states that a permit is required for all signs erected in Downers Grove, except those provided for in Section 9.030. Section 9.030, in turn, provides a content-based list of signs that are allowed without a permit and specific regulations governing each type of sign. Some types of signs listed in Section 9.030 do not require a permit regardless of the size and number of them on a lot: governmental signs; temporary decorations; temporary signs at a residence commemorating a personal event; noncommercial flags; and memorial signs and tablets. Political and noncommercial signs that do not exceed 12 square feet also do not require a permit. Signs that are not exempt under Section 9.030 – including both commercial signs such as Leibundguth's and noncommercial signs that are not exempt under Section 9.030 – must comply with the restrictions found in Section 9.050.

Thus, to determine whether one must obtain a permit for a sign, and to determine what restrictions apply to a sign, one must determine the *kind of speech* the sign conveys. As the Supreme Court stated in *Reed*, "distinctions drawn based on the message a speaker conveys," such as those "defining regulated speech by particular subject matter" or "defining regulated speech by its function or purpose," are content-based distinctions subject to strict scrutiny. 135 S. Ct. at 2227. The Ordinance draws distinctions based on both subject matter of the signs and by the function or purpose of signs in determining whether the restrictions of Section 9.050 apply and therefore is content-based.

2. The Ordinance cannot survive strict scrutiny analysis.

Because the Ordinance discriminates against certain signs based on their content, it is subject to strict scrutiny, and the Village must therefore prove that the discrimination is narrowly tailored to further a compelling governmental interest. The Village has failed to do so because the two interests it has cited to justify the restrictions in Section 9.050 – traffic safety and aesthetics – have never been held to be compelling. *See Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016) ("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."); *Whitton v. City of Gladstone*, 54 F.3d 1400, 1408 (8th Cir. 1995) ("a municipality's asserted interests in traffic safety and aesthetics, while significant, have never been held to be compelling"); *Neighborhood Enters. v. City of St. Louis*, 644 F.3d 728, 737-38 (8th Cir. 2011) (quoting *Whitton*); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267 (11th Cir. 2005) ("nor has our case law recognized those interests [in aesthetics and traffic safety] as 'compelling'"); *Foti v. City of Menlo Park*, 146 F.3d 629, 637 (9th Cir. 1998) (cities' "'interest in protecting the aesthetic appearance of their communities by avoiding visual clutter . . . [and] in assuring safe and convenient circulation on their streets' . . . may not be compelling"). Indeed, the district court agreed that, if strict scrutiny applies, the provisions Leibundguth challenges cannot survive. A-40. Because Section 9.050 cannot survive strict scrutiny, it is unconstitutional and

invalid in all of its applications, including against Leibundguth. *See Bd. of Trs. of State Univ. of New York v. Fox*, 492 U.S. 469, 483 (1989).

3. Section 9.050 treats some noncommercial speech more favorably than other political and noncommercial speech, which allows Leibundguth to challenge it as overbroad.

This conclusion does not change because Leibundguth is engaged in commercial speech, restrictions on which have generally received less First Amendment protection than noncommercial speech. As the district court recognized, "[t]he First Amendment's overbreadth doctrine can be used by [a] commercial litigant [like Leibundguth] to challenge an ordinance that might be constitutionally applied to it, but unconstitutionally applied to a noncommercial litigant." A-39; *Fox*, 492 U.S. at 481.

The district court concluded, however, that Leibundguth could not raise such an overbreadth challenge because, it concluded, Section 9.050 only applies to commercial signs. A-39. That conclusion was incorrect.

To the contrary, Section 9.050's restrictions apply to *all* signs that are not otherwise prohibited or regulated by the Ordinance. This is evident from the plain language of Section 9.050, which is entitled "Sign Regulations Generally" and does not contain the word "commercial."

It is also evident from the context surrounding Section 9.050 in the Ordinance. Section 9.020 provides a list of signs prohibited in the Village. As discussed above, Section 9.030 provides a content-based list of signs that do not require a permit, along with certain size and number restrictions for such signs. It provides that

governmental signs, temporary decorations, temporary signs at a residence commemorating a personal event, noncommercial flags, and memorial signs and tablets do not require a permit, and it does not impose size or number limits on such signs. And Section 9.030 specifies that no permit is necessary for political and noncommercial signs that do not exceed 12 square feet. Section 9.040 governs temporary signs; Section 9.060 governs signs in certain concentrated business districts; and Section 9.070 governs special sign types.

From all this, one can only conclude that *any* sign in Downers Grove is subject to the restrictions in Section 9.050, unless it is prohibited by Section 9.020, allowed without a permit and subject to other rules under Section 9.030, is a temporary sign governed by Section 9.040, is in the concentrated business districts governed by Section 9.060, or is a special sign governed by Section 9.070. That includes political signs and other noncommercial signs in excess of 12 square feet, which are not exempt from permitting as smaller political and commercial signs are under Section 9.030 and are not prohibited under Section 9.020, unless they are temporary signs governed by Section 9.040 or in a business district governed by Section 9.060.

Thus, the Ordinance imposes the size and number restrictions of Section 9.050 on some political and non-commercial signs larger than 12 square feet but not to others – specifically, those that are exempt under Section 9.030 based on their content.

In concluding that Section 9.050 did not apply to noncommercial signs, the district court relied on the Village's statement in support of its motion for summary

judgment that "Section 9.050 regulates commercial signs," which Leibundguth did not dispute. A-26. But the district court read too much into Leibundguth's agreement with that statement. Leibundguth never stipulated that Section 9.050 *only* regulates commercial signs, which is contrary to the ordinance's plain language. SA-258.

The district court's interpretation of Section 9.050 is untenable. It cannot be correct that political and noncommercial signs exceeding 12 feet, and not otherwise addressed in the Ordinance, are subject to *no* regulations because that would render the Ordinance's provision specifically allowing smaller political and noncommercial signs without a permit superfluous. *Cf. McClain v. Retail Food Emplrs. Joint Pension Plan*, 413 F.3d 582, 587 (7th Cir. 2005) ("[I]t is an elementary canon of construction that a statute should be interpreted so as not to render one part . . . superfluous . . . .") (internal marks and citations omitted). And it cannot be correct that such signs are prohibited, despite their absence from the list of prohibited signs in Section 9.020, because that would violate both the *expressio unius est exclusio alterius* maxim (according to which "the expression of one thing implies the exclusion of others") and the rule of lenity (according to which a statute imposing a penalty should be construed strictly to avoid harsh treatment of defendants). *See* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 107-11, 296-302 (2012). Further, if such signs were prohibited, then the Ordinance would allow commercial signs of greater than 12 square feet (with a permit) but would prohibit noncommercial and political signs greater than 12

square feet that the Ordinance does not specifically allow – in which case the Ordinance would discriminate against noncommercial speech, and Leibundguth therefore would still be able to pursue an overbreadth challenge.

Also, the Ordinance's "substitution clause" in Section 9.010(E) – which the Village adopted after the parties filed their initial summary judgment motions, but before they filed their reply briefs, A-283 – further implies that Section 9.050 applies to noncommercial signs. The substitution clause authorizes a property owner to substitute noncommercial copy for existing commercial copy on an existing sign without an additional permit or other Village approval. Because any commercial sign is subject to Section 9.050, any noncommercial sign substituted for such commercial copy is presumably also subject to Section 9.050.[5]

Thus, under the only reasonable reading of Section 9.050, the Ordinance discriminates against both commercial speech and some non-commercial speech; Leibundguth may challenge the restrictions on noncommercial speech as overbroad; and the restrictions fail strict scrutiny because they are not narrowly tailored to serve a compelling governmental interest.

[5] The substitution clause also illustrates the absurdity of the idea that, because Section 9.050 supposedly only applies to commercial speech, the Ordinance prohibits noncommercial and political signs larger than 12 square feet that it does not specifically allow. If that were true, then the substitution clause would absurdly allow someone to evade the prohibition by putting up a commercial sign, then substituting noncommercial copy for the commercial copy.

B. Section 9.020(P) is a content-based restriction on speech because the Village allows painted flags and murals but not other commercial or noncommercial painted signs, and it fails strict scrutiny.

In addition, Section 9.020(P)'s prohibition on signs painted directly on a wall of a building, as applied by the Village, is a content-based restriction on speech, which is subject to – and fails – strict scrutiny.

The painted sign ban is a content-based restriction because the Village has exempted some painted signs from the ban based on their content, specifically exempting painted flags and murals. When the Village amended the Ordinance in 2015 to extend the painted sign ban to cover all of Downers Grove, Village Planning Manager Stanley Popovich, the official responsible for interpreting the Ordinance, prepared a staff report, SA-254-255, in which he stated: "There are instances of flags and murals painted on buildings and these are permitted by the code on the basis that they are decorative, and do not convey constitutionally protected commercial or non-commercial speech." SA-238. The parties did not dispute the Staff Report or its content. SA-292-293.

Nonetheless, the district court concluded that the Village has not exempted painted flags and murals from its painted sign ban. The district court discounted the Staff Report, even though the Village did not dispute its content, concluding that its statement on painted flags and murals was contrary to the text of the Ordinance. A-15. This was error: the court should have deferred to the Village's "own authoritative construction of the [O]rdinance, including its implementation and interpretation." *Southlake Prop. Assocs., Ltd. v. City of Morrow*, 112 F.3d 1114,

1119 (11th Cir.1997). The district court's conclusion was particularly unwarranted because there was no dispute as to how the Village *actually applies* Section 9.020(P): it allows painted flags and murals but not other commercial and noncommercial painted signs.

Of course, the Staff Report's legal conclusion that flags and murals do not convey constitutionally protected speech is incorrect. It is well-established that flags and murals *do* convey constitutionally protected speech. *See Spence v. Washington*, 418 U.S. 405, 410 (1974) (per curiam) (flags are protected speech); *Piarowski v. Ill. Cmty. Coll. Dist. 515*, 759 F.2d 625, 628 (7th Cir. 1985) (artistic expression is protected speech); *N. Olmsted Chamber of Commerce v. City of N. Olmsted*, 86 F. Supp. 2d 755, 767 n.7 (N.D. Ohio 2000) (murals are protected speech).

Therefore, Section 9.020(P), as interpreted and applied by the Village, is a content-based restriction on speech because it allows painted flags and murals but prohibits others signs based on the content of those signs alone. *See Reed*, 135 S. Ct. at 2226. Therefore, the Village must prove that Section 9.020(P) furthers a compelling interest and is narrowly tailored to achieve that interest. *Id.* at 2231. And, again, the interests asserted by the Village – traffic safety and aesthetics – have never been held to be compelling. *See Cent. Radio Co.*, 811 F.3d at 633; *Whitton*, 54 F.3d at 1408; *Neighborhood Enters.*, 644 F.3d at 737-38; *Solantic, LLC*, 410 F.3d at 1267; *Foti*, 146 F.3d at 637. Therefore, Section 9.020(P) cannot survive strict scrutiny and is unconstitutional and invalid in all of its applications, including against Leibundguth. *See Fox*, 492 U.S. at 481.

II. The Ordinance cannot survive lesser First Amendment scrutiny.

In the alternative – even if the provisions of the Ordinance that Leibundguth challenges were subject to lesser First Amendment scrutiny rather than strict scrutiny – they would still be unconstitutional.

A. The ban on painted signs cannot survive lesser First Amendment scrutiny.

Even if Section 9.020(P)'s prohibition of "any sign painted directly on a wall, roof, or fence" were not a content-based restriction, it would still fail First Amendment scrutiny under the "time, place and manner" test of *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Under *Clark*, a government may impose "reasonable time, place, or manner restrictions" on speech if "they are justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Id*. Section 9.020(P) fails this test because it is not narrowly tailored to advance the government interest in improving aesthetics asserted by the Village.[6]

Under the *Clark* test, the Village has the burden to show that there is *evidence* supporting its proffered aesthetic justification for the Ordinance's painted sign ban. *Weinberg v. City of Chicago*, 310 F.3d 1029, 1038 (7th Cir. 2002). The government must provide more than "mere facial assertions" to justify restrictions on First Amendment rights. *Id*. Accordingly, the Village cannot simply "blindly invoke"

[6] The Village made no argument and provided no evidence that the ban on painted wall signs advanced an interest in traffic safety. The district court focused solely on the Village's assertion of aesthetics as its significant government interest. A-16.

aesthetic concerns to support its restriction on hand painted signs. *Id.* But that is exactly what the Village has done in this case. It has failed to provide any sufficient evidence that supports it aesthetics justification for the painted sign ban.

The district court erred in concluding that the Village had satisfied its burden with evidence that it took hundreds of photographs of signs around Downers Grove and nearby towns and that it documented various sign styles and on several occasions made notes of aesthetic preferences. A-17; SA-44-232. The photographs do not support the conclusion that banning painted signs advances an aesthetic interest: nothing in the record connects them to aesthetic concerns or otherwise mentions aesthetic considerations related to painted signs. The photographs on which the district court relied were taken in 2005 or earlier and were submitted to the Village Council as part of a January 3, 2005 letter from the Village Sign Subcommittee, which does not address the issue of painted signs at all. SA-41-43. The Village has not provided any connection, either by logic or evidence, between these photographs with the 2015 amendment to Section 9.020(P), banning signs painted directly on a wall, roof, or fence, let alone any connection between these photographs and the version of Section 9.020(P) adopted in 2005, which explicitly allowed signs painted directly on a wall, roof, or fence in certain business zoning districts. Without requiring even a remote connection between these photographs and subsequent amendments to the Ordinance, under the district court's logic, these photographs would allow the Village to withstand intermediate First

Amendment scrutiny for any future sign regulation adopted by the Village that was justified by an interest in improving aesthetics.

The only other purported evidence on which the Village relies to support its interest in aesthetics is the Staff Report (discussed above) prepared by Village Planning Manager Stanley Popovich in support of the amendment to Section 9.020(P) that banned painted wall signs in all zones. SA-238. The Staff Report provided three reasons for the ban: (1) painted wall signs require ongoing maintenance; (2) paint on a building wall is subject to water damage; and (3) a painted wall sign is usually hard to remove. *Id*. The Staff Report, which was prepared during the course of this litigation, provides no citations or references to support these assertions, nor does it identify any specific current or historic examples of problems with painted wall signs.[7] Thus, the justifications provided in the Staff Report that the Village has relied on are "mere facial assertions" insufficient to justify the restriction on First Amendment rights.

Further, the Village has not shown that these justifications advance the Village's interest in aesthetics in a narrowly tailored manner, and there are reasons to doubt that they do. The Village allows painting on brick walls in general, SA-292 – but only prohibits it when it takes the form of a sign. (Section 9.020(P)). In fact, after

[7] The Village does point to Leibundguth's painted signs as examples of why the ban on painted signs is necessary, asserting that Leibundguth's signs are faded. A-18. Putting aside any questions raised by the fact that the only example the Village could come up with to justify the need for the amended Ordinance was the signs over which the Village found itself in litigation after it tried to have them removed, it is understandable that Leibundguth was hesitant to touch up the paint on its painted signs during the years that the Village was asserting that they were illegal; opting to wait until the situation was resolved one way or the other prior to taking action.

the district court entered summary judgment in favor of the Village, the Village permitted Leibundguth to remove its painted signs by painting directly over them with a solid color, as it had previously permitted it to do, SA-270, 291, even though the painted-over signs, of course, still require on-going maintenance and are still are subject to water damage. *See Cincinnati v. Discovery Network*, 507 U.S. 410, 428 (1992) (restrictions on speech struck down where city failed to "establish[] the 'fit' between its goals and its chosen means"). Further, if one can remove a painted sign to the Village's satisfaction by simply painting over it, as Leibundguth did here, that undermines the Village's argument that painted signs are difficult to remove. Indeed, painted signs may be even easier – or at least require less skill – to remove (by painting over them) than most other types of sign permitted by the Ordinance.

Further, the Village's admission that it allows flags and murals to be painted on buildings – even though they would present the same concerns about maintenance, water damage, and removal – undermines its assertion that the painted sign ban advances an aesthetic interest in a narrowly tailored manner. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (exemptions from restrictions on speech can "diminish the credibility of the government's rationale for restricting speech in the first place" and demonstrate that restrictions are not narrowly tailored to serve a sufficiently important governmental interest).

The district court erred in concluding that the painted sign ban is narrowly tailored because it is "probably the only effective way to address the aesthetics problem posed by painted wall signs." A-19. To reach that conclusion, the Court

relied on the fact that the Village spent more than a year in "deliberation and dialogue with Village residents and businesses regarding the Ordinance" before determining "that the best way to eliminate the harm caused by painted wall signs was to ban them." *Id*. But there are at least two reasons why this "deliberation and dialogue" cannot support the conclusion that the painted sign ban is narrowly tailored. For one, the record – which includes many hundreds of pages of documents produced by the Village – never even mentions the alleged problems associated with painted wall signs. For another, the "deliberation and dialogue" in question preceded the previous version of Section 9.020(P), which allowed painted wall signs in the downtown business zones, SA-25 – undermining the idea that Village found that the best way to eliminate the harm caused by painted wall signs was to ban them. In contrast, when the Village amended Section 9.020(P) to completely prohibit painted wall signs in the Village a decade later, it engaged in almost no "deliberation and dialogue" at all. The entire process took little more than three weeks: the Planning Commission heard the proposal on July 6, 2015, and the Village Council heard it on July 14, 2015 and passed it on July 21, 2015. At these three meetings only three members of the public had a "dialogue" with the Village about it, and two of those people were Leibundguth's owner and its attorney. SA-271-277, 293-296.

The Village's concerns about water damage and maintenance could be easily addressed by a rule that painted signs must be properly maintained – which the Ordinance *already requires*. Section 9.110. Further, the Village's concern about

painted signs being hard to remove could easily be addressed by a rule that signs not in use must be painted over – which is exactly what the Village allowed Leibundguth do to its painted wall signs after the district court granted the Village's motion for summary judgment. SA-270, 291. Those rules would be more narrowly tailored than a blanket ban on painted signs, while being effective at addressing the issues with the water damage, maintenance, and difficulty of removal for painted signs.

For these reasons, Section 9.020(P) is not narrowly tailored to serve an interest in aesthetics and therefore fails the *Clark* test.

B. The size and number restrictions on wall signs cannot survive lesser First Amendment scrutiny.

The size and number restrictions in the Ordinance that Leibundguth challenges likewise cannot survive even less-than-strict First Amendment scrutiny because the Village has not shown that they are narrowly tailored to serve an interest in aesthetics.

To recap, Section 9.050(A) limits the total sign area to 1.5 square feet per linear foot of tenant frontage; Section 9.050(C)(1) allows only one wall sign per tenant frontage along a public roadway or drivable right-of-way; and Section 9.050(C) limits a lot to one wall sign along the BNSF railroad right-of-way of no more than 1.5 square feet per lineal foot of tenant frontage. Because Leibundguth's signs are commercial, the Village's application of Sections 9.050(A), 9.050(C), and 9.050(C)(1) to them is analyzed under a four-part test that considers whether: (1) the commercial speech concerns a lawful activity and is not false or misleading; (2) the

asserted governmental interest is substantial; (3) the regulation directly advances the governmental interest asserted; and (4) the restriction is no more extensive than necessary to serve that interest. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). The fourth prong requires "a means narrowly tailored to achieve the desired objective." *Fox*, 492 U.S. at 480.

The district court correctly concluded that Leibundguth's signs are entitled to First Amendment protection because, under the first part of the test, Leibundguth's signs concern a lawful activity, moving and storage, and are not false or misleading. A-29. The district court also concluded that the Village's asserted interests in traffic safety and aesthetics are substantial. A-30-31. The real dispute between the parties concerns the third and fourth prongs of the test: whether the regulation directly advances the governmental interest asserted and whether the restriction is no more extensive than necessary (narrowly tailored) to serve that interest. The Village bears the burden to affirmatively establish these final prongs. *Fox*, 492 U.S. at 480.

Under the *Central Hudson* test, the Village cannot satisfy its burden "by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993) (citations omitted). In addition, regulations that are inconsistent and irrational cannot directly advance a substantial interest. *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 190-94 (1999).

The Village failed to provide sufficient evidence to show that the size and number restrictions Leibundguth challenges actually advance the two interests – traffic safety and aesthetics – the Village has asserted to justify them.

The district court correctly held that the Village failed to provide sufficient evidence to show that these restrictions on the size and number of signs are no more extensive than necessary to advance the Village's interest in traffic safety. A-31. The Village failed to provide any studies, police reports, or even anecdotal stories to show that the traffic harms it cited were real, and it failed to produce any evidence demonstrating that restricting the size and number of commercial signs, but not other signs (e.g., noncommercial flags, governmental signs, and decorations temporarily displayed), would alleviate this alleged harm to a material degree. A-32. And the Village's citations to treatises and sign-industry publications were insufficient to justify the restrictions because the Village failed to "develop any actual argument based on these treatises or to explain how these treatises support its contention that traffic safety is a real problem for the Village." A-32-33. Likewise, "simply noting that other locales cite to traffic safety in their sign codes is insufficient" as well. A-34. Thus, without any evidence showing that the targeted signs pose a traffic safety problem, the Village failed to show that these restrictions directly advance an interest in traffic safety. A-32.

The Village's aesthetic justification for the restrictions fails for the same reasons that its traffic-safety justification fails. As with traffic-safety argument, the Village has failed to provide any studies, police reports, or even anecdotal stories to show

that the restrictions serve its interest in improving aesthetics. The Village also failed to produce any evidence demonstrating that restricting the size and number of commercial signs, but not other signs (e.g., noncommercial flags, governmental signs, or decorations temporarily displayed), alleviates the alleged harm to aesthetics to a material degree.

Therefore, the district court should have rejected the Village's argument based on aesthetics, just as it rejected the argument based on traffic safety. Nevertheless, the district court found it sufficient that, before enacting the restrictions in 2005, the Village took hundreds of pictures of commercial signs around the community, spoke with several village members regarding the different signage currently in use by town residents and businesses, and took pictures of signs in surrounding communities for comparison purposes. A-34.

Those actions by the Village should not suffice, however, under the same reasoning the district court applied in rejecting its traffic-safety argument. The Village "fail[ed] to develop any actual argument" based on the photographs and communications, just as it failed to develop any argument based on traffic safety. *See* A-32-33. The Village also failed to explain how the photographs and communication show that the size and number restrictions address a real problem, just as it failed to "explain how the[] treatises [it cited] support its contention that traffic safety is a real problem for the Village." *See id*. As with the treatise citations, "[w]ithout a developed argument, actually analyzing the [photographs and records], the Court cannot accept 'speculation or conjecture' as proof that the Ordinance's

restrictions advance the Village's interest in [improving aesthetics]." A-33. And while the district court found that "simply noting that other locales cite to traffic safety in their sign codes is insufficient" to show that the restrictions advance the Village's interest in traffic safety, it apparently considered photographs of other locales – without any record evidence connecting such photographs to the size and number restrictions at issue – sufficient to show that the restrictions advance the Village's interest in improving aesthetics. A-34.

It makes no sense to require the Village to present evidence to explain how its restrictions actually address a real traffic safety concern, but then not require the Village to present evidence to explain how its restrictions actually address real aesthetic concerns. If this were the law, governments could justify any sign restrictions by simply invoking "aesthetics" and submitting some photographs. But that is not the law: the government must provide evidence to show that its restrictions will actually alleviate real harms to a material degree. *Edenfield*, 507 U.S. at 770–71. Because the Village failed to do so, the district court should have rejected its aesthetics justification.

Further, even if the size and number restrictions in Section 9.050 did advance an interest in aesthetics, they still would not be narrowly tailored to do so. The fit between "improving aesthetics" and the restrictions on the size and number of wall signs is questionable because the Village has provided exemptions to the size and number restrictions to some businesses and because the Ordinance allows other types of signs without the same size and number restrictions. *See City of Ladue*, 512

U.S. at 52 (exemptions from speech restrictions may demonstrate that they are not narrowly tailored); *see also Vanguard Outdoor, LLC v. City of Los Angeles*, 648 F.3d 737, 742 (9th Cir. 2011) (a restriction on speech can be underinclusive, and therefore, invalid, when it has exceptions that undermine and counteract the interest the town claims its restrictions further). For example:

- Section 9.050(A) limits the number of *wall* signs on a building to one per tenant frontage, but Section 9.050(H) places no limit on the number of *window* signs.
- While a building with one wall sign may not add another, it may have multiple window signs (Section 9.050(H)), a shingle sign or a monument sign (Section 9.050(B)), a menu board (Section 9.050(D)), a projecting sign (Section 9.050(E)), an awning sign (Section 9.050(F)), and an under-canopy sign (Section 9.050(G)).
- Properties abutting the right-of-way of I-88 or I-355 are allowed an additional monument sign that may not exceed 225 square feet, which does not count in calculating the lot's total sign area. (Sec. 9.050(B)(3).)
- Buildings of four stories or more are allowed one wall sign of 100 square feet or less on no more than three sides of the building, and these are not counted against the maximum allowable sign area. (Sec. 9.050(C)(4).)
- The Village also does not count a panel sign in a multi-tenant shopping center (Sec. 9.050(B)(2)), window signs (Sec. 9.050(H)), or menu boards (Sec. 9.050(D)) in calculating a lot's sign area.

- In November 2014, the Village Council approved a Planned Development Amendment to allow Art Van Furniture's building to have 990 square feet of signs – 690 square feet more than the Ordinance allows. SA-278-281, 296. During the Village Council's discussion the Mayor stated that allowing the additional signage would *improve* the aesthetics of the Village. SA-278-280, 297.

In addition, the size limitations of Sections 9.050(A) and 9.050(C) are not narrowly tailored to serve any aesthetic interest because they set arbitrary limits based on a building's length rather than its wall's surface area, without regard for the readability of the signs. Sections 9.050(A) and (C) allow the total square footage of wall signs to be 1.5 times the total length of a building along the road or railroad, with a maximum of 300 square feet for any such signs. This arbitrarily treats buildings with the same amount of wall space differently: for example, a building with a wall along a roadway or railway that is 100 feet long and 12 feet high may have a 150-square-foot wall sign, but a building with a wall facing the roadway or railway that is 50 feet long and 24 feet high may have only a 75-square-foot wall sign, even though both walls are the same square feet in area. The Village has presented no evidence to explain how a rule restricting signs' size based on a building's length serves its aesthetic interests better than a rule restricting signs' size based on a building's walls' surface area would. It has therefore failed to show that the size restriction is narrowly tailored.

Additionally, Section 9.050(C)'s restriction of wall signs along the BNSF railway is not narrowly tailored to serve an interest in aesthetics when compared to other provisions in the Ordinance. Section 9.050(C) permits lots with frontage along the BNSF railroad right-of-way one additional wall sign to be displayed on the wall facing the BNSF railroad right-of-way, but limits such a sign to 1.5 square feet per lineal foot of tenant frontage along the BNSF railroad right-of-way. Section 9.050(C) further indicates that the additional wall sign along the BNSF railroad and any other permitted signs on the same lot may not exceed 300 square feet. In contrast, Sec. 9.050(B)(3) provides that properties abutting the right-of-way of I-88 or I-355 are allowed an additional monument sign that may not exceed 225 square feet, which does not count in calculating the lot's total sign area. Thus, while these two provisions of the Ordinance appear to have a similar purpose – to enable lot owners to advertise along major commuter arteries that do not necessarily affect local roadways – the restrictions they impose are quite different. Because the Village has not presented evidence explaining this different treatment, the restrictions are not narrowly tailored to serve an important governmental interest.

The Village's allowance of various types of signs other than wall signs – and its special exception for at least one favored business – undermines its assertion that its restrictions on the size and number of wall signs serve its interest in improving aesthetics, and it demonstrates that the Ordinance is not narrowly tailored to serve that interest. The restrictions on the size and number of wall signs in Sections 9.050(A), 9.050(C), and 9.050(C)(1) therefore violate the First Amendment.

CONCLUSION

The district court's order granting summary judgment to the Village and denying summary judgment to Leibundguth should be reversed.

Respectfully submitted,

/s/ Jeffrey M. Schwab
Jeffrey M. Schwab
Jacob H. Huebert
Liberty Justice Center
190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603

Attorneys for Plaintiff-Appellant Leibundguth Storage and Van Service, Inc.

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the type-volume limitations imposed by Fed. R. App. P. 32 and Circuit Rule 32 for a brief produced using the following font: Proportional Century Schoolbook Font 12 pt body text, 11 pt for footnotes. Microsoft Word 2013 was used. The length of this brief was 9,713 words.

/s/ Jeffrey M. Schwab
Jeffrey M. Schwab

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2016, I served the foregoing brief upon Appellee's counsel by electronically filing it with the appellate CM/ECF system.

/s/ Jeffrey M. Schwab
Jeffrey M. Schwab

CIRCUIT RULE 30(d) STATEMENT

I, Jeffrey M. Schwab, certify that all the materials required by parts (a) and (b) of Circuit Rule 30 are included in the attached required short appendix and the separate appendix filed by the Appellants.

/s/ Jeffrey M. Schwab
Jeffrey M. Schwab

APPENDIX

Page

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT PETERSON and LEIBUNDGUTH STORAGE & VAN SERVICE, INC.,	)	
Plaintiffs,	)	No. 14 C 9851
v.	)	Judge Edmond E. Chang
VILLAGE OF DOWNERS GROVE,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiffs Robert Peterson and Leibundguth Storage & Van Service, Inc. sued the Village of Downers Grove to challenge the constitutionality of the Village's Sign Ordinance. R. 1, Compl.[1] Plaintiffs contend that several sections of the Village's revised Ordinance, which was originally adopted in 2005 but later amended, violate the First and Fourteenth Amendments, as well as Article I, Section 4 of the Illinois Constitution.[2] Plaintiffs focus their challenge on the following restrictions in the Sign Ordinance: its restriction on painted wall signs, on signs that do not face a roadway or drivable right-of-way, and on the total sign area and number of wall signs permitted on a single lot. *Id.* Earlier in the case, the Court dismissed Peterson as named plaintiff (because really his corporation is the sole proper plaintiff), R. 29 at 10-12 (April 2015 Opinion), leaving Leibundguth Storage & Van Service, Inc. as

[1]Citations to the record are "R." followed by the docket number then the page or paragraph number.

[2]This Court has subject-matter jurisdiction over the federal issue under 28 U.S.C. § 1331, and supplemental jurisdiction over the state-law claim under 28 U.S.C. § 1367(a).

the only remaining plaintiff. Both parties have now moved for summary judgment. R. 35, Def.'s Mot. for Summ. Judgment; R. 39, Pl.'s Mot. for Summ. Judgment. For the reasons set forth below, the Court grants the Village's motion, and denies Leibundguth's.

I. Background

The nature of Leibundguth's claims are set forth in detail in the April 2015 opinion [R. 29] that denied the Village's motion to dismiss. *Peterson et al v. Village of Downers Grove*, 2015 WL 1929737, at *1-3 (N.D. Ill. April 27, 2015). The relevant facts are largely undisputed.

A. Leibundguth's Signs

Robert Peterson is a resident of Downers Grove, Illinois. R. 38-4, Exh. 5, Peterson Depo. at 15. He has owned Leibundguth Storage & Van Service, Inc., which provides moving and storage services, since the mid-1980s. *Id.* at 24. Leibundguth operates out of a building located between Warren Avenue and the Metra commuter-railway tracks in the Village of Downers Grove. R. 40, PSOF ¶ 5.[3]

On the building's north and south facing walls, signs can be found advertising Leibundguth's business. On the south wall, a sign has been painted

[3]Citations to the parties' Local Rule 56.1 Statements of Fact are "DSOF" (for the Village's Statement of Facts) [R. 37; R. 38]; "PSOF" (for Leibundguth's Statement of Facts) [R. 40]; "Pl.'s Resp. DSOF" (for Leibundguth's Response to the Village's Statement of Facts) [R. 40]; and "Def.'s Resp. PSOF" (for the Village's Response to Leibundguth's Statement of Facts) [R. 46]. In several instances, the parties submitted their Statement of Facts and their responses/replies to the opposing party's Statement of Facts in a single document. As a point of clarification, the paragraph numbers referenced in the Court's citations to these Statements refer to that portion of the document being referenced. For example, PSOF ¶ 1 refers to paragraph 1 of Leibundguth's Statement of Facts, which begins on page 16 of R. 40. Finally, where a fact is admitted, only the asserting party's statement of facts is cited; where an assertion is otherwise challenged, it is so noted.

directly onto the brick, which reads "Leibundguth Storage and Van Service / Wheaton World Wide Movers." PSOF ¶ 7; R. 10, Am. Compl. ¶ 16; Peterson Depo., Exh. B at 10. The company's phone number is also listed. Am. Compl. ¶ 16. The sign looks like this:

Id. ¶ 1. The sign is 40 feet long, 10 feet high, and is directly visible to commuters riding by on Metra trains into and out of Chicago. *Id.* ¶ 16; PSOF ¶ 7. The sign does not face a roadway and is not visible to drivers. Am. Compl. ¶ 17; PSOF ¶ 5. According to Leibundguth, this sign brings in around 12 to 15 potential new customers each month, and generates between $40,000 and $60,000 in revenue per year, or about 15 to 20 percent of the company's annual revenue. Am. Compl. ¶ 18; PSOF ¶ 16.

On the front of the building, which faces north, Leibundguth has several signs. Leibundguth has another painted wall sign, which lists the company's name and phone number. Am. Compl ¶ 19; PSOF, ¶ 9. This sign is 40 feet long and 2 feet high, and is visible to drivers. Am. Compl. ¶ 19. It looks like this:

Id.

Leibundguth also has a separate sign (also on the front of the building) which spells out the company's name, "Leibundguth Storage & Van Service," in red and white (primarily white) hand-painted block letters. PSOF ¶ 11; Am. Compl. ¶ 21. Directly beneath those words is a rectangular sign, which advertises Leibundguth's relationship with "Wheaton World Wide Moving," a long-distance mover. PSOF ¶ 12. Neither of these signs is painted directly onto the building's exterior, but both face a roadway and can be seen by drivers. Am. Compl. ¶ 22. The portion of the sign spelling out the company's name is 19 feet long by two feet high, and the portion referencing Wheaton World Wide Moving is seven feet long by four feet high. Am. Compl. ¶¶ 20-21. These signs look like this:

Id. ¶ 21. The parties dispute whether the pictured sign(s) are one sign or two. Leibundguth argues two; the Village, one. PSOF ¶ 6; R. 46, Def.'s Resp. to PSOF ¶¶ 6, 11-12. In total, Leibundguth's signs cover more than 500 square feet of the building. Am. Compl. ¶ 42 (Leibundguth suggests they cover about 550 sq. ft.); R. 12, Ans. to Am. Compl ¶¶ 16, 19-20 (the Village asserts they cover about 665 sq. ft.).

B. The Village's Sign Ordinance

In May 2005, the Village of Downers Grove amended its sign ordinance, reducing the amount of signage permitted and prohibiting certain types of signs altogether. DSOF ¶ 15. (The Village's sign ordinance is contained in Article 9 of the Village's municipal code; for convenience's sake, this Opinion will refer to Article 9 as the "Sign Ordinance.") The Sign Ordinance's stated purpose is "to create a comprehensive but balanced system of sign regulations to promote effective communication and to prevent placement of signs that are potentially harmful to motorized and non-motorized traffic safety, property values, business opportunities and community appearance." R. 38-1, Exh. 2, Sign Ord. § 9.010(A).

Three of the Sign Ordinance's restrictions directly apply to Leibundguth's signs by banning *painted* wall signs; setting a cap on *total square footage* of signage; and setting a cap on the total *number* of wall signs. More specifically, the Ordinance prohibits "any sign painted directly on a wall, roof, or fence." *Id.* § 9.020(P). It limits the "maximum allowable sign area" for each property to 1.5 square feet per linear foot of frontage (two square feet per linear foot if the building is set back more than 300 feet from the street), in no case to "exceed 300 square feet in total sign surface

area." *Id.* § 9.050(A). And finally, it limits the number of wall signs a lot may display to "one wall sign per tenant frontage along a public roadway or drivable right-of-way." *Id.* § 9.050(C)(1). As originally enacted, this last provision prevented a property owner from displaying a sign facing the BNSF railroad, because such a sign would not be facing a roadway or drivable right-of-way. After Leibundguth filed this lawsuit, however, the Village amended this portion of the ordinance to allow "lots with frontage along the BNSF railroad" to display "one additional wall sign" facing the railroad, but limited the sign area to 1.5 square feet per linear foot of frontage along the BNSF railroad right-of-way. Def.'s Br., Exh. B, Am. Sign Ord. § 9.050(C)(5).

Leibundguth also points to § 9.030 of the Village's Sign Ordinance to show that the restrictions that apply to it are content-based. Pl.'s Br. at 16-20. Section 9.030 of the Sign Ordinance exempts certain signs—not Leibundguth's—from needing to obtain a sign permit and subjects those signs, which it identifies based on the type of sign being displayed, to different size restrictions. Sign Ord. § 9.030. For example, it exempts (among other signs) Governmental Signs, Railroad and Utility Signs, Street Address Signs, Noncommercial Flags, Real Estate Signs, Decorations displayed in connection with a Village-sponsored event, "No Trespassing" Notices, "Political and noncommercial signs," and "Memorial signs and tablets" from needing to obtain a permit. *Id.* Some of the listed exemptions remain subject to size restrictions, such as "Political and noncommercial signs," which "may not exceed a maximum area of 12 square feet per lot," *id.* § 9.030(I), while others are

not subject to any size restrictions at all, such as Governmental Signs and Noncommercial Flags, *id.* § 9.030(A), (G). None of the listed exemptions, however, are subject to the one wall-sign restriction in § 9.050(C) that Leibundguth is. The Village says that all signs (whether exempted under § 9.030 or not) remain subject to the prohibitions laid out in § 9.020, including the restriction on painted wall signs found in § 9.020(P) (but the square-footage and number-of-signs restrictions are not in § 9.020, so those restrictions do not apply to the exempted signs). DSOF ¶ 6.

Leibundguth's signs violate the Sign Ordinance in a number of ways. The Ordinance's ban on signs painted directly onto walls makes Leibundguth's Metra-facing advertisement and its similar, smaller sign on the front of the building unlawful. PSOF ¶¶ 8-9. The Ordinance also only allows the company 159 square feet for all of its signs (calculated at 1.5 square feet per linear foot of frontage, because Leibundguth's building is not set back more than 300 feet from the street), far less than the more than 500 square feet of advertising the company currently displays. PSOF ¶¶ 8-9, 13; Am. Compl. ¶ 41. And, according to Leibundguth, the Ordinance also prohibits its combined block-letter wall sign and Wheaton World Wide Moving sign, because only one wall sign can be displayed on a given wall and these signs constitute two signs. PSOF ¶¶ 11-13. The Village, of course, disputes this last point, whether Leibundguth's block-letter wall sign and Wheaton World Wide Moving sign constitute one or two signs. Def.'s Resp. PSOF ¶¶ 11-12.

When enacted, the Sign Ordinance established a grace period, giving property owners and businesses until May 2014 to bring any non-conforming signs

into compliance. DSOF ¶¶ 15-16; R. 37-4, Exh. 1D at 349, 352[4]. During that time, Leibundguth applied with the Downers Grove Zoning Board of Appeals for a variance that would allow the company to have a Metra-facing sign, painted wall signs, and total signage area that exceeded the maximum allowed under the ordinance. PSOF ¶ 18; R. 40-5, Exh. D at 2. The Zoning Board denied Leibundguth's request, and instead gave Leibundguth a four-month window (until April 2014) in which to paint over its painted wall signs with a solid color. PSOF ¶¶ 18-19; R. 40-2, Exh. A at 2-9. With the compliance period long over, and with Leibundguth's signs still not in compliance, Leibundguth could face fines of up to $750 per violation per day. Am. Compl. ¶ 63; R. 10-5, Exh. E, Village Muni. Code § 1.15(a). The Village has, however, agreed not to enforce the Sign Ordinance against Leibundguth and not to assess any fines during the pendency of these summary judgment motions. R. 11, Minute Entry dated Jan. 30, 2015.

C. The Lawsuit

Leibundguth (and at the time, Peterson too) sued the Village in December 2014. R. 1, Compl. In Count One of Leibundguth's amended complaint, Leibundguth challenges the "sign ordinance's content-based restrictions." Pointing to § 9.030 explicitly and § 9.050 implicitly, Leibundguth alleges that the size and number restrictions included in the Village's Sign Ordinance are impermissible content-based restrictions that violate the First Amendment. R. 10, Am. Compl. ¶¶ 65-74. In Counts Two, Three and Four, Leibundguth challenges the Sign Ordinance's ban on painted wall signs; its ban on signs that do not face a roadway or drivable right-of-

[4]The page numbers associated with Exhibit 1D refer to the pagination in the PDF.

way (this provision has since been amended); and its limit on total signage area and on the number of permitted wall signs. *Id.* ¶¶ 75-95. According to Leibundguth, these restrictions violate the First Amendment because the Village lacks "a compelling, important, or even rational justification" for them, because they are not narrowly tailored to advance the Village's purported interests in traffic safety and aesthetics, and because they are more extensive than necessary to advance the Village's interests. *Id.* ¶¶ 77-80, 84-87, 91-94. Leibundguth seeks a declaratory judgment that the Sign Ordinance violates the First and Fourteenth Amendments of the United States Constitution and Article I, Section 4 of the Illinois Constitution; a permanent injunction against enforcing the Sign Ordinance; one dollar in nominal damages; and costs and attorneys' fees. *Id.* ¶¶ A-G.

II. Legal Standard

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In evaluating summary judgment motions, courts must view the facts and draw reasonable inferences in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). The Court may not weigh conflicting evidence or make credibility determinations, *Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 704 (7th Cir. 2011), and must consider only evidence that can "be presented in a form that would be

admissible in evidence" at trial, Fed. R. Civ. P. 56(c)(2). The party seeking summary judgment has the initial burden of showing that there is no genuine dispute and that they are entitled to judgment as a matter of law. *Carmichael v. Village of Palatine*, 605 F.3d 451, 460 (7th Cir. 2010); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Wheeler v. Lawson*, 539 F.3d 629, 634 (7th Cir. 2008). If this burden is met, the adverse party must then "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. On cross motions for summary judgment, the Court assesses whether each movant has satisfied the requirements of Rule 56. *See Cont'l Cas. Co. v. Nw. Nat'l Ins. Co.*, 427 F.3d 1038, 1041 (7th Cir. 2005); *see also Laskin v. Siegel*, 728 F.3d 731, 734 (7th Cir. 2013).

III. Analysis

Leibundguth challenges the following restrictions in the Village's Sign Ordinance, which impact Leibundguth's signs: its restriction on painted wall signs, *see* Sign Ord. § 9.020(P); its requirement that wall signs face a roadway or drivable right-of-way, *id.* § 9.050(C); and its restriction on the maximum total sign area permitted on a given lot and on the number of wall signs that may displayed on a building, *id.* § 9.050(A) and (C). Leibundguth argues in the alternative that, in the event the Court finds that these restrictions do not violate the First Amendment as applied to Leibundguth, they nonetheless constitute facially impermissible content-based restrictions on speech. Pl.'s Br. at 16.

A. Painted Wall Signs

Leibundguth's first challenge is to the Sign Ordinance's restriction on painted wall signs. Sign Ord. § 9.020(P). This section prohibits "any sign painted directly on a wall, roof, or fence." *Id.* According to Leibundguth, this section violates the First Amendment because it does not advance "a compelling, important, or even rational" government interest, and it is not narrowly tailored to serve the Village's purported interests in traffic safety and aesthetics. Pl.'s Br. at 2.

Neither party disputes whether signs are a form of expression protected by the First Amendment, and for good reason. *See City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994) (noting that "signs are a form of expression protected by the Free Speech Clause" of the First Amendment). The Supreme Court has explained, however, that signs "pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation." *Id.* Thus, municipalities, like the Village, generally may "regulate the physical characteristics of signs," within reasonable bounds. *Id.*

Both parties agree that the Sign Ordinance's ban on painted wall signs constitutes a time, place, and manner restriction. Pl.'s Br. at 2; Def.'s Br. at 7. The Village may enforce a time, place, and manner restriction without violating the First Amendment if the restriction is: (1) content-neutral, (2) narrowly tailored to serve a significant government interest, and (3) leaves open ample alternative channels of communication. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288,

293 (1984); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 828 (7th Cir. 1999). The Village bears the burden of proving that its restriction on painted wall signs meets these requirements. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000).

As to the first element, the Village has satisfied its burden: its ban on painted wall signs, § 9.020(P), is content-neutral. To be content-neutral, a regulation must not restrict speech "because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2226 (2015). If a regulation "appl[ies] to particular speech because of the topic discussed or idea or message expressed," then that regulation is content-based. *Id.* at 2227. Likewise, if the government adopts a regulation of speech "because of disagreement with the message [the speech] conveys," then that regulation is similarly content-based. *Ward*, 491 U.S. at 791.

In this case, the Village's restriction on painted wall signs "is wholly indifferent to any specific message or viewpoint," *Weinberg*, 210 F.3d at 1037; it applies to *all* signs, regardless of their message or content. The first step to understanding this is to recognize that the Village's Municipal Code broadly defines a "sign" as:

> Any object, device, display or structure … that is used to advertise, identify, display, direct or attract attention to an object, person, institution, organization, business, product, service, event, or location by any means including words, letters, figures, designs, symbols, fixtures, colors, or illumination whether affixed to a building or separate from any building.

R. 40-6, Exh. E, Village Muni. Code § 15.220. This expansive definition does not on its face refer to the content of speech, either by singling out a *viewpoint* or a

particular *topic* of speech. Next, the Village regulates signs in Article 9 of the Municipal Code (this Opinion has been calling Article 9 the "Sign Ordinance" for convenience). After setting forth the Sign Ordinance's general purpose, *see* Sign Ord. § 9.010, the Ordinance then bans certain types of signs, again without reference to the viewpoint or topic of the sign's message. Entitled "Prohibited Signs and Sign Characteristics," Section 9.020 sets out 21 categories of banned signs, including "any sign painted directly on a wall, roof, or fence." § 9.020(P) (as amended).[5] There is no exception in Section 9.020: all painted wall signs are banned, regardless of a sign's content.

It is true that the next section of the Sign Ordinance, § 9.030, exempts certain types of signs from being subject to the Village's permit application and fee requirements—and the exemptions do, in some instances, refer to the content of the signs. To back-up for a moment, the Sign Ordinance does generally require that persons who want to display a sign apply for a permit to do so. Sign Ord. § 9.080(A). Unless the Sign Ordinance "expressly" says otherwise, "all signs require a permit." § 9.080. The permit-application process includes a "plat of survey" and a permit fee. § 9.080(A), (B). A copy of the application, which apparently is used for a wide variety of Village-required permits and thus is not specific to signs, is attached to this Opinion, as is the schedule of user fees. There is nothing more specific in the Sign Ordinance about the requirements for issuance of a permit, but in the same section, the Sign Ordinance does require that signs (a) conform with the National

[5]In July 2015, the Village amended this section to remove a previous exception for certain business districts in the Village. R. 36-2, Exh. B, Am. Sign Ord.

Electrical Code (if the sign has electrical wiring and connections); (b) be designed and constructed to withstand wind pressure of at least 40 pounds per square foot and to receive "dead loads" as required in the Village's building code; and (c) for signs that extend over, or could fall on, a public right-of-way, the applicant must agree to indemnify the Village and to obtain certain insurance coverage. § 9.080(C), (D), (E). So the Sign Ordinance does require a permit-application process for signs, absent an express exemption.

Returning to Section 9.030, that particular section does exempt certain types of signs from the permit-application process. And, as noted earlier, some of the exemptions do refer to the content of the signs. *E.g.*, § 9.030(B) (public-safety signs), § 9.030(E) (temporary signs at a residence commemorating a "personal" event, such as a birthday), § 9.030(G) ("Noncommercial flags" of a government), § 9.030(I) ("Political signs and noncommercial signs," within certain size limits). But that does not mean that the ban on painted wall signs—contained in § 9.020 of the Sign Ordinance—is content-based. The ban applies to *all* signs, even those that are not subject to the permit-application requirement. Nothing in the text of § 9.020 suggests that the prohibited signs in that section are anything but completely banned, even if the sign is one of the types exempted in § 9.030. In other words, the only thing that § 9.030 does in categorizing certain types of signs is to exempt those signs from the permit-application process. For example, if someone wanted to display a political or noncommercial sign, the sign would be exempt from the permit-application process (assuming it met the other requirements detailed in

§ 9.030), but § 9.020 would still ban the sign from being painted directly on a wall. Nor is there anything in the text of either § 9.030 or § 9.080 that purports to override the complete ban of § 9.020. So the painted-wall ban does not single out a certain message for different treatment, nor does it require consideration of the content of the speech in order to apply it.[6] There is also no evidence to suggest that the Village adopted this restriction because of disagreement with the messages conveyed in painted wall signs. Accordingly, because the Village's restriction on painted wall signs applies to all signs, regardless of their content, the restriction is content-neutral.

The Court must next consider whether the Ordinance's restriction on painted wall signs is narrowly tailored to achieve a significant government interest. It is this prong that the parties most contentiously dispute. The Village generally asserts that two governmental interests underlie the restrictions in its Sign Ordinance: traffic safety and aesthetics. *See* Def.'s Br. at 8-9. The Village then specifies, in a

[6]In resisting the content-neutral text of the Sign Ordinance's ban against painted wall signs, Leibundguth points to a Staff Report authored by the Village's Planning Manager, Stanley Popovich. According to Leibundguth, the report shows that flags and murals are allowed to be painted directly on walls. Pl.'s Br. at 3; R. 47, Pl.'s Reply Br. at 6. The report was submitted as a recommendation on the proposed 2015 amendments to the Sign Ordinance. *See* R. 36-2, Exh. B, 2015 Staff Report. In the report, Popovich does say that purely "decorative" flags and murals are not subject to the ban. 2015 Staff Report at 3 ("There are instances of flags and murals painted on buildings and these are permitted by the code on the basis that they are decorative, and do not convey constitutionally protected commercial or non-commercial speech."). But the report simply states that conclusion without any discussion of the Sign Ordinance's text. *See id.* As discussed above, the actual text of the pertinent provisions of the Sign Ordinance contains no exception to the ban on painted wall signs. Indeed, the Village concedes that flags and murals that meet the definition of a "sign" *are* subject to the painted wall sign restriction. R. 45, Def.'s Reply and Resp. Br. at 1. In light of municipal code's broad definition of a "sign," *see* R. 40-6, Exh. E, Village Muni. Code § 15.220, it is difficult to conceive of a flag or mural that would not be considered a "sign," despite the note in the Staff Report.

footnote, that "[f]or purposes of Section 9.020.P" the relevant governmental interest is "solely … aesthetics." *Id.* at 8 n.4.[7] Based on that concession, the Court will focus its analysis on aesthetics only. It is well settled that a town's interest in aesthetics is a significant governmental interest. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805-06 (1984) ("it is well settled that the state may legitimately exercise its police powers to advance esthetic values … [and] municipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression."); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981) (describing both "traffic safety" and "the appearance of the city" as "substantial government goals"). So the *significance* of the government interest is satisfied—the only question is whether the Village's ban on painted wall signs is narrowly tailored to further that aesthetic interest.

"A regulation is narrowly tailored if it 'promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Weinberg*, 310 F.3d at 1040 (quoting *Ward*, 491 U.S. at 799). "[A]n ordinance need not be the least restrictive method for achieving the government's goal" in order to satisfy the narrowly tailored prong. *Id.* Although the Village cannot "blindly invoke" its concerns without more, *Weinberg*, 310 F.3d at 1038, the burden to put forth evidence supporting a content-neutral speech restriction of this kind is "not

[7]The Village's concession on this point is oddly worded; it says that the "focus of this pleading" (its brief) is "solely on aesthetics." Def.'s Br. at 8 n.4. Regardless of what is meant by that, even if the Village *did* want to rely on traffic safety as a purported justification for the painted wall sign ban, the Village develops no argument and points to no record evidence that *painted* wall signs pose some special traffic-safety problem that differs from non-painted signs.

overwhelming," *DiMa Corp.*, 185 F.3d at 829. For example, "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* (internal quotation marks omitted). *See also City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1554 (7th Cir. 1986).

Leibundguth's primary challenge is to the sufficiency of the evidence offered by the Village to justify its need for its restriction on painted wall signs. The Village does "ha[v]e the burden of showing there is evidence supporting its proffered justification," which in this case is aesthetics. *Weinberg*, 310 F.3d at 1038. And although the evidence does not need to be "overwhelming," the Village does need to show that it did more than "blindly invoke" aesthetic concerns to support its restriction on painted wall signs. *Id.* But in this case, the Village has satisfied its burden. Before the Village implemented its Sign Ordinance, it took hundreds of photographs of signs both around the village, as well as in nearby towns. R. 37-4, Exh. 1D at 160-348[8]. The Village documented the various sign styles and structures in use by the community and on several occasions made note of aesthetic preferences. *See, e.g.*, *id.* at 326. More to the point, in a Staff Report prepared for the Village's Plan Commission, the Village specifically discussed the aesthetic problems associated with *painted* wall signs. *See* R. 36-3, Exh. C, 2015 Staff Report. The Report explains that painted wall signs "present numerous issues, including

[8]The page numbers associated with this exhibit refer to the pagination in the PDF.

permanence, on-going maintenance and water damage to the underlying structure;"[9] that the typical removal processes for painted wall signs "are very caustic and can cause significant damage to the brick," "[i]n many cases" leaving a "ghost sign" on the wall; and that "[t]ired, faded, chipped wall signs painted directly onto wood or masonry are perceived by many … as presenting a negative face to the commercial vitality of the community." *Id.* at 3-5. The Report also sets forth a photographic example of what the "ghost" sign problem looks like and what the water damage problem looks like (given the Village's ban, the exemplar photos are not actually from signs in the Village). *Id.* at 4, 5. Although this Report did not come out until the Sign Ordinance was amended in 2012, it nevertheless supports the Village's conclusion that painted wall signs pose specific aesthetic problems that justify the ban in § 9.020(P). On top of all this, the Village also offers photos of Leibundguth's railway-facing, painted wall sign, and those photos do show some of the fading and chipping aesthetic problems discussed by the Staff Report. R. 36-4, Exh. D at 7-9 (photos taken on July 22, 2015). All of this evidence together shows that the Village did not blindly invoke its aesthetic concerns, but rather that it carefully documented and considered the current appearance of signs around the community and the impact different types of signs, including painted wall signs, have on the town's general appearance. The Village has provided sufficient evidence to justify its need for a restriction on painted wall signs.

[9]The Report explains in detail why water damage is a special problem with paint on bricks: the paint traps moisture on the brick's surface, and when the water freezes and expands, the ice shears the face of the brick. 2015 Staff Report at 4.

The Village's painted wall sign restriction is also narrowly tailored to serve the Village's interest in aesthetics. The Village spent more than a year in deliberation and dialogue with Village residents and businesses regarding the Sign Ordinance, as reflected in the Village's meeting minutes. *See, e.g.*, DSOF ¶¶ 13-14; R. 37-1, Exh. 1A at 49-104.[10] Recognizing the problems created by painted wall signs, the Village determined that the best way to eliminate the harm caused by painted wall signs was to ban them. This was probably the only effective way to address the aesthetics problem posed by painted wall signs. *See Taxpayers for Vincent*, 466 U.S. at 808 ("By banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy. … It is not speculative to recognize that [posted signs] by their very nature, wherever located and however constructed, can be perceived as an esthetic harm." (internal quotation marks and citation omitted)). In arguing to the contrary, Leibundguth does not, except for one immaterial exception, actually attempt to explain how the Village could adopt some other, narrower restriction and still serve its concern over aesthetics. Pl.'s Br. at 4-5.[11] Really, Leibundguth just argues that the Village's concerns are not genuine concerns because (1) painted murals are allowed, Pl.'s Br. at 5, and (2) the Village does not ban painting on brick walls, it just bans painted wall signs, *id.* at 4. But on the first point, this Opinion earlier explained why there is no exemption for murals.

[10]The page numbers associated with this exhibit refer to the pagination in the PDF.

[11]The immaterial exception is in response to the Village's unpersuasive argument that striking down the painted wall sign ban would prevent the Village from banning spray-painted signs. Pl.'s Br. at 3-4. Of course it would be narrower to ban only spray-painted signs, but luckily for the Village, the Village more broadly argues (persuasively) that the aesthetic problems posed by painted wall signs are not limited to *spray* paint. *See* 2015 Staff Report at 3-5.

Supra at 14-15, 15 n.6. And on the second point—which, again, is not really an argument on narrow tailoring, so much as it is an argument against the genuineness of the aesthetic concern—the Village reasonably could conclude that a sign, which is by definition a display that attracts attention (and indeed is designed to attract attention), poses a more serious aesthetic problem that just a painted wall. The Village's restriction on painted wall signs is narrowly tailored to advance its interest in aesthetics.

Moving on to the final element of the time-place-and-manner test, the parties do not dispute whether the Village's ban on painted wall signs leaves open ample alternative channels of communication, and for good reason. The Village's restriction on painted wall signs prohibits just *painted* wall signs; it does not prohibit other types of wall signs. In fact, the Sign Ordinance expressly permits residents and businesses to put up wall signs if they wish to do so, they just cannot directly paint the sign on the wall. Sign Ord. § 9.050(C). The Ordinance also allows businesses to use a variety of other types of signs, such as window signs, awning signs, and under-canopy signs. *Id.* § 9.050(F)-(H). The Village has left open ample alternative channels through which commercial entities, like Leibundguth, can advertise their businesses. This element is satisfied.

Because the Village has satisfied its burden—at least as to its interest in aesthetics—under the First Amendment, the Village's ban on painted wall signs is constitutional. The Village's motion for summary judgment is granted as to

Leibundguth's claim that the ban on painted wall signs violates the First Amendment.[12]

B. Restriction on Wall Signs Facing a Roadway or Drivable Right-of-Way

Leibundguth's next challenge is to the Ordinance's requirement that wall signs face a roadway or drivable right-of-way. *See* Sign Ord. § 9.050(C)(1). When originally adopted, this requirement precluded those lots adjacent to the Metra railroad (like Leibundguth's) from displaying wall signs that faced the railroad but did not face a roadway or drivable right-of-way. After Leibundguth filed suit, however, the Village amended § 9.050(C). In July 2015, the Village added a provision allowing "lots with frontage along the BNSF railroad right-of-way"—like Leibundguth's—to display "one additional wall sign" facing the railroad, provided that the sign does "not exceed 1.5 square feet per linear foot of tenant frontage along the BNSF railroad right-of-way." Am. Sign Ord. § 9.050(C)(5). Due to this amendment, the Village argues, Leibundguth's claim here—that the Sign Ordinance's ban on signs facing the Metra violates the First Amendment—is moot. Def.'s Br. at 15.

[12]The Village suggests that in the event this Court determines that the Ordinance's restriction on painted wall signs is valid, the remainder of Leibundguth's complaint becomes moot because Leibundguth—after removing its painted wall signs—will only have one remaining sign, which meets the Ordinance's restrictions. Def.'s Br. at 14. This, however, does not moot the remainder of the complaint, because Leibundguth still currently has *all* three signs on its building. Until Leibundguth removes the painted wall signs, the company remains in violation of the restrictions in § 9.020(P) as well as the restrictions in § 9.050. What's more, Leibundguth is entitled to appeal this Court's holding that the ban on painted wall signs is valid, so even if Leibundguth removes the painted wall signs, the company can present a live, non-moot dispute because the company would want to paint the signs back onto the walls (and, in any event, perhaps Leibundguth will win a stay of the decision pending appeal). The remainder of the complaint is not moot.

The Village is correct. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). For claims seeking only prospective relief, the repeal of a challenged ordinance ordinarily renders that case moot "unless there is evidence creating a reasonable expectation that the City will reenact the ordinance or one substantially similar." *Fed'n of Adver. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 930 (7th Cir. 2003) (citing *Rembert v. Sheahan*, 62 F.3d 937, 940 (7th Cir. 1995), *Thomas v. Fiedler*, 884 F.2d 990, 995 (7th Cir. 1989)). *See also Zessar v. Keith*, 536 F.3d 788, 793 (7th Cir. 2008) ("[A]ny dispute over the constitutionality of a statute becomes moot if a new statute is enacted in its place during the pendency of the litigation, and the plaintiff seeks only prospective relief."). The same holds true for when a municipality amends a statute, at least so long as the amended statute "clearly rectifies the statute's alleged defects." *Rembert v. Sheahan*, 62 F.3d 937, 940-41 (7th Cir. 1995).

In this case, the Village's amended provision, § 9.050(C)(5), rectified the Sign Ordinance's alleged defect on the railroad-facing ban. The Ordinance no longer bans wall signs facing only the Metra railway. Now, lots with railroad frontage *are* allowed to display a wall sign facing the railroad even if that sign does not also face a drivable right-of-way. Am. Sign Ord. § 9.050(C)(5). Thus, Leibundguth is no longer precluded from displaying a wall sign that faces only the Metra tracks, as he complains. There is also no evidence in the record to show that the Village is likely to repeal its amended provision; in fact, Leibundguth does not even argue that the

Village is likely to reenact its ban. And while the Village did amend the ordinance to moot this claim after Leibundguth filed suit, courts have held that the altering of an ordinance in response to litigation "does not alone show the city's intent to later reenact the challenged ordinance." *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 901 (9th Cir. 2007). *See also Fed'n of Adver. Indus. Representatives, Inc.*, 326 F.3d at 929 (ruling that where a municipality appears to be voluntarily amending a statutory provision in order to fashion an ordinance that passes constitutional scrutiny, it is proper to presume that the municipality does not intend to reenact the same or a substantially similar unconstitutional provision). Thus, without more, there is no reasonable basis to believe that the Village will reenact its ban on wall signs facing the Metra railway. Leibundguth's claim is moot as to the declaratory and injunctive relief Leibundguth requests in its amended complaint. *Id.* ("If the plaintiff's only claims seek to require government officials to cease allegedly wrongful conduct, and those officials offer to cease that conduct, then the claims should be dismissed as moot, absent some evidence that the offer is disingenuous."). To the extent Leibundguth wishes to challenge the amended section of the Ordinance and to again request declaratory and injunctive relief on the revised Ordinance, Leibundguth must amend its complaint to do so (though there does not seem to be a practical reason to do so, at least not as to the revised Ordinance's authorization of a railroad-facing sign, as that is what Leibundguth wanted).

It is true that Leibundguth did not seek just declaratory and injunctive relief in its amended complaint. Leibundguth also sought one dollar in nominal damages in connection with "the violation of [its] constitutional rights," which presumably includes a violation resulting from the Village's ban on wall signs facing the Metra. *See* Am. Compl. ¶ D. A plaintiff who has been deprived of a constitutional right is entitled to nominal damages, as Leibundguth claims, even absent actual damages. *Hessel v. O'Hearn*, 977 F.2d 299, 302 (7th Cir. 1992). The problem for Leibundguth, however, is that the Village never did commit a constitutional violation of Leibundguth's rights because the Village never enforced its short-lived ban on signs facing only the Metra. The ban, when in effect, could have impacted only Leibundguth's painted wall sign on the back of its building; the sign facing the Metra. But that sign was in place before the ordinance was enacted, remained in place after the enactment, and still remains in place today. Leibundguth was not required to change it; Leibundguth was never precluded from speaking through that sign; and importantly, Leibundguth was never fined for having a non-conforming sign when the ban was in effect. Rather, the Village agreed not to fine Leibundguth during this case's pendency. R. 10. So long as the Village will not fine Leibundguth for having a Metra-facing sign during the time the ban was in effect, Leibundguth's request for nominal damages is likewise moot. *See Freedom from Religion Found., Inc. v. City of Green Bay*, 581 F. Supp. 2d 1019, 1029-33 (E.D. Wis. 2008). *See also Carey v. Piphus*, 435 U.S. 247, 266 (1978) (explaining that nominal damages are

available to "vindicate[] deprivations of certain 'absolute' rights that are not shown to have caused injury"). Accordingly, the Court dismisses this claim as moot.

C. Restriction on Total Sign Area and the Number of Permitted Wall Signs

Leibundguth's next challenge is to the ordinance's restriction on the total signage area allowed under § 9.050(A), and on the number of wall signs permitted under § 9.050(C). Section 9.050(A) limits the maximum allowable signage area per lot to "1.5 square feet per linear foot of tenant frontage" for buildings which are set back 300 feet or less "from the abutting street right-of-way," and "2 square feet per linear foot of tenant frontage" for buildings set back more than 300 feet. *See* Sign. Ord. § 9.050(A). Section 9.050(C), which applies just to *wall* signs, limits the number of wall signs a "business or property owner" may display to "one wall sign per tenant frontage along a public roadway or drivable right-of-way." *Id.* § 9.050(C)(1). According to Leibundguth, these size and number restrictions violate the First Amendment because they do not serve even a rational government interest, are not narrowly tailored, and are not the least extensive means necessary to achieve the Village's interests. Am. Compl. ¶¶ 91-94. Leibundguth challenges these restrictions both on their face and as applied. The Court will address Leibundguth's as applied challenge first, and its facial overbreadth challenge second.

As a threshold matter, the Court must determine the proper framework to use in analyzing these restrictions. As the Court explained in its April 2015 order addressing the Village's motion to dismiss, the appropriate level of scrutiny here is

intermediate scrutiny. R. 29, April 2015 Order, at 17-19; *see also Central Hudson Gas & Elec. Corp. v. Public Svc. Comm'n*, 447 U.S. 557, 562 (1980). Both parties agree that as far as the restrictions in § 9.050 are concerned, they restrict only commercial speech. The Village adopted this position in its motion to dismiss briefing, *see* R. 25 at 4 (explaining that "only three specific commercial sign regulations prohibit [Leibundguth's] commercial signs"); and neither party disputes it now, *see* Def's Br. at 15; Pl's Br. at 5. Commercial speech, although of course worthy of First Amendment protection, is entitled only to intermediate scrutiny, *see Central Hudson*, 447 U.S. at 562; therefore, the restrictions in § 9.050 need only satisfy the requirements of the Supreme Court's *Central Hudson* test in order to be valid under the First Amendment, *see id.*

Before addressing the merits of the Village's restrictions under *Central Hudson*, however, it is worth discussing a recent Supreme Court decision that was issued after this Court's opinion on the dismissal motion. In *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), the Supreme Court held that a town's sign code was unconstitutionally content-based because it applied different restrictions to signs depending on the sign's content. 135 S. Ct. at 2231-32. In *Reed*, a majority of the Supreme Court explained that a speech regulation would be considered content-based in one of two ways: first, if the regulation, on its face, "applies to particular speech because of the topic discussed or the idea or message expressed," then that regulation is content-based. *Id.* at 2227. This is so "even if the regulation does not discriminate among viewpoints within that subject matter." *Id.* at 2230. Second, if a

regulation is facially neutral, but cannot be "justified without reference to the content of the regulated speech" or was "adopted by the government because of disagreement with the message the speech conveys," then that regulation is likewise content-based. *Id.* at 2227 (internal quotations omitted). Applying these principles to the town's sign code in *Reed*, the Supreme Court concluded that the distinctions the code drew between different types of signs—for example, Ideological Signs, Political Signs, and Temporary Directional Signs—were content-based because they "depend[ed] entirely on the communicative content of the sign," *id.* at 2227, and that because the code favored certain kinds of speech (*e.g.*, ideological signs) over other kinds of speech (*e.g.*, temporary directional signs), its restrictions had to be subject to strict scrutiny, *id.* at 2227-31.

Given how recently *Reed* was decided, its reach is not yet clear. Although *Reed* broadly states that content-based restrictions must be subject to strict scrutiny, *see id.* at 2231, even if there is no viewpoint discrimination and even if the speech regulation differentiates just as to particular *topics*, it remains to be seen whether strict scrutiny applies to *all* content-based distinctions. As pertinent here, the question would be whether strict scrutiny applies to *commercial*-based distinctions like those at issue in § 9.050(A) and (C). There are certain broad statements in *Reed* that could be read that way, *see id.* at 2226 ("Content-based laws [are] unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."), but other statements tug the other way, *id.* at 2232 ("Not all distinctions are subject to strict

scrutiny, only content-based ones are."). Yet the concurring opinions warn that the majority's test for how to tell what is content-based and what is not could result in commercial-speech regulation being deemed content-based. *See id.* at 2235 (Breyer, J., concurring in judgment) ("Nor can the majority avoid the application of strict scrutiny to all sorts of justifiable … regulations by relying on this Court's many subcategories of exceptions to the rule," such as, "for example, … commercial speech."); *id.* at 2236 (Kagan, J., concurring in judgment) ("Says the majority: When laws single out specific subject matter, they are facially content based; and when they are facially content based, they are automatically subject to strict scrutiny."). But the majority never specifically addressed commercial speech in *Reed*, which is not surprising, because the Supreme Court did not need to address that issue: all of the restrictions at issue in *Reed* applied only to *non*-commercial speech. What is important for this case is that, absent an express overruling of *Central Hudson*, which most certainly did not happen in *Reed*, lower courts must consider *Central Hudson* and its progeny—which are directly applicable to the commercial-based distinctions at issue in this case—binding. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of th[e] [Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court … should follow the case which directly controls, leaving to th[e] [Supreme] Court the prerogative of overruling its own decisions."). Accordingly, notwithstanding any broad statements in *Reed*, the

restrictions in § 9.050(A) and (C) still only need to survive *Central Hudson's* intermediate scrutiny test.

With the proper test identified, it is time to apply it. *Central Hudson* lays out a four-step analysis for determining whether restrictions on commercial speech are valid under the First Amendment. *Central Hudson*, 447 U.S. at 566. First, for commercial speech to even be entitled to First Amendment protection, *Central Hudson* instructs that the speech must not itself comprise unlawful activity (such as being fraudulent) and must not be misleading. *Id.* If the speech satisfies this requirement, then the burden falls on the government to show (1) that its asserted interest in regulating the speech is "substantial," (2) that its regulation "directly advances" the government's asserted interest, and (3) that its regulation is "not more extensive than is necessary to serve that interest." *Id.*

As to the threshold element, Leibundguth's commercial speech—its signs advertising its business—are entitled to First Amendment protection. Leibundguth's signs concern a lawful activity: moving and storage; and they are not false or misleading. Before conducting discovery, the parties did not dispute whether Leibundguth's signs were truthful. Now, however, the Village asserts that one of Leibundguth's signs is false and misleading—the sign on the back of Leibundguth's building facing the Metra—because it misidentifies the name of Leibundguth's partner company, Wheaton World Wide Moving. *See* Def.'s Br. at 16. The Village points out that the sign announces the partner-company name as Wheaton World Wide *Movers*, when in fact the company's name is Wheaton World

Wide *Moving*. *Id.*; DSOF ¶ 25. Maybe a very discerning grammarian would wonder whether the noun "Movers" is equivalent to the gerund "Moving" (or is "Moving" a present participle in the sign?) But to every other observer, this slight difference is not false or misleading, at least not in the commercial-speech sense. The requirement that commercial speech not be false or misleading is designed to protect consumers from deceit or misinformation. *See Central Hudson*, 447 U.S. at 563. The Village does not dispute that there is no registered company under the name Wheaton World Wide Movers, *see* Pl.'s Br. at 6, so Leibundguth is not trying to feed on the reputation of another company. Nor has the Village otherwise submitted any evidence showing that anyone is likely to be misled by this error, or tricked into thinking Leibundguth has a relationship with one moving company when in reality it has a relationship with another. Because none of Leibundguth's signs are false or likely to deceive the public, they are all entitled to First Amendment protection. *Central Hudson*, 447 U.S. at 563 (explaining that there is no constitutional problem with banning "communication [that is] more likely to deceive the public than inform it"); *see also In re R.M.J.*, 455 U.S. 191, 203 (1982) (explaining that for *Central Hudson* purposes, "inherently misleading" advertising "may be prohibited entirely").

Moving on to the next element, the question is whether the interests the Village advances—traffic safety and aesthetics—are substantial. It is well settled that they are. *See Metromedia, Inc.*, 453 U.S. at 508 ("Nor can there be substantial doubt that the twin goals that the ordinance seeks to further—traffic safety and the

appearance of the city—are substantial government goals."); *see also Taxpayers for Vincent*, 466 U.S. at 806 (recognizing that towns may ban certain signs in furtherance of a "weighty" interest "in proscribing intrusive and unpleasant formats for expression"). To be sure, Leibundguth disputes whether the record shows that those problems are actually posed by the size and number of signs targeted by the ordinance, and that dispute is discussed next, but this part of *Central Hudson* is satisfied because aesthetics and traffic safety qualify as substantial government interests.

The third element of *Central Hudson* asks whether the Village's restrictions in § 9.050(A) and (C) directly advance the Village's proffered interests in traffic safety and aesthetics. A regulation infringing commercial speech "may not be sustained if it provides only ineffective or remote support for the government's purpose." *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (quoting *Central Hudson*, 447 U.S. at 564). Put differently, this burden "is not satisfied by mere speculation or conjecture; rather the governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.*; *see also Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999). It is here that the Village's restrictions falter, although only in part and not fatally. On the Village's purported interest in traffic safety, the Village has failed to provide sufficient evidence to prove that the signs of the targeted size and number pose a traffic-safety problem, or to show that the Village's restrictions advance its interest

in traffic safety "in any direct [or] material way." *Edenfield*, 507 U.S. at 771. The Village has not provided any studies, police reports, or even anecdotal stories to show that the traffic harms it recites are real. *See id.* (concluding that the regulations at issue were not narrowly tailored to serve the Board's purported interests where the Board presented no studies or anecdotal evidence to show that its interest was advanced by its restrictions, and where many states failed to impose a similar restriction). Nor has it produced any evidence demonstrating that restricting the size and number of commercial signs, but not other signs (*e.g.*, non-commercial flags, governmental signs, or decorations temporarily displayed in connection with a Village-sponsored event, *see* Sign Ord. § 9.030), will alleviate this alleged harm to a material degree. *See City of Cincinnati v. Discovery Network*, 507 U.S. 410, 424 (1993) (rejecting purported interest where distinction between commercial and noncommercial speech bore "no relationship whatsoever to the particular interests that the city has asserted"). Without any evidence showing that the targeted signs pose a traffic safety problem, the Village cannot show that its restrictions in § 9.050 directly advance that interest. *See Pearson v. Edgar*, 153 F.3d 397, 402 (7th Cir. 1998).

It is true that the Village attaches treatises and sign-industry publications to its brief, which it asserts shows that sign regulations—like those at issue in § 9.050—directly impact traffic safety. *See* R. 38-13, Exh. 14, Treatises. But the real problem with the Village's presentation is that it fails to develop any actual argument based on these treatises or to explain how these treatises support its

contention that traffic safety is a real problem for the Village. In one sentence—and one sentence only—the Village proffers that these treatises show that "limiting the size and number of signs *can* enhance traffic safety and aesthetics," Def.'s Br. at 17 (emphasis added), but the fact that such restrictions *can* improve traffic safety does not show that the traffic safety harms the Village recites are real or that the Village's restrictions in § 9.050 operate to alleviate those harms to a material degree. Without a developed argument, actually analyzing the underlying treatises and publications, the Court cannot accept "speculation or conjecture" as proof that the Ordinance's restrictions advance the Village's interest in traffic safety. *Edenfield*, 507 U.S. at 770-71. Accordingly, these treatises do not save the Village's traffic safety interest.

The Village also cites to several sign codes from surrounding towns, suggesting that because those towns imposed size and number restrictions in the name of traffic safety, the Village's interest in traffic safety must likewise be real. Def.'s Reply and Resp. Br. at 9. But the Village's argument again falls short. In order for these other sign codes to provide the support the Village needs here, those codes must do more than simply cite traffic safety as a governmental interest (which is exactly what the Village has done here), they must provide some sort of evidence showing that traffic safety is advanced by restrictions like the ones the Village has imposed here. To be sure, this evidence need not be extensive; it can be in the form of studies performed by those other locales or even by anecdotes from those towns. *See Lorillard Tobacco v. Reilly*, 533 U.S. 525, 555 (2001) (noting that

"litigants [can] justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, … [by] relying on history, consensus, and 'simple common sense'"). But simply noting that other locales cite to traffic safety in their sign codes is insufficient. The Village has failed to point the Court to anywhere in those sign codes showing the existence of a relationship between traffic safety and regulations limiting the size and number of signs. And again, absent some sort of evidence showing that the Village's restrictions in § 9.050(A) and (C) alleviate to at least some degree the Village's interest in traffic safety, the Village's restrictions in § 9.050(A) and (C) cannot be said to directly advance that interest.

The Village's interest in aesthetics, however, saves the Sign Ordinance. Unlike with its interest in traffic safety, the Village does have a sufficient basis for believing that its restrictions in § 9.050(A) and (C) help "enhance the physical appearance of the Village"—one of the alleged goals of the Village's Sign Ordinance. Sign Ord. § 9.010(A)(3). As noted earlier in the Opinion, before enacting the Ordinance, the Village took hundreds of pictures of commercial signs around the community, spoke with several village members regarding the different signage currently in use by town residents and businesses, and even took pictures of signs in surrounding communities for comparison purposes. R. 37-4, Exh. 1D at 160-348; DSOF ¶¶ 13-14. Because the Village spent time studying the appearance of signs in its town (as well as in other towns), the Village knew how the town's commercial signs looked and how it wanted to change those signs to improve the town's overall

aesthetic appeal. This shows that the aesthetic harms the Village cites are not just mere conjecture, but rather that they are real harms that can be alleviated by placing restrictions on the size and number of signs that may be placed on buildings in the village. *See Metromedia*, 453 U.S. at 510 ("It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.'"); *Taxpayers for Vincent*, 466 U.S. at 807 (concluding that a complete ban on the posting of signs on public property directly advanced a town's interest in preventing visual clutter); *see also View Outdoor Advertising, LLC v. Town of Schererville Bd. of Zoning Appeals*, 86 F. Supp. 3d 891, 895 (N.D. Ind. 2015) (finding that a ban on commercial billboards directly advanced a town's interest in aesthetics). Accordingly, the Village's restrictions in § 9.050(A) and (C) directly advance its stated interest in improving the town's aesthetics.

The Village's restrictions in § 9.050(A) and (C) are also narrowly tailored to serve the Village's interest in aesthetics. This last part of the *Central Hudson* analysis asks whether the Village's restrictions are no more extensive than necessary to further the Village's purported interest. To satisfy this prong, the Village need not show that its restrictions are "the least restrictive means conceivable," or that they are a "perfect" fit. *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999). Rather, all that the Village must show is that there is a "fit between the … ends and the means [that it] chose[] to accomplish those ends." *Am. Blast Fax, Inc.*, 323 F.3d at 658-59 (citing *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995). The Village has done this.

Municipalities, like the Village, are generally given "considerable leeway … in determining the appropriate means to further a legitimate governmental interest, even when enactments incidentally limit commercial speech." *South-Suburban Housing Ctr. v. Greater South Suburban Bd. of Realtors*, 935 F.2d 868, 897 (7th Cir. 1991) (citing *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 478-79). In this case, the Village chose to limit the total sign area, § 9.050(A), and the number of commercial wall signs a building may display, § 9.050(C). The Village did not go so far as to completely ban wall signs (except painted ones) or commercial signs altogether; nor is there evidence in the record to suggest that the Village's restrictions in § 9.050 are likely to have a detrimental impact on a business' ability to effectively advertise to consumers. *Id.* In fact, the Village's Sign Ordinance still permits a business to advertise in a variety of ways, including not only through wall signs, but also through window signs, awning signs, vehicle signs, and sandwich board signs.[13] *See generally* Sign Ord. § 9.050. The Village's decision to limit the total sign area and number of wall signs a commercial business may display is thus narrowly tailored to serve the Village's interest in enhancing the town's overall appearance. A reasonable fit exists between the Village's ends—improving town

[13]Leibundguth points to the Ordinance's allowance of other signs in unlimited numbers to suggest that the Ordinance's restrictions in § 9.050 are not narrowly tailored. *See* Pl.'s Br. at 12. But this point is not persuasive. As the Court noted above, this last element of the *Central Hudson* analysis merely requires a reasonable fit between the Village's goal—improving town aesthetics—and its chosen means—reducing total signage area and the number of wall signs permitted. It does *not* require that the restrictions implemented by the Village be a perfect fit or the least restrictive means possible. *See Members of the City Council of Los Angeles*, 466 U.S. at 815-16. It is sufficient that the Village's aesthetic goals are directly advanced by its restrictions in § 9.050 and that those restrictions are an "effective approach" to solving the problem before the Village. *Metromedia*, 453 U.S. at 508.

aesthetics—and the means the Village chose to accomplish those ends—restricting the size and number of commercial signs.

Leibundguth argues that the Village's interest in community aesthetics cannot be considered narrowly tailored because the Village was willing to exempt one company, Art Van Furniture, from having to abide by § 9.050's restrictions. Pl.'s Br. at 8. According to Leibundguth, the Village's willingness to make such an exception demonstrates that the Village's restrictions in § 9.050(A) and (C) are impermissibly underinclusive. *Id.* It is true that a restriction on speech can be underinclusive, and therefore, invalid, when it has exceptions that undermine and counteract the interest the town claims its restrictions further. *See Vanguard Outdoor, LLC v. City of Los Angeles*, 648 F.3d 737, 742 (9th Cir. 2011); *see also View Outdoor Advertising, LLC*, 86 F. Supp. 3d at 896. But exceptions should also not be "viewed in isolation" or "parsed too finely." *Vanguard Outdoor, LLC*, 648 F.3d at 742. In this case, the Village's decision to grant one company a variance to § 9.050's restrictions does not undermine the Village's overall interest in advancing its community appearance. The Village's restrictions in § 9.050(A) and (C) still effectively advance the Village's interest in aesthetics.

Because the Ordinance's restrictions in § 9.050(A) and (C) satisfy the requirements outlined in *Central Hudson*, the restrictions do not run afoul of the First Amendment. Accordingly, Leibundguth's as applied challenge fails. The Village's restrictions in § 9.050(A) and (C) may stand.

All that remains then is Leibundguth's final argument: its facial challenge. Leibundguth frames its challenge as an overbreadth attack. Pl.'s Br. at 16. It contends that even if the Village's restrictions in § 9.050(A) and (C) "might be constitutionally applied to Leibundguth" (that is, might pass muster as restrictions on commercial speech), the restrictions may nonetheless "conceivably be applied unconstitutionally to others," (that is, to noncommercial speakers) and thus, must be deemed "invalid" in "all [their] applications." *Id.* In making this argument, Leibundguth relies not only on § 9.050, but also on § 9.030 of the Village's Ordinance. Section 9.030 is what Leibundguth identifies as the "noncommercial" counterpart to § 9.050's restrictions on commercial signs. R. 47, Pl.'s Reply Br. at 17. As discussed previously, Section 9.030 exempts certain signs, depending on their content, from needing to obtain a permit and then subjects those exempted signs to a variety of size and number restrictions, which are different than the size and number restrictions found in § 9.050 for commercial signs. Sign Ord. § 9.030. For example, it exempts noncommercial and political signs from needing to obtain a permit, but then restricts those signs to a "maximum area of 12 square feet per lot" and requires that they not be in "the public right-of-way." *Id.* § 9.030(I). It likewise exempts governmental signs and noncommercial flags, but then does not impose any size or number restrictions on those signs. *Id.* § 9.030(A) and (G). Leibundguth contends that the content-based distinctions the Ordinance draws between different noncommercial signs in § 9.030, requires that *all* of the Ordinance's size and

number restrictions (in both § 9.030 and § 9.050) be subject to strict scrutiny—a level of scrutiny, Leibundguth argues, the Village cannot meet. Pl.'s Br. at 18-20.

Leibundguth, however, is not entitled to invoke the overbreadth doctrine in this way, because the parties agree that § 9.050 applies *only* to commercial speech. The overbreadth doctrine is designed to give a litigant, who has been injured under one provision of an ordinance, standing to bring a facial challenge to vindicate the constitutional rights of another litigant not currently before the court who may also have been injured under *that* same provision. *Alexander v. United States*, 509 U.S. 544, 555 (1993); *see also CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1273-74 (11th Cir. 2006). In the case of a commercial litigant then, like Leibundguth, the First Amendment's overbreadth doctrine can be used by that commercial litigant to challenge an ordinance that might be constitutionally applied to it, but unconstitutionally applied to a noncommercial litigant. *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 481 (1989). The problem for Leibundguth, of course, is that because § 9.050 does *not* apply to noncommercial speakers, there is no overbreadth challenge to be had. A *non*-commercial litigant will never be subject to § 9.050's requirements, because those requirements apply only to *commercial* speakers; therefore, there are no non-party rights to assert here. And although Leibundguth can point to § 9.030 to *inform* whether § 9.050—the section that applies to Leibundguth—is content-neutral, Leibundguth cannot *challenge* under the overbreadth doctrine an entirely different section of the Ordinance—like § 9.030—which does not apply to it. *See CAMP Legal Defense*

Fund, Inc., 451 F.3d at 1273-74 ("The overbreadth doctrine allows CAMP to mount a facial challenge to provisions of the Festivals Ordinance that harm its ability to hold a festival … [But] [n]othing in the overbreadth doctrine allows CAMP to challenge provisions wholly unrelated to its activities."); *see also Brazos Valley Coal. for Life v. City of Bryan*, 421 F.3d 314 (5th Cir. 2005); *Lamar Adver. of Pa., LLC v. Town of Orchard Park*, 356 F.3d 365 (2d Cir. 2004). Accordingly, Leibundguth's facial challenge also fails.[14]

IV. Conclusion

The Court holds that the Village's restriction on painted wall signs in § 9.020(P) is a valid content-neutral time, place, and manner restriction. This restriction is valid under the First Amendment and may remain in place. The Village's restrictions in § 9.050(A) and (C) may likewise remain in place, as those restrictions, which apply only to commercial speech, satisfy the *Central Hudson* test. Accordingly, the Court grants the Village's motion for summary judgment, and denies Leibundguth's.

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[14]If Leibundguth's facial challenge survived, and strict scrutiny applied to both § 9.030 and § 9.050, then the Village's restrictions would in all likelihood fail to survive that level of scrutiny. To survive strict scrutiny, the Village would need to show that its restrictions in § 9.050, as well as its restrictions in § 9.030, further "a compelling state interest and [are] narrowly drawn to achieve that end." *Arkansas Writers' Project, Inc. v Ragland*, 481 U.S. 221, 231 (1987); *see also Reed*, 135 S. Ct. at 2231; *Billings v. Madison Metro. Sch. Dist.*, 259 F.3d 807, 815 (7th Cir. 2001). The Village—at least on this record—very likely has failed to make that showing. For example, it is questionable whether the Village's interests in traffic safety and aesthetics are sufficiently *compelling* to satisfy strict scrutiny. *See Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728, 738 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1543 (2012) (ruling that "a municipality's asserted interests in traffic safety and aesthetics, while significant, have never been held compelling"); *but see Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267 (11th Cir. 2005) (holding that while the city's "asserted interests in aesthetics and traffic safety" are not "compelling" in this instance, "[w]e do not foreclose the possibility that [they] may in some circumstances constitute a compelling government interest").

As mentioned earlier, the Village has agreed to not impose any fines against Leibundguth during the case's pendency. Because this Opinion brings the case to a close in the district court, it is conceivable that the Village now will seek to start the meter running in fines, even if Plaintiffs plan to appeal. But to give both sides time to consider this Opinion and make deliberative decisions on whether to appeal and whether to agree to a continued stay of the imposition of fines if an appeal were to be filed (including a possible agreement by the parties to expedite (or at least move promptly) appellate briefing in exchange for not imposing fines during the appeal's pendency), the Court on its own motion enters a temporary stay of judgment so that the fines will not accumulate during the deliberative process. The temporary stay will expire on December 28, 2015, by which time hopefully the parties will have entered into an agreement concerning the pace of an appeal and the stay of fines during an appeal. If no agreement is reached, then Plaintiffs must file a motion to extend the stay during the appeal by December 28, 2015. If a stay motion is filed, then the stay will automatically be decided until after briefing and a decision on the stay motion.

ENTERED:

s/Edmond E. Chang
Honorable Edmond E. Chang
United States District Judge

DATE: December 14, 2015

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS

Robert Peterson, et al,

Plaintiff(s),

v.

Downers Grove, The Village of,

Defendant(s).

Case No. 14 CV 9851
Judge Edmond E. Chang

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☒ in favor of defendant(s) Defendant-Counterclaimant Village of Downers Grove
and against plaintiff(s) Plaintiff Leibundguth Storage and Van Service, Inc.

.

Defendant(s) shall recover costs from plaintiff(s).

☐ other:

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge Edmond E. Chang on a motion Rule 54(b) judgment entered on the federal-law claims and counterclaim. Section 9.020(P) and Section 9.050(A) and (C) are valid, and the federal claims of Plaintiff Leibundguth Storage & Van Service, Inc. against those sections are dismissed and judgment is entered in favor of Defendant-Counterclaimant as to those sections. A declaration is entered as to those sections' validity. The claim against former Section 9.050(C)(1) is dismissed as moot.

Date: 1/7/2016 Thomas G. Bruton, Clerk of Court

Marsha E. Glenn , Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT PETERSON and LEIBUNDGUTH STORAGE & VAN SERVICE, INC.,	)	
Plaintiffs,	)	No. 14 C 09851
v.	)	Judge Edmond E. Chang
VILLAGE OF DOWNERS GROVE, ILLINOIS,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

On December 14, 2015, the Court issued an order granting the Village of Downers Grove, Illinois's motion for summary judgment and denying Leibundguth Storage & Van Service, Inc.'s cross motion for summary judgment.[1] R. 51, 12/14/15 Op.[2] The Court formally entered a Rule 54(b) judgment in the Village's favor on all of Leibundguth's claims on January 7, 2016. R. 52; R. 53. Currently before the Court is Leibundguth's motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e). R. 63, Mot. to Amend J.; R. 64, Pl.'s Amend J. Br. For the reasons discussed below, Leibundguth's motion is denied.

I. Background

The factual background and procedural history of this case are set forth in detail in the opinion granting the Village's motion for summary judgment. 12/14/15 Op. (For convenience, the Court will refer to that opinion as the "December 2015

[1]This Court has subject matter jurisdiction over this case under 28 U.S.C. § 1331.
[2]Citations to the record are indicated as "R." followed by the docket number.

Opinion.") There is no need to repeat all of those details here, so this Opinion sets out only those facts relevant to deciding the current motion.

In December 2014, Leibundguth sued the Village of Downers Grove, alleging that several sections of the Village's Sign Ordinance violated the First Amendment. R. 1, Compl.; R. 10, Am. Compl. Leibundguth challenged the provision prohibiting painted signs, R. 10, Exh. A, Sign Ord. § 9.020(P), the provision prohibiting wall signs that face only the BNSF Railway and not a public roadway or drivable right-of-way, *id.* § 9.050(C), and the provisions limiting the size and number of wall signs that a business or property owner may display along a public roadway or drivable right-of-way, *id.* § 9.050(A) (maximum sign area); *id.* § 9.050(C)(1) (number of wall signs). The Village answered Leibundguth's complaint and filed a counterclaim. R. 12, Ans. and Countercl. In its counterclaim, the Village asked the Court to declare the challenged provisions of the Sign Ordinance constitutional, to order Leibundguth to bring all non-conforming signs into compliance with the Ordinance, and to award the Village fines if Leibundguth failed to bring its signs into timely compliance. *Id.* at 32-36.

After discovery had closed, the Village filed a motion for summary judgment, in which it asked for summary judgment in its favor on all counts in Leibundguth's amended complaint. R. 35, Def.'s Mot. Summ. J.; R. 36, Def.'s Summ. J. Br. at 20. The Village did not ask for summary judgment on its counterclaim. Leibundguth then filed its own cross motion for summary judgment, in which it too asked for

summary judgment in its favor on all counts in its complaint. R. 39, Pl.'s Mot. Summ. J. at 4-5. Again, the Village's counterclaim was not discussed.

On December 14, 2015, the Court granted the Village summary judgment on all counts in Leibundguth's amended complaint. 12/14/15 Op. In analyzing the various claims, the Court first held that the Sign Ordinance's prohibition on painted signs, R. 36, Exh. B, Am. Sign Ord. § 9.020(P), was content-neutral and constituted a valid time, place or manner restriction. 12/14/15 Op. at 11-21.

Second, the Court concluded that Leibundguth's challenge to the Ordinance's prohibition on wall signs that face only the commuter railway, and not a public roadway or drivable right-of-way, R. 36, Exh. A, Sign Ord. § 9.050(C)(1), was moot because the Village had amended that section of the Sign Ordinance. 12/14/15 Op. at 21-25. When originally enacted, the Sign Ordinance prohibited buildings next to the Metra railroad (like Leibundguth's) from displaying a wall sign that faced the railroad but not a public roadway or drivable right-of-way. Sign Ord. § 9.050(C)(1). But in July 2015, after Leibundguth filed suit, the Village amended § 9.050(C) to include a new provision allowing "lots with frontage along the BNSF railroad" to display "one additional wall sign" facing the railroad, provided the sign did "not exceed 1.5 square feet per linear foot of tenant frontage along the BNSF railroad right-of-way." R. 36, Exh. B, Am. Sign Ord. § 9.050(C)(5). Because Leibundguth was no longer precluded from displaying a wall sign that faced only the railroad, which is all that Leibundguth had challenged in its amended complaint, the Court decided that this claim was moot. 12/14/15 Op. at 22-24.

Third, the Court held that the Sign Ordinance's restrictions on the size and number of wall signs that may be displayed on a given lot, R. 36, Exh. A, Sign Ord. § 9.050(A) (size provision) and § 9.050(C)(1) (number provision), applied only to commercial signs, and therefore, were subject to intermediate scrutiny under *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). 12/14/15 Op. at 25-26. In reaching this conclusion, the Court noted that the Village adopted this position—that these restrictions apply only to commercial speech—in its motion-to-dismiss briefing, *id.* at 26; R. 25, Def.'s Mot. to Dismiss Reply Br. at 4, and that the parties did not dispute this point in their summary-judgment-briefing, 12/14/15 Op. at 26; Def.'s Summ. J. Br. at 15; R. 41, Pl.'s Summ. J. Br. at 5. The Court also reviewed the Supreme Court's recent decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), but concluded that because the Supreme Court did not specifically overrule *Central Hudson* in *Reed*, *Central Hudson* still applied to restrictions targeting commercial speech. 12/14/15 Op. at 27-29. Applying the test articulated in *Central Hudson*, the Court found that the Ordinance's restrictions on the size and number of wall signs that may be displayed along a public roadway or drivable right-of-way were narrowly tailored to advance the Village's interest in aesthetics and constituted valid restrictions on commercial speech. *Id.* at 29-37.

Finally, the Court addressed Leibundguth's facial challenge to these same size and number restrictions in § 9.050(A) and (C)(1). Relying on the overbreadth doctrine, Leibundguth asserted that even if the restrictions could be constitutionally applied to it, the restrictions could conceivably be applied unconstitutionally to

others, and thus, had to be found invalid in all applications. Pl.'s Summ. J. Br. at 16. The Court, however, rejected Leibundguth's overbreadth attack:because the parties agreed that the size and number restrictions in § 9.050(A) and (C) applied only to commercial speech, a non-commercial litigant could never be subject to these provisions, which meant there was no overbreadth challenge to be had. 12/14/15 Op. at 38-40.

Having reached these conclusions, the Court granted summary judgment in favor of the Village on all counts of Leibundguth's complaint. *Id.* at 40. The December 2015 Opinion did not, however, specifically address the Village's counterclaim, and in particular, did not address the state-law issues raised in the counterclaim, which neither party had briefed. At the status hearing immediately following the Court's issuance of its December 2015 Opinion, the Court entered a Rule 54(b) judgment on Leibundguth's claims, all of which were federal claims, and on the federal portion of the Village's counterclaim (that is, the portion asking for a declaration of constitutionality). R. 52 (Jan. 7, 2016 Minute Entry). The Court then ordered the parties to file position papers addressing whether the Court should relinquish supplemental jurisdiction over the remaining issues in the Village's counterclaim, all of which were based on state law. *Id.*

The parties filed their initial position papers on January 21, 2016, R. 56; R. 57; they filed their responses a week later, R. 59; R. 60. Leibundguth urged the Court to relinquish supplemental jurisdiction over the state-law issues, R. 56; the Village urged the Court to retain jurisdiction, R. 57. On the same day the parties

submitted their initial position papers, January 21, Leibundguth also filed a motion under Federal Rule of Civil Procedure 62, asking the Court to stay enforcement of the Sign Ordinance during any post-judgment motions and while on appeal. R. 54, Pl.'s Stay Mot.; R. 55, Pl.'s Stay Br. On February 3, 2016, a day before the Court issued its ruling on the jurisdiction issue and on Leibundguth's Rule 62 motion, but less than 28 days after the Court had entered judgment on the parties' motions for summary judgment, Leibundguth filed this Rule 59(e) motion to alter or amend the December 2015 Opinion. R. 63, Pl.'s Mot. to Amend J.; R. 64, Pl.'s Amend J. Br. The next day, the Court issued an order relinquishing supplemental jurisdiction over the Village's remaining counterclaims and denying Leibundguth's motion to stay enforcement of the Sign Ordinance. R. 67, 02/04/16 Op. So all that remains is Leibundguth's motion to alter or amend judgment.

II. Legal Standard

Under Federal Rule of Civil Procedure 59(e), a party may, within 28 days of the entry of judgment, move to alter or amend that judgment. Fed. R. Civ. P. 59(e). The granting of a Rule 59(e) motion "is only proper when the movant presents newly discovered evidence that was not available at the time of trial" or when the movant "clearly establishes a manifest error of law or fact." *Burritt v. Ditlefsen*, 807 F.3d 239, 253 (7th Cir. 2015) (internal quotation marks and citation omitted); Fed. R. Civ. P. 59(e). The Seventh Circuit has made clear that Rule 59(e) is not to be used as a vehicle to "'advance arguments that could and should have been presented to the district court prior to the judgment,'" *Cincinnati Life Ins. Co. v. Beyrer*, 722

F.3d 939, 954 (7th Cir. 2013) (quoting *Bordelon v. Chi. Sch. Reform Bd. of Trs.*, 233 F.3d 524, 529 (7th Cir. 2000)), or to "rehash" arguments previously made and rejected, *Vesely v. Armslist LLC*, 762 F.3d 661, 666 (7th Cir. 2014); *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000). Rather, the Seventh Circuit has said that reconsideration is allowed only when a "significant change in [the] law has occurred," or "new facts have been discovered," or when a court has "misunderstood a party," "made a decision outside the adversarial issues presented to the court by the parties," or "made an error of apprehension (not of reasoning)." *Broaddus v. Shields*, 665 F.3d 846, 860 (7th Cir. 2011), overruled on other grounds by *Hill v. Tangherlini*, 724 F.3d 965, 967 n.1 (7th Cir. 2013); *see also Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990).

Because judgments are presumed final, reconsideration under Rule 59(e) is granted only when the moving party has shown that there is a compelling reason to set the judgment aside. *Bank of Waunakee*, 906 F.2d at 1191; *Hecker v. Deere & Co.*, 556 F.3d 575, 591 (7th Cir. 2009); *Solis v. Current Dev. Corp.*, 557 F.3d 772, 780 (7th Cir. 2009). If a party seeks reconsideration based on a "manifest error," it must show a "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto*, 224 F.3d at 606.

III. Analysis

A. Challenge to Sections 9.050(A) and (C)

Leibundguth first attacks the Court's decisions on the Sign Ordinance's restrictions that limit the size and number of wall signs permitted on a single lot,

§ 9.050(A) and (C)(1). Pl.'s Amend J. Br. at 2. Section 9.050(A) limits the total sign area to "1.5 square feet per linear foot of tenant frontage," and § 9.050(C)(1) limits "[e]ach business or property owner" to "one wall sign per tenant frontage along a public roadway or drivable right-of-way." R. 36, Exh. A, Sign Ord. § 9.050(A) and § 9.050(C)(1). Leibundguth argues that the Court incorrectly held that these restrictions apply only to commercial signs, and therefore, only to commercial speech; according to Leibundguth, the restrictions apply to *all* signs and speech. *Id.* But in making this argument, Leibundguth disregards the fact that the Court's conclusion that § 9.050(A) and (C)(1) apply only to commercial signs was based on the parties' own arguments. Up until this point, both parties seemingly agreed that the restrictions in § 9.050 restrict only commercial speech. 12/14/15 Op. at 26. That is the position the Village took in its motion-to-dismiss briefing, *see id.*; R. 25, Def.'s Mot. to Dismiss Reply Br. at 4, and the position both parties took on summary judgment, Def.'s Summ. J. Br. at 15; Pl.'s Summ. J. Br. at 5.

Leibundguth now argues that "although [it] agrees that Section 9.050 applies to commercial speech, it has never claimed that Section 9.050 *only* applies to commercial signs." Pl.'s Amend J. Br. at 2 (emphasis in original). But a review of the record in this case refutes this. It is true, as Leibundguth points out, that nothing in § 9.050 specifically states that it is limited to commercial speech; it does not use the word "commercial" and it is entitled "Sign Regulations Generally." *Id.*; R. 36, Exh. A, Sign Ord. § 9.050. But on summary judgment, Leibundguth clearly asserted that the restrictions in § 9.050(A) and (C)(1) apply only to commercial

speech—it was implied in Leibundguth's responses to the Village's statement of facts, and it was explicit in Leibundguth's briefing.

Specifically, in the Village's Local Rule 56.1 Statement of Uncontested Material Facts, the Village stated:

> 7. Section 9.050 regulates commercial signs, (Ex. 2 § 9.050) and Section 9.050.A is a commercial sign size limitation. (Ex. 2, § 9.050.A). Section 9.050.A permits up to 1.5 sq. ft. of commercial signage per linear foot of tenant frontage, not to exceed collectively 300 sq. ft. per tenant. (Ex. 2, § 9.050.A).
>
> 8. Section 9.050.C is a limitation on the number of commercial wall signs permitted based upon the number of tenants having frontage along a public roadway or drivable right-of-way (Ex. 2, § 9.050.C.1).

R. 37, Def.'s Statement of Facts (DSOF) ¶¶ 7-8. Both of these statements show that the Village viewed the restrictions in § 9.050(A) and (C)(1) as restricting only commercial signs. Leibundguth, for its part, did *not* refute these statements. In both instances, Leibundguth responded that the statements were "Undisputed." R. 40, Pl.'s Resp. to DSOF ¶¶ 7-8. Leibundguth could have challenged the Village's position that § 9.050(A) and (C)(1) apply only to commercial signs; it did not. Instead, it took the same position as the Village: that the restrictions regulate commercial signs.

Leibundguth's summary judgment briefing is also crucial in making this point. Both Leibundguth and the Village agreed on summary judgment that § 9.050's restrictions should be analyzed under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), which only applies when a regulation restricts *commercial* speech. Pl.'s Summ. J. Br. at 5-6; Def.'s Summ. J. Br. at 15. *See also* R. 47, Pl.'s Summ. J. Reply Br. at 11 ("The

parties agree that the proper test in evaluating Leibundguth's First Amendment challenge to the size and number restrictions is the *Central Hudson* test[.]"). True, the Court held that *Central Hudson* applied to these restrictions at the motion-to-dismiss stage, R. 29, 04/27/15 Dismissal Op., a fact which the Village noted in its summary judgment briefing when addressing § 9.050, Def.'s Summ. J. Br. at 15. But remember, the Court reached that conclusion because the Village specifically asserted that the restrictions were commercial restrictions, *see* R. 25, Def.'s Mot. to Dismiss Reply Br. at 4 (stating that "only three specific commercial sign regulations prohibit [Leibundguth's] commercial signs"), and at that time, the Court was simply considering whether the complaint was sufficient to state a claim. If Leibundguth wished to challenge the applicability of *Central Hudson* to the restrictions in § 9.050 on summary judgment, it easily could have done so (or at a minimum, Leibundguth could have preserved the argument by making note of it in its briefing). But Leibundguth did no such thing. Instead, Leibundguth argued *only* that § 9.050(A) and (C)(1) failed under *Central Hudson*. Leibundguth never asserted that something other than *Central Hudson* applied or that the restrictions applied to more than just commercial signs. At this stage, it is too late.

It is worth noting that Leibundguth did attack the restrictions in § 9.050(A) and (C)(1) on summary judgment under the overbreadth doctrine. Pl.'s Summ. J. Br. at 16. Leibundguth argued that even if the Village's restrictions in § 9.050(A) and (C)(1) "might be constitutionally applied to Leibundguth" (that is, might pass muster as restrictions on commercial speech), the restrictions may nonetheless

"conceivably be applied unconstitutionally to others," (that is, to noncommercial speakers) and thus, must be deemed "invalid" in "all [their] applications." *Id.* Out of context, this argument could be viewed as supporting Leibundguth's contention that it never asserted that § 9.050 applies *only* to commercial signs. But when Leibundguth's argument is read in its entirety, it is clear that that is not the case. In making this argument, Leibundguth relied not only on § 9.050(A) and (C)(1), but also on an entirely different section of the Ordinance, § 9.030, which Leibundguth identified as the non-commercial counterpart to § 9.050's restrictions on commercial signs. Section 9.030 exempts certain signs from needing a permit (technically, all signs require a permit under the Ordinance unless exempted, Sign Ord. § 9.080) depending on the content of the sign and whether the sign meets the specific restrictions described in that section for those types of signs. Pl.'s Summ. J. Br. at 18-20; Pl.'s Summ. J. Reply Br. at 16-17; R. 36, Exh. A, Sign Ord. § 9.030. Relying on these two sections, Leibundguth argued that when the two sections are viewed together—§ 9.030 and § 9.050—it is clear that the Ordinance's size and number restrictions violate the overbreadth doctrine because they impose restrictions on commercial speech (under § 9.050(A) and (C)(1)) that are more favorable than some of the restrictions they impose on non-commercial speech (under § 9.030), and because they treat certain non-commercial speech better than other non-commercial speech. Pl.'s Summ. J. Br. at 18-20; Pl.'s Summ. J. Reply Br. at 17. Although the Court need not rehash its discussion on this issue, the important point here is that even when making its overbreadth argument, Leibundguth did not once suggest

that the restrictions in § 9.050(A) and (C)(1) applied to anything other than commercial signs.

What Leibundguth is attempting to do here is challenge, for the first time, the scope of § 9.050; and more specifically, the Village's contention that § 9.050(A) and (C)(1) apply strictly to commercial signs. A motion under Rule 59(e) is not the appropriate vehicle for a first-time challenge like this. *Cincinnati Life Ins. Co.*, 722 F.3d at 954 (Rule 59(e) cannot be used to "advance arguments that could and should have been presented to the district court prior to the judgment."). Leibundguth could have raised this argument on summary judgment. It could have challenged whether § 9.050(A) and (C) apply only to commercial signs (as opposed to all signs generally) in its response to the Village's Local Rule 56.1 Statement and in its briefing, or at the very least attempted to preserve the argument if it thought the Court had already ruled that *Central Hudson* applied. It did not. It cannot now, on a Rule 59(e) motion, raise this argument for the first time. *Id.* Leibundguth has failed to show that reconsideration is warranted on this ground.

Leibundguth makes two additional arguments related to the restrictions in § 9.050(A) and (C)(1). First, Leibundguth argues that the Court incorrectly held that the Village provided sufficient evidence to show that its restrictions in § 9.050(A) and (C)(1) advance the Village's interest in "improving aesthetics." Pl.'s Amend J. Br. at 11-14. Leibundguth argues that "the Village's 'evidence' regarding aesthetics"—that is, the pictures the Village took of commercial signs in Downers Grove and nearby towns, and the conversations between the Village and residents

regarding the Sign Ordinance—"consist[s] of nothing more than 'speculation or conjecture,'" and does nothing to show the "*specific* [aesthetic] end the Village is seeking to achieve." *Id.* at 11-12 (emphasis in original). Leibundguth further asserts that the Village has advanced "conflicting policies"; "it has argued that restricting the size and number of wall signs improves aesthetics, but [it] … has also asserted that granting Art Van Furniture significantly *more* and *larger* wall signs than the Ordinance allows would improve aesthetics." *Id.* at 12 (emphases in original).

Leibundguth's contention is problematic for a couple of reasons. The first is that Leibundguth raised these same points during summary judgment, and is now merely reemphasizing issues it thinks the Court got wrong. Pl.'s Summ. J. Br. at 12-14 (discussing how "mere speculation or conjecture" is insufficient, and how the Village has provided evidence only of the process it undertook); *id.* at 12 (discussing exemptions given to Art Van Furniture); Pl.'s Summ. J. Reply Br. at 15-16 (same). *See* 12/14/15 Op. at 34-37 (rejecting these same arguments). It is well settled that Rule 59(e) cannot be used to rehash old arguments. *Vesely*, 762 F.3d at 666; *Oto*, 224 F.3d at 606.

The second problem for Leibundguth is that it is seeking to impose a more rigorous standard than is required under *Central Hudson*. Leibundguth asserts that the Village should have been required to identify the *specific* aesthetic interest it was seeking to advance through its restrictions. But a general interest in aesthetics is recognized as a significant governmental interest. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805-06 (1984) ("[M]unicipalities

have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression."). And Leibundguth fails to cite to anything that would indicate that a more specific breakdown of that aesthetic interest is required for it to pass muster under *Central Hudson*. Now, it is true that the Village must provide some evidence to support its asserted interest in aesthetics, and that the evidence must consist of something more than speculation or conjecture. *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). But the evidence need not be overwhelming; it can consist of "history, consensus, and 'simple common sense.'" *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001); *Lavey v. City of Two Rivers*, 171 F.3d 1110, 1116 (7th Cir. 1999) (explaining that City did not have to produce a voluminous record when common-sense restrictions were involved). Despite Leibundguth's contention to the contrary, the Court remains convinced that the Village has met this burden in this case. The Village clearly studied the signs around town, as evidenced by the hundreds of pictures Village officials took of commercial signs in town. R. 37-4, Exh. 1D at 267-348; R. 37-1, Exh. 1A at 44 (Village Workshop Meeting Minutes 05/11/04: noting that the Plan Commission and Economic Development Commission have looked at signage within the context of "aesthetics"). Village staff members also met regularly to discuss the town's signage and policies, R. 37-1, Exh. 1A at 57 (Plan Commission Meeting Minutes 02/21/05: noting that "[t]he Sign Subcommittee met almost weekly for 17 weeks for 2-3 hour meetings"), and asked for resident input on all suggested amendments along the way, *e.g.*,

R. 37-1, Exh. 1A at 55-91 (minutes from Plan Commission Meetings on 02/21/05 and 02/28/05 where all proposed amendments to the Sign Ordinance were discussed and public input was sought). *See also* 12/14/15 Op. at 34; DSOF ¶¶ 13-14. These actions show that the Village did not rely on mere speculation when deciding what restrictions to impose. What's more, just as with billboards, "[i]t is not speculative to recognize that [large wall signs] by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm,'" particularly when they are numerous. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981). This is common sense. The Village has provided enough evidence to support its aesthetic interest. Leibundguth has failed to provide any new evidence or to cite to any case law that persuades the Court that anything more is required, or that the Court committed a manifest error. *Oto*, 224 F.3d at 606 (manifest error of law requires a showing of wholesale disregard or misapplication of the law, or failure to recognize controlling precedent).

Leibundguth's next and final argument on the restrictions in § 9.050 is that the Court wrongly held that the Village had established that its size and number restrictions are narrowly tailored to advance the Village's interest in aesthetics. Pl.'s Amend J. Br. at 14-15. In particular, Leibundguth argues that the restrictions are not narrowly tailored because "the Village has provided exemptions to the size and number restrictions to some businesses and the Ordinance allows other kind[s] of signs [such as window signs] without the same size and number restrictions." *Id.* at 14. But this assertion is once again a mere rehash of an argument previously

made and rejected. Pl.'s Summ. J. Br. at 11-13, 8-9; 12/14/15 Op. at 35-36, 36 n.13. It too fails to meet the rigorous standard imposed under Rule 59(e) for reconsideration to be warranted. *Vesely*, 762 F.3d at 666; *Oto*, 224 F.3d at 606.

B. Challenge to Section 9.020(P)

Next, Leibundguth attacks the Court's decision on the Ordinance's restriction on painted signs in § 9.020(P). R. 36, Exh. B, Am. Sign Ord. § 9.020(P) (banning "any sign painted directly on a wall, roof, or fence"). Leibundguth asserts that the Court ignored the fact that § 9.020(P)'s ban on painted signs excludes flags and murals, making § 9.020(P) a content-based restriction that should have been subject to strict scrutiny. Pl.'s Amend J. Br. at 3-4. As support, Leibundguth points to a 2015 Village Staff Report that contains a statement to that effect.[3] *Id.* But contrary to Leibundguth's contention, the Court did *not* ignore the fact that a Village Staff Report, authored by the Village's Planning Manager, Stanley Popovich, stated that purely "decorative" flags and murals are not subject to the painted sign ban. 12/14/15 Op. at 15 n.6; R. 36, Exh. C, 2015 Staff Report at 3. Leibundguth brought this point up during summary judgment, Pl.'s Summ. J. Br. at 2-5, and the Court

[3]In its reply brief, Leibundguth also cites the Village's response to Leibundguth's Local Rule 56.1 Statement of Undisputed Material Facts, suggesting that there too the parties agreed that flags and murals are exempt from the painted sign ban. Pl.'s Amend. J. Reply Br. 8 (citing R. 46, Def.'s Resp. to Pl.'s Statement of Material Facts (PSOF) ¶ 33). But that paragraph merely refers to the same 2015 Staff Report Leibundguth otherwise cites: "33. The Village staff report accompanying [the Sign] Ordinance … states: 'There are instances of flags and murals painted on buildings and these are permitted by the code on the basis that they are decorative, and do not convey constitutionally protected commercial or non-commercial speech.' (Def. Exh. 4, Report of Plan Commission, July 6, 2015, at 3.)[.]" *Id.* In its response, the Village simply agreed that the Staff Report contains that statement: "Undisputed that this statement is included as part of the overall report referenced." *Id.* So, although it might appear that Leibundguth cites to more than just the Staff Report to support its argument here, Leibundguth does not.

specifically addressed it in the December 2015 Opinion, 12/14/15 Op. at 15 n.6. The Court was not then (and is still not) persuaded that Popovich's statement in the Staff Report turns the Sign Ordinance's ban on painted signs into a content-based restriction. As explained in detail in the prior Opinion, the actual text of the Sign Ordinance does not exempt any signs (decorative or otherwise) from the restriction, and the Village conceded on summary judgment that any flag or mural that meets the definition of a "sign" is subject to the painted sign restriction, despite Popovich's statement to the contrary. *Id.*; R. 45, Def.'s Summ. J. Reply and Resp. Br. at 1. Given the Village's concession and the broad definition of "sign" adopted by the Village in its Municipal Code, R. 40, Exh. E, Village Muni. Code § 15.220, the Court held that the restriction in § 9.020(P) was content-neutral. 12/14/15 Op. at 15 n.6. In its current motion, Leibundguth does not raise any new arguments or point to any new evidence that convinces the Court that it erred in reaching this conclusion.

Leibundguth does try to bolster its argument by attaching to its Rule 59(e) brief a photo of a restaurant in Downers Grove that has a painted American flag on the side of its building, as well as a picture of the restaurant that was located there previously, which had an Irish flag painted on the side of its building. R. 64, Exh. A. Leibundguth argues that these pictures similarly show that the Village exempts flags and murals from § 9.020(P)'s ban. Pl.'s Amend J .Br. at 3-4. These photographs, however, were not in the record at summary judgment, and Leibundguth fails to provide a valid explanation for why they could not have been produced earlier. Both photographs are dated. R. 64, Exh. A. The photograph of the

American restaurant appears to be from September 2015, and the photograph of the Irish restaurant from September 2012. *Id.* Leibundguth did not file its reply brief in support of its motion for summary judgment until October 2015. Pl.'s Summ. J. Reply Br. These pictures could easily have been included with that briefing. Leibundguth implies that it could not have attached these photographs at that time because the Staff Report was issued after discovery had closed, and therefore, Leibundguth was not able to take discovery on this point during summary judgment. Pl.'s Amend J. Br. at 4 n.1. But Leibundguth never objected to the introduction of the Staff Report, or to the Village's reliance on it, during summary judgment. If Leibundguth had a problem with the Staff Report it should have voiced its concern. The same holds true for any additional discovery; if Leibundguth wanted to take additional discovery after the Staff Report came to light, it should have asked the Court to do so. We are now at the motion to vacate stage; Leibundguth's decision to wait to raise its concerns until now comes too late. *Salas v. Wis. Dep't of Corr.*, 493 F.3d 913, 924 (7th Cir. 2007); *Witte v. Wis. Dep't of Corr.*, 434 F.3d 1031, 1038 (7th Cir. 2006) (recognizing that a party forfeits any argument it fails to raise in a brief opposing summary judgment). These photos do not present new evidence that can properly be considered under Rule 59(e), and they do not show that reconsideration is appropriate. *Cincinnati Life Ins. Co.*, 722 F.3d at 954 (Rule 59(e) is not to be used to "advance arguments that could and should have been presented to the district court prior to the judgment[.]").

Leibundguth separately argues that the Court wrongly held that the Village satisfied is burden to show that the Ordinance's ban on painted signs is narrowly tailored to advance the Village's asserted interest in aesthetics. Pl.'s Amend J. Br. at 4-9. Specifically, Leibundguth argues that the Village has not provided enough evidence to support its aesthetic interest, and that it has not shown that its painted sign ban is narrowly tailored to achieve that interest. *Id.* But once again, Leibundguth has failed to present any new, compelling evidence or to show that the Court committed a manifest error. To support its aesthetic interest, the Village provided copies of hundreds of photographs its staff members took of signs around town before it passed the Sign Ordinance, R. 37-4, Exh. 1D at 267-348; it also included a copy of the 2015 Staff Report previously discussed, which describes in detail the Village's concerns with painted wall signs, R. 36, Exh. C, 2015 Staff Report at 3-5. Leibundguth takes issue with the fact that nothing connects the photographs with the Village's asserted interest in aesthetics, and with the fact that the 2015 Staff Report provides no support for its assertions that painted signs require on-going maintenance, are subject to water damage, and are hard to remove. *Id.* at 6-7.

But these arguments do not establish that reconsideration is warranted; they simply highlight Leibundguth's disagreement with the Court's conclusion. Mere disagreement is not sufficient to establish manifest error or to entitle a party to reconsideration. *Seng-Tiong Ho v. Taflove*, 648 F.3d 489, 505 (7th Cir. 2011); *Oto*, 224 F.3d at 606; *see also King v. Cross*, 2014 WL 1304320, at *2 (N.D. Ill. Mar. 28,

2014). As the Court explained in the December 2015 Opinion, this evidence is enough to show that the Village did not "blindly invoke" its stated concern over aesthetics, which is all that the Village is required to show. *Weinberg v. City of Chi.*, 310 F.3d 1029, 1038 (7th Cir. 2002). The Village's photographs show that it took the time to study the signs that were in use in the Village before implementing any new sign regulations, which inherently includes consideration of the overall aesthetic appeal of those signs. And the 2015 Staff Report shows that the Village carefully considered the effects of painted signs before fully banning them. 12/14/15 Op. at 17-18. It is perfectly reasonable to believe that Mr. Popovich, the Village's Planning Manager, has sufficient expertise to draw the conclusions that he did in the Staff Report. What's more, Leibundguth's painted wall sign also provides additional proof that the Village's concerns are real; the photo of Leibundguth's painted wall sign on the back of its building, which the Village provided on summary judgment, shows the exact fading and chipping problems discussed by the Staff Report. R. 36, Exh. D at 7-9. Leibundguth responds that its painted sign looks the way it does because it has not "touched [it] up" because of this lawsuit. Pl.'s Amend J. Br. at 9. But that just goes to show that the Staff Report is correct in that painted signs require ongoing maintenance or are otherwise likely to deteriorate, and that they are prone to fading and chipping. R. 36, Exh. C, 2015 Staff Report at 3-4. This evidence remains sufficient to meet the Village's burden to show that its painted sign ban advances its interest in town aesthetics. The Village need only show that it did not "blindly invoke" its aesthetic concerns; it has done that.[4] While Leibundguth may

[4]Leibundguth again points out that discovery had closed in this case before the 2015

disagree with the Court's conclusion, as noted above, a Rule 59(e) motion is not the proper vehicle to air that difference of opinion. *Seng-Tiong Ho*, 648 F.3d at 505; *Oto*, 224 F.3d at 606.

Leibundguth's assertion that the painted sign ban is not narrowly tailored to advance the Village's aesthetic interest suffers from a similar problem. Leibundguth argues that the "deliberation and dialogue" between the Village and its residents that occurred before the original Sign Ordinance was passed does not support the conclusion that the painted sign ban is narrowly tailored for two reasons: because painted signs were never specifically discussed at that time, and because the discussions occurred in advance of the passing of the original Sign Ordinance, which still allowed painted signs in certain downtown business zones. Pl.'s Amend J. Br. at 7-8. Leibundguth points out that almost no deliberation or dialogue occurred before the passing of the amended (and the now current) ordinance, which completely bans painted signs. *Id.* at 8.

Although Leibundguth frames this argument as one attacking whether the painted sign ban is narrowly tailored, it really attacks (again) whether the Village's

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Staff Report came to light and before the Village decided to amend § 9.020(P) to ban painted signs in all of Downers Grove (previously, it had allowed painted signs in the Downtown Business, Downtown Transitional, and Fairview Districts). Pl.'s Amend. J. Br. at 5 n.3, 6. According to Leibundguth, without discovery, "there is no way to know whether the [2015 Staff] Report accurately reflects real concerns about painted signs." *Id.* at 6. But again, Leibundguth could have moved to reopen discovery on this issue as soon as it became aware of the Staff Report and the amendment, but it chose not to. *Id.* Leibundguth must live with that decision. As the Court has already explained both in this Opinion and in its prior opinions, this argument comes too late; it has been forfeited. Leibundguth also has yet to explain what discovery it would have taken related to the Staff Report. *See* 02/04/16 Op. at 11 (explaining when Leibundguth raised this same argument in its motion requesting a stay that Leibundguth should have identified what discovery it would have taken).

asserted aesthetic interest is genuine, as that is where the Court discussed the Village's "deliberation and dialogue." 12/14/15 Op. at 17. Leibundguth is correct in that the Village, once upon a time, did allow painted signs in certain districts, R. 36, Exh. A, Sign Ord. § 9.020(P), but that is no longer the case, R. 36, Exh. B, Am. Sign Ord. § 9.020(P), which makes any argument along these lines moot. Leibundguth also failed to raise this issue during summary judgment, something it certainly could have done. *Cincinnati Life Ins. Co.*, 722 F.3d at 954 (Rule 59(e) is not to be used to "advance arguments that could and should have been presented to the district court prior to the judgment."). In addition, that painted wall signs may not have been explicitly discussed between the Village and its residents does not change the fact that the Village took the time to study the town's signs prior to implementing any ban on painted signs (or any other restrictions for that matter), and that it gave residents a chance to voice any concerns they may have had prior to the new restrictions taking effect, including the restriction on painted signs. This "deliberation and dialogue" was also just one piece of evidence (and not the primary piece) that the Court relied on in finding that the Village's asserted aesthetic interest was real and that its painted sign ban narrowly tailored. 12/14/15 Op. at 17. The other piece of evidence was the 2015 Staff Report, which the Court has already discussed and which addresses in detail the problems with painted signs. This argument is rejected.

Leibundguth also asserts that the painted sign ban is not narrowly tailored because it is underinclusive: it still allows flags and murals to be painted on walls.

This is again an attempt by Leibundguth to rehash an argument previously made. Leibundguth made this same argument on summary judgment, Pl.'s Summ. J. Reply Br. at 8, and the Court specifically addressed it in its December 2015 Opinion, 12/14/15 Op. at 15 n.6. Leibundguth is not entitled to reconsideration simply because it does not like the result the Court reached.[5]

C. Challenge to Amended Section 9.050(C)(5)

Finally, Leibundguth contends that the Court should not have held that Leibundguth's challenge to the Sign Ordinance's ban on signs facing only the BNSF railway (Count 3 of the Amended Complaint) was moot. Pl.'s Amend J. Br. at 10. According to Leibundguth, the December 2015 Opinion "did not address Leibundguth's challenge to Section 9.050(C)'s limits [to] the size of wall signs along the BNSF railroad, which were properly pleaded as well as raised in Leibundguth's motion for summary judgment."[6] Pl.'s Amend J. Reply Br. at 2. Leibundguth is correct on this point. Technically, if Leibundguth had prevailed on striking down the ban on painted wall signs in § 9.020(P), and also won on the size and number

[5]It is also worth emphasizing that "[t]he '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.'" *Graff v. City of Chi.*, 9 F.3d 1309, 1321 (7th Cir. 1993) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). Here, the painted sign ban surely promotes the Village's aesthetic interest: it alleviates many of the concerns regarding maintenance and building wear-and-tear that the Village emphasized in its 2015 Staff Report. Absent a ban like the one imposed in § 9.020(P), these concerns would not be addressed as effectively. The Court remains unpersuaded that its holding regarding the Sign Ordinance's painted sign ban was incorrect.

[6]Leibundguth did not specifically challenge the size restriction in § 9.050(C)(5) in its amended complaint, R. 10, Am. Compl., no doubt because the amendment came out after Leibundguth had already filed that complaint. But it would certainly have been better if Leibundguth had asked for leave to amend its complaint again after the Village revised its restriction on wall signs facing just the BNSF railroad. That would have given Leibundguth a chance to properly raise any relevant arguments in its complaint against this amendment.

restrictions imposed in § 9.050(A) and (C)(1), then it is possible that Leibundguth could still be found in violation of the Ordinance under the revised § 9.050(C)(5). That section allows "lots with frontage along the BNSF railroad" to display "one additional wall sign" facing the railroad, provided the sign does "not exceed 1.5 square feet per linear foot of tenant frontage along the BNSF railroad right-of-way." R. 36, Exh. B, Am. Sign Ord. § 9.050(C)(5). Neither party disputes that the size of Leibundguth's railway-facing sign exceeds § 9.050(C)(5)'s size limit. R. 46, Def.'s Resp. to Pl.'s Statement of Material Facts (PSOF) ¶ 8. So, Leibundguth is right in that for Article III purposes, this claim is not moot, because even if Leibundguth won summary judgment on the remainder of its claims, it could still be found in violation of § 9.050(C)(5). The Court will revise its judgment to reflect that Leibundguth's claim related to § 9.050(C)(5)'s size restriction is not moot.

That said, Leibundguth has still not shown that it is entitled to summary judgment on this claim. The size restriction imposed under § 9.050(C)(5) is exactly the same size restriction imposed under § 9.050(A) for wall signs that face a public roadway or drivable right-of-way. Both may not exceed 1.5 square feet per linear foot of tenant frontage.[7] R. 36, Exh. A, Sign Ord. § 9.050(A); R. 36, Exh. B, Am. Sign Ord. § 9.050(C)(5). So, for the same reasons that the size restriction in § 9.050(A) is constitutional, so too is the size restriction in § 9.050(C)(5). In challenging § 9.050(C)(5), Leibundguth does not raise any new arguments or present any new

[7]Section 9.050(A) also includes an exception for buildings set back more than 300 feet from the abutting roadway or public right-of-way. R. 36, Exh. A, Sign. Ord. § 9.050(A). But that restriction has never been at issue because Leibundguth's building is not set that far back.

evidence. Instead, Leibundguth merely asserts that the Court should hold that the size limitation for signs facing the BNSF railway is "unconstitutional for the same reasons that Section 9.050(A) [sic] size restrictions are unconstitutional." Pl.'s Amend J. Br. at 10. Because Leibundguth has not shown that the Court committed a manifest error in finding that § 9.050(A)'s size restriction is constitutional, it has likewise failed to show that § 9.050(C)(5)'s restriction should be found unconstitutional. Accordingly, while the Court will revise its judgment to reflect that Leibundguth's claim under revised § 9.050(C)(5) is not moot for Article III purposes, reconsideration of the Court's decision to grant the Village summary judgment on this Count is not warranted.

IV. Conclusion

For the reasons discussed above, Leibundguth's Rule 59(e) motion to alter or amend the December 2015 Opinion [R. 63] is denied. But the Court will revise its judgment to reflect the fact that Leibundguth's challenge to § 9.050(C)(5)'s size restriction is not moot for Article III purposes, but that its claim is still dismissed for the same reasons Leibundguth's challenge to the other size restriction in § 9.050(A) was dismissed.

ENTERED:

s/Edmond E. Chang
Honorable Edmond E. Chang
United States District Judge

DATE: June 29, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS

ROBERT PETERSON and LEIBUNDGUTH) STORAGE & VAN SERVICE, INC.,

Plaintiff(s),

v.

VILLAGE OF DOWNERS GROVE,) ILLINOIS,

Defendant(s).

Case No. 14 C 09851
Judge Edmond E. Chang

AMENDED JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☐ in favor of defendant(s)
and against plaintiff(s)

.

Defendant(s) shall recover costs from plaintiff(s).

☒ other: Judgment entered on the federal-law claims and counterclaim in favor of Defendant and against Plaintiffs. Section 9.020(P) and Section 9.050(A) and (C)(1) and (C)(5) (amended) are valid, and the federal claims of Plaintiff Leibundguth Storage & Van Service, Inc. against those sections are dismissed with prejudice and judgment is entered in favor of Defendant-Counterclaimant as to those sections. A declaration is entered declaring that those sections are valid. Plaintiff Peterson was previously dismissed from the case with prejudice. The Court relinquishes jurisdiction over Downers Grove's state-law counterclaim and dismisses it without prejudice.

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge Edmond E. Chang on a motion

Date: 6/29/2016

Thomas G. Bruton, Clerk of Court

\s\Sandra Brooks , Deputy Clerk