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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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

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

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ARGUMENT

Plaintiff-Appellant Leibundguth Storage & Van Service, Inc. ("Leibundguth") challenges four provisions of the Village of Downers Grove's sign ordinance (the "Ordinance"): (1) Section 9.020(P)'s prohibition of "any sign painted directly on a wall, roof, or fence," (the "painted sign ban"); (2) Section 9.050(A)'s limitation on 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; (3) Section 9.050(C)(1)'s limitation of only one wall sign per tenant frontage along a public roadway or drivable right-of-way; and (4) Section 9.050(C)'s limitation of lots with frontage along the BNSF railroad right-of-way to one additional wall sign limited to 1.5 square feet per lineal foot of tenant frontage along the right-of-way. (Items 2, 3, and 4 are hereafter collectively referred to as the "size and number restrictions.")

In challenging these restrictions, Leibundguth makes two alternative arguments. First, the painted sign ban and the size and number restrictions are content-based restrictions on speech and cannot survive strict scrutiny. Second, even if the painted sign ban and the size and number restrictions are not content-based, they still cannot survive intermediate First Amendment scrutiny.

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

The Ordinance is content based in two ways. First, it imposes different limitations on the size and number of different types of signs based entirely on their content. Second, its ban on painted wall signs includes a content-based exemption –

for painted flags and murals. Neither of these content-based restrictions can survive strict scrutiny.

A. The Ordinance's application of different limits on the size and number of signs based on their content cannot survive strict scrutiny analysis.

1. The Ordinance's content-based size and number restrictions are subject to, and cannot survive, strict scrutiny.

As Leibundguth has shown in its primary brief, the Ordinance imposes content-based restrictions on speech because it subjects both commercial signs and some noncommercial and political signs to the size and number restrictions of Section 9.050 but subjects certain other noncommercial signs – governmental signs, temporary decorations, temporary signs at a residence commemorating a personal event, noncommercial flags, and memorial signs and tablets – to *no* size and number limits under Section 9.030. (Appellant Br. at 16-22.)

The Ordinance's discriminatory size and number restrictions are content-based restrictions on speech, and therefore are subject to strict scrutiny, because they impose greater restrictions on certain signs based on the topic discussed or the idea or message expressed. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). The Village asserts that *Reed* does not apply here because that case did not involve restrictions on commercial speech and did not explicitly overturn Supreme Court precedent allowing the government to place greater restrictions on commercial speech than it does on noncommercial speech. (Appellee Br. at 26-27.) But the Supreme Court in *Reed* stated categorically that "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. Based on this language, *Reed* must apply to distinctions made between commercial and noncommercial signs, since the distinction between commercial and noncommercial signs is inherently a distinction based on the signs' message.

This Court's application of *Reed* confirms that the Court should apply strict scrutiny to the content-based restrictions on speech at issue in this case. In *Norton v. City of Springfield*, this Court, following *Reed*, applied strict scrutiny to conclude that an anti-panhandling ordinance, which prohibited panhandling in the "downtown historic district" of Springfield, Illinois, but allowed signs and oral requests for money, was content-based and therefore violated the First Amendment. *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015). The Court stated that, under *Reed*, "*[a]ny law* distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification." *Id*. (emphasis added).

This Court also recently rejected a plaintiff's argument that an exception for political speech should be carved from Indiana's anti-robocall statute, because, as this Court stated, such an "exception if created, would be real content discrimination, and *Reed* then would prohibit the state from forbidding robocall advertising and other non-political speech." *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 305 (7th Cir. 2017). In other words, the Court concluded that *Reed* would

prohibit the state from discriminating against commercial speech in favor of certain noncommercial speech – which is precisely what the Village has done through the Ordinance provisions Plaintiffs challenge.

The Village has not explained any substantive reason why the rule in *Reed* – and therefore strict scrutiny – should not apply to a case such as this one where a sign ordinance carves out an exception for certain noncommercial speech to a rule that generally governs both commercial and noncommercial speech. And the Village has not met its burden under strict scrutiny to show that the Ordinance's discriminatory restrictions are narrowly tailored to serve a compelling governmental interest. (*See* Appellant Br. 18-19.)

2. Leibundguth has standing to bring an overbreadth challenge to the Ordinance's size-and-number restrictions.

As Leibundguth argued in its primary brief, even if *Reed* does not require the Court to subject rules that discriminate against commercial speech to strict scrutiny, this Court should nonetheless apply strict scrutiny because of the Ordinance's discrimination against certain noncommercial signs, which undisputedly is subject to strict scrutiny under *Reed*. (Appellant Br. at 19-22.) Leibundguth has standing to bring an overbreadth challenge to the Ordinance on behalf of the affected noncommercial speakers. (Appellant Br. at 19-22.)

a. Leibundguth can bring an overbreadth challenge because Section 9.050 applies to both commercial and noncommercial signs.

There is no merit in the Village's argument that Leibundguth cannot bring an overbreadth challenge to the size and number restrictions of Section 9.050 because they supposedly only apply to commercial signs, not noncommercial signs.

i. The text and structure of the Ordinance show that Section 9.050 applies to both commercial and noncommercial signs.

As Leibundguth argued in its opening brief, the text and structure of the Ordinance make clear that Section 9.050's size and number restrictions apply to all signs that are not otherwise prohibited or regulated by the Ordinance. (Appellant Br. at 19-22.) Section 9.020 provides a list of signs prohibited in the Village. Section 9.030 provides a content-based list of signs that do not require a permit, along with certain limits on the size and number of such signs. Section 9.040 governs temporary signs, providing specific limits on their size and number; Section 9.060 governs signs in certain concentrated business districts and provides its own limits on the size and number of signs; and Section 9.070 governs special sign types and provides limits on the size and number of such signs.

Thus, a sign not prohibited by Section 9.020 is subject to certain limits on the size and number of such signs provided in one of the other sections of the Ordinance, unless it is one of the specified noncommercial signs listed by content in Section 9.030, on which no permit requirement or size and number restrictions are placed. Other noncommercial or political signs are limited by the Ordinance: If they

are under 12 square feet, they are allowed without a permit. Section 9.030. If one wishes to erect a noncommercial sign greater than 12 square feet, one must obtain a permit and meet the requirements of Section 9.050, unless one's property is in a concentrated business district, in which case it is subject to the requirements of 9.060. In addition, temporary and special noncommercial signs are subject to the size and number restrictions imposed by Sections 9.040 and 9.070, respectively.

Nothing in the text of Section 9.050 limits its application to commercial signs. Indeed, the word "commercial" isn't even found anywhere in Section 9.050. Section 9.050 is entitled "Sign Regulations Generally" and states that "The regulations of this section (Sec. 9.050) apply to signs in all areas of the village except the DB and DT zoning districts and the Fairview concentrated business district." If Section 9.050 only applied to commercial signs, presumably it would say so.

The Village contends that Section 9.010(D) "unequivocally limits [the Ordinance's definition of] signs to commercial signs because unless 'otherwise expressly provided' in the sign ordinance, the content of the signs is limited to the business, service, or activity conducted on the property at issue (by definition, *commercial content*)." (Appellee Br. at 23.) But this provision does not reference "commercial content": a "service" or "activity" could be either commercial or noncommercial in nature, and the Village has provided no basis to conclude that Section 9.010(D) refers only to commercial services and activities. Moreover, the Village's reading of Section 9.010(D) as limiting the Ordinance only to commercial signs, unless otherwise stated, makes no sense in light of Section 9.010(B), which

states: "The regulations of this article apply to *all signs* in the village, unless otherwise *expressly* stated." (emphasis added).

Because noncommercial and political signs can be subject to the size and number restrictions of Section 9.050, Leibundguth has standing to challenge the content-based nature of the Ordinance under the overbreadth doctrine. (*See* Appellant Br. at 19-22; *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 481 (1989).)

ii. Leibundguth has never agreed that Section 9.050 only applies to commercial signs.

Contrary to the Village's argument (which echoes the district court), Leibundguth never agreed or stated that Section 9.050 only applies to commercial signs.

In concluding that Section 9.050 only applies to commercial signs, the district court relied entirely on Leibundguth's agreement with the Village statement of fact that "Section 9.050 regulates commercial signs" (SA-258) and "Section 9.050.A is a commercial sign size limitation" (SA-258) (Appellee Br. at 21.) And the Village now asserts that, in the summary judgment briefing, "Leibundguth argued and admitted that the Village wall sign size and number regulations within Section 9.050 applied *only* to commercial wall signs, and as such were subject to intermediate scrutiny." (Appellee Br. at 19) (emphasis added).

But Leibundguth never agreed, stated, or implied that Section 9.050 applies *exclusively* to commercial signs. Rather, Leibundguth simply agreed and stated that Section 9.050 does, in fact, apply to commercial signs. (SA-258.) Neither the district court nor the Village has cited any basis to construe Leibundguth's statements as

an admission that Section 9.050 does not apply to noncommercial signs. The provision can – and, in fact, does – apply to both. Stating that it applies to one category of sign does not imply that it does not also apply to the other category.[1]

iii. The Ordinance's substitution clause confirms that Section 9.050 applies to both commercial and noncommercial signs.

The Ordinance's substitution clause in Section 9.010(E) – adopted after the parties filed their initial summary judgment motions, but before they filed their reply briefs (SA-283) – further shows that Section 9.050 applies to both commercial and noncommercial speech. Under the substitution clause, any commercial sign regulated by Section 9.050 may substitute noncommercial copy in lieu of its commercial copy. So even if it was not clear that Section 9.050 applied to noncommercial signs before the Village enacted the substitution clause, it certainly is clear now by virtue of Section 9.010(E). And even if Leibundguth's agreement that "Section 9.050 is a commercial sign regulation" – which Leibundguth made before the substitution clause was enacted – could be construed as implying that Section 9.050 did not regulate noncommercial signs, it cannot be construed as implying anything about what Section 9.050 means now, after the enactment of the substitution clause.

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[1] The Village's argument commits the logical fallacy of *Affirming a Disjunct*, which states:

> *p or q.*
> *p.*
> *Therefore, not-q.*

There is no merit in the Village's argument that the substitution clause in Section 9.010(E) actually renders the Ordinance content-neutral and thus saves it from Leibundguth's overbreadth challenge. With the substitution clause, certain noncommercial signs are subject to the regulations of Section 9.050 – but certain other noncommercial signs still do not have any size or number restrictions under Section 9.030. Thus, even with the substitution clause, the Ordinance still provides some noncommercial signs with no size and number restrictions, while imposing size and number restrictions on others entirely based on the content of those noncommercial signs.

b. Leibundguth could bring an overbreadth challenge even if Section 9.050 did apply only to commercial signs.

Even if Section 9.050 did apply only to commercial signs, the Ordinance's size-and-number restrictions would still impose content-based restrictions on speech because the Ordinance would discriminate against noncommercial and political signs by limiting them to 12 square feet while allowing commercial signs (with a permit) to be much larger. (Appellant Br. at 21-22.) Under this scenario, Leibundguth would still have standing to challenge Section 9.050's content-based discrimination against noncommercial signs with an overbreadth challenge because, by prohibiting noncommercial signs of greater than 12 square feet from obtaining a permit, Section 9.050 would treat commercial signs better than noncommercial signs.

3. Leibundguth did not waive its overbreadth argument.

There is no merit in the Village's argument that Leibundguth waived its overbreadth argument because Leibundguth never explicitly argued that Section 9.050 is both a commercial and noncommercial sign regulation in its summary judgment briefs.

The Village's argument fails because it is based in part on the district court's incorrect conclusion that Leibundguth stipulated that Section 9.050 applies *only* to commercial signs, which, as shown above, is not true. It also fails because it ignores Leibundguth's actual argument below that "[b]ecause the sign ordinance applies *size and number restrictions* on both commercial and noncommercial signs, Leibundguth has standing to challenge the noncommercial aspect of the size and number restrictions." R. 6418. (emphasis added). Leibundguth specified that the term "size and number restrictions" referred to the size and number restrictions in Section 9.050, specifically: "(2) the size limit for wall signs along the BNSF railway; (3) the total aggregate sign size limit; and (4) the limit on the number of wall signs." R. 6402. Thus, the Village's premise that Leibundguth never explicitly argued that Section 9.050 is both a commercial and noncommercial sign regulation is not true. And even if, in its summary judgment briefs, Leibundguth did not argue its claim that the size and number restrictions are content-based in the exact manner that it does so now, it is permitted to do so on appeal under the "traditional rule . . . that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made

below.'" *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (*quoting Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

B. The Village provides content-based exceptions to the painted sign ban, which cannot survive strict scrutiny analysis.

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 other signs based on the content of those signs alone.

A staff report, written by Village Planning Manager Stanley Popovich, shows how the Village interprets and applies the painted sign ban. It 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." (SA-238.)

The Village attempts to dismiss the report by arguing that "one staff comment" cannot "supersede[] the legislative will of the Village Council." (Appellee Br. at 35.) But the report is not just any "staff comment": it was written and presented to the Village Council by the Village official responsible for interpreting and enforcing the Ordinance (SA-254-255) as the proposal to amend the Ordinance to apply the painted sign ban Village-wide. The statement therefore shows exactly how the Village interprets and enforces the painted sign ban as well as the Village Council's understanding of how the painted sign ban would be interpreted and enforced when it voted on the amendment.

The Village also tries to dismiss the report by asserting that, on summary judgment, "Leibundguth stipulated that its painted wall signs were the last two

signs painted directly on a wall anywhere in the Village" (Appellee Br. at 35-36) – as though Leibundguth admitted that the Village has not actually allowed any flags and murals to remain. But the stipulation to which the Village refers states: "As of the date of this filing, Leibundguth is the last property located within the entire Village with a *commercial sign* painted directly onto *a brick wall*." (VA-2) (emphasis added). Leibundguth's stipulation that it had the last painted *commercial* signs does not preclude the existence of any noncommercial painted flags and murals on a wall, roof, or fence.

The Village claims – for the first time – that even if it does allow flags and murals painted on walls, this only raises a question of selective enforcement of the painted sign prohibition, not content-based regulation. (Appellee Br. at 36.) But this is not a selective enforcement equal protection claim. Leibundguth is not claiming that the Village selectively enforces its painted sign ban; it is claiming that, as a matter of interpretation and application – as evidenced by the staff report presented to the Village Council before voting on the amending Section 9.020 by the Village official in charge of interpreting and enforcing the Ordinance – the Ordinance's painted sign ban does not apply to painted flags and murals.

The Village also asserts that the painted flags and murals it allows convey "neither a commercial nor non-commercial message" and "are not signs covered by the Village code." (Appellee Br. at 36.) But the Village's (supposed) decision not to consider certain flags and murals to be "signs" has no relevance under the First Amendment, which protects flags and murals as speech. (*See* Appellant Br. at 24.)

The Village dismisses Leibundguth's cases supporting the proposition that flags and murals are protected speech under the First Amendment by asserting that not all flags necessarily communicate a message (Appellee Br. 37), but it is difficult to conceive of a flag or mural that does not communicate some message. Moreover, flags and murals *are* encompassed in the definition of "sign" in the Village's Zoning Code (of which the Ordinance is part):

> Any *object*, device, display or structure, or part thereof, excluding patio umbrellas 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.

Downers Grove Zoning Ordinance, Section 15.220 (emphasis added).

The Village interprets and enforces Section 9.020(P) to permit some signs – flags and murals – to be painted on the wall, roof, or fence of a building. Thus, Section 9.020(P) is a content-based restriction on speech, and the Village's purported interests in traffic safety and aesthetics are not compelling interests that can justify it. *See Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016).

II. In the alternative, the Ordinance cannot survive intermediate First Amendment scrutiny.

In the alternative, even if the Court were to find the painted sign ban and the size-and-number restrictions are not content-based restrictions on speech, those restrictions still could not survive intermediate scrutiny under the First Amendment. The Village has failed to provide sufficient evidence to support its assertions that the painted sign ban and size-and-number restrictions advance its

interests in traffic safety and aesthetics, let alone shown that they are narrowly tailored to do so.

A. The painted sign ban cannot survive intermediate scrutiny.

The painted sign ban of Section 9.020(P) fails the "time, place and manner" test set forth in *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984), because it is not narrowly tailored to advance a specific government interest in improving aesthetics asserted by the Village.[2] First, the Village failed to meet its burden to show that there is evidence supporting its proffered aesthetic justification for the Ordinance's painted sign ban. *See Weinberg v. City of Chicago*, 310 F.3d 1029, 1038 (7th Cir. 2002). Second, the painted sign ban is not narrowly tailored to advance the Village's specific interest in aesthetics. *See Cincinnati v. Discovery Network*, 507 U.S. 410, 428 (1992).

1. The painted sign ban does not advance a specific government interest in aesthetics.

The Village asserts that "because Leibundguth has not suggested the Village prohibited painted wall signs and claimed aesthetic concerns as a pretext for some ulterior motive, the Village's aesthetic determination is entitled to reasonable deference." (Appellee Br. at 40-41.) But the cases on which it relies are inapposite

[2] During summary judgment, the Village made no argument and provided no evidence that the ban on painted wall signs advanced an interest in traffic safety. In its brief, the Village makes arguments related to the interests of both traffic safety and aesthetics in defense of the painted sign ban, but in a footnote, the Village states that it is not asserting an interest in traffic safety to justify the painted sign ban, but that it includes arguments in support of traffic safety so that it can refer back to this argument in its defense of the size and number restrictions on signs. Therefore, in this discussion of the painted sign ban, Leibundguth does not refer to any interest in traffic safety.

because they both address only billboards. In *Prime Media, Inc. v. City of Brentwood, Tenn.*, the parties had simply agreed that billboards "cause visual blight and interfere with traffic safety." 398 F.3d 814, 823 (6th Cir. 2005). Further, *Prime Media* limited such deference and required a more "demanding review for situations . . . where the 'broad sweep of the regulations' themselves show that the government did not reasonably weigh the costs and benefits of regulating speech." *Id*. at 824 (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001)). *Metromedia, Inc. v. City of San Diego* was a plurality opinion in which the plurality found that billboards cause an aesthetic harm. 453 U.S. 490, 510 (1981). The Village points to no cases that apply the same logic to signs other than billboards.

In any event, like the plaintiff in *Weinberg*, Leibundguth is not "explicitly question[ing] the legitimacy of the state interest . . . [but rather] challenges the sufficiency of evidence the government introduced justifying the necessity of the ordinance." *Weinberg*, 310 F.3d at 1038. The Village bears the burden of showing that evidence supports its proffered justification. *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 829 (7th Cir. 1999). "'Mere speculation or conjecture' will not suffice; rather the State 'must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 143 (1994) (*quoting Edenfield v. Fane*, 507 U.S. 761, 770, 771 (1993)).

As the Supreme Court has recognized, if the protections afforded commercial speech are to retain their force, the government cannot simply invoke certain words

to supplant its burden to demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. *Ibanez*, 512 U.S. at 146 ("we cannot allow rote invocation of the words 'potentially misleading' to supplant the Board's burden"). Likewise, here, the Village cannot simply invoke the word "aesthetics" to alleviate its burden to show that the harms it recites are real and that its restriction will alleviate such harms. The Village must point to specific aesthetic harms and provide evidence that such signs cause the specific aesthetic harm and evidence that the regulation actually alleviates that harm to a material degree. *See id*. at 143.

To attempt to justify the painted sign ban, the Village cites the process it went through in adopting the Amended Sign Ordinance in 2005 and the purposes articulated underlying the Ordinance. (Appellee Br. at 41-43.) But the Village points to *nothing* in its process, deliberations, or purposes that is relevant to banning painted signs; the Village never actually *connects* those deliberations and purposes to the particular ban it chose to enact. Indeed, although the Village provided over 900 pages of documentation from the process and deliberations involved in adopting the Ordinance, it has never pointed to one page, one picture, or even one word in those documents that address painted signs.

Similarly, the Village's reliance on "hundreds of photographs extensively documenting both the existing signage problems within the Village and solutions successful in other communities" (Appellee Br. at 41) completely ignores the argument made in Leibundguth's opening brief that these photographs *do not*

address painted signs at all, and, in any event, were taken in the process of adopting the prior version of Section 9.020(P), which did not completely ban painted signs in the Village (Appellant Br. at 26).

The Village's assertion that 26 of the 33 hand-picked sign ordinances of surrounding communities that it reviewed also contain restrictions on painted signs is insufficient evidence to meet the Village's burden. *See DiMa Corp.*, 185 F.3d at 829 ("conclusory assertions regarding [the city's] goals and its effect are insufficient by themselves to survive a First Amendment challenge because they are not 'evidence'"). Here, the Village merely cites the text of other cherry-picked ordinances; it has not done a "considerable analysis of studies from other cities," which the city in *DiMa* had done. *Id.* at 831.[3]

The Village also relies on a staff report 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 Village asserts that "[w]hile Leibundguth denies the accuracy of these findings (SA-256-257), Leibundguth offers not a shred of evidence to rebut the accuracy of the legislative findings which are entitled to judicial deference." (Appellee Br. 43.) But it is the Village's burden to provide evidence that supports its assertion that painted signs cause a specific aesthetic harm and that the complete prohibition is narrowly tailored to fix that harm to a material degree. As Leibundguth pointed out in its primary brief, the

[3] The Village's reliance on treatises submitted to the district court (Appellee Br. at 42-43) applies to the size and number restrictions, not the painted sign ban. The Village has never argued that such treatises show that painted signs result in a specific aesthetic harm – or pointed to *anything* specific in these treatises to support *any* of its arguments.

staff report contains mere facial assertions, was prepared during the course of this litigation, provides no citations or references to support these assertions, and does not identify any specific current or historic examples of problems with painted wall signs. (*See* Appellant Br. at 27.) When the Village relies on nothing more than "mere facial assertions" with no actual evidence, it is not Leibundguth's burden to provide evidence to refute such bare assertions. *See Weinberg*, 310 F.3d at 1038.

The Village also submits as evidence the condition of Leibundguth's signs. This evidence is not relevant because "the validity of the restriction" must be judged "by the relation it bears to the general problem" and not "by the extent to which it furthers the Government's interest in an individual case." *Lavey v. City of Two Rivers*, 171 F.3d 1110, 1115 (7th Cir. 1999). (*See* Appellant's Br. at 27 n.7 for further discussion.)

2. The painted sign ban is not narrowly tailored to serve a specific government interest in aesthetics.

The Village asserts that none of Leibundguth's arguments as to why the Village's painted sign ban is not narrowly tailored "actually address[] narrow tailoring as defined by the Supreme Court." (Appellee Br. at 47.) According to the Village, "[e]ach assertion runs to whether or not painted signs present any real threat to traffic safety and aesthetics, not to whether the prohibition is broader than necessary." (Appellee Br. at 47.) This is demonstrably not true.

As Leibundguth argued in its brief, the Village's admitted allowance of painted flags and murals on walls, roofs, and fences, despite the painted sign ban,

undermines its assertion that the painted sign ban advances an aesthetic interest in a narrowly tailored manner. (Appellant Br. at 28.) As this Court has said:

> The Supreme Court has repeatedly recognized that an underinclusive regulatory scheme is not narrowly tailored. . . . Here, there is similar underinclusiveness that would be fatal to the intermediate scrutiny-narrow tailoring analysis: the ordinance permanently insulates eight concentrated establishments from the alcohol ban and leaves alcohol use at those establishments otherwise entirely unrestricted.

Joelner v. Vill. of Wash. Park, 508 F.3d 427, 433 (7th Cir. 2007) (citations omitted).

Similarly, here, the underinclusiveness of the painted sign ban, by allowing painted flags and murals – and painting on brick walls in general (SA-292) – shows that Section 9.020(P) is not narrowly-tailored. (*See* Appellant Br. at 27-30.) In addition, Leibundguth has pointed out that the painted sign ban is not narrowly tailored because the Ordinance already requires signs to be maintained. Section 9.110.

The painted sign ban is therefore not narrowly tailored to serve a specific government interest in aesthetics.

B. The size and number restrictions on wall signs cannot survive intermediate scrutiny.

The size and number restrictions in Section 9.050 of the Ordinance cannot survive intermediate First Amendment scrutiny because the Village has not shown that they are narrowly tailored to serve an interest in aesthetics – i.e., it has not met the third and fourth prongs of the test provided in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*: (3) the regulation directly advances the

governmental interest asserted; and (4) the restriction is no more extensive than necessary to serve that interest. 447 U.S. 557, 566 (1980).

1. The size and number restriction do not advance any specific government interests in traffic safety or aesthetics.

The Village has failed to provide sufficient evidence to show that the size and number restrictions Leibundguth challenges advance the Village's interests in traffic safety and aesthetics.

Instead of providing such evidence, the Village merely asserts that "[a]ny effort to suggest that traffic safety is unaffected by the size, height, location, and number of signs not only conflicts with the published treatises, it also embraces intellectual myopia and defies simple common sense which is to be considered by the court." (Appellee Br. at 50.) This assertion shows that the Village completely misunderstands what it required by the *Central Hudson* test. The Village must provide sufficient *evidence* to prove that the signs of the targeted size and number pose a traffic-safety problem or a specific aesthetic problem, and that the Village's restrictions advance its specific interest in traffic safety or aesthetics in any direct or material way. *Edenfield*, 507 U.S. at 770-71.

As Leibundguth explained in its opening brief, the district court's analysis of whether the size and number restrictions advance the Village's interest in traffic safety shows why the Village has failed to provide sufficient evidence to provide that signs of the targeted size and number pose a traffic-safety problem and that the size and number restrictions advance its traffic safety interest in a direct or

material way[4], and shows why the Village has similarly failed to justify the size and number restrictions under any specific interest in aesthetics. (*See* Appellant Br. at 32-34.)

In its brief, the only support the Village asserts for its claim that the size and number restrictions serve the Village's interest in aesthetics is the "extensive legislative study and analysis undertaken prior to the Village's adoption of the sign ordinance." (Appellee Br. at 50.) The Village fails to explain to what specific legislative study and analysis it refers, or how such study and analysis supports the size and number restrictions in Section 9.050(A), Section 9.050(C)(1), and Section 9.050(C) of the Ordinance.

The district court cited pictures of commercial signs around the community taken by the Village, conversations with village members regarding the different signage currently in use, and pictures of signs in surrounding communities as evidence in support of the Village's burden. (A-34.) But the Village has never explained how any of these pictures or conversations (or legislative study and analysis) address the specific size and number restrictions that Leibundguth challenges. The Village has never pointed to any photographs or conversations in which the subject was the need to restrict a property to one wall sign per tenant frontage. The Village has never explained how any particular photograph or conversation led it to conclude that the total sign area should be limited to 1.5

[4] Leibundguth provided expert testimony that the academic research found that signs that are readable and conspicuous do not pose a threat to traffic safety and thus restricting the size and number of readable and conspicuous signs would not improve traffic safety. R. 5822. The Village presented no evidence to the contrary.

square feet per tenant frontage. Despite providing over 900 pages of evidence that document the Village's adoption of the Ordinance, the Village has failed to cite even one page addressing the specific aesthetic concerns of the Village that supposedly led it to adopt the size and number restrictions.

Vague references to photographs, conversations, or legislative deliberations, without any specific citations, do not satisfy the Village's burden show, with evidence, why the signs of the targeted size and number pose a specific aesthetic problem and how the size and number restrictions advance the Village's interest in combatting that specific aesthetic problem.

2. The size and number restriction are not narrowly tailored to serve any specific government interests in traffic safety or aesthetics.

The Village's failure to identify a specific aesthetic problem with signs of the targeted size and number undermines its argument that it has satisfied the fourth prong of the *Central Hudson* test – that the restrictions are "narrowly tailored to achieve the desired objective." *Fox*, 492 U.S. at 480.

The Village asserts that large wall signs can be perceived as an aesthetic harm, particularly when they are numerous. (Appellee Br. at 51.) But when Leibundguth pointed out that the Ordinance allows numerous exceptions to the size and number limits (Appellant Br. at 34-36) the Village responded by just asserting that "it is obvious" that other factors explain why these exceptions are necessary. (Appellee Br. at 52).

In response to Leibundguth's observation that Sec. 9.050(C)(4) provides that 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 (Appellant Br. at 35), the Village asserts that "a four-story building presents a different proportional aesthetic concern than a one-story building" (Appellee Br. at 53). But this does not explain why numerous wall signs on four-story buildings are not perceived as an aesthetic harm. Further, if the Village is so concerned about the proportional aesthetic of buildings based on their height, then why is the total maximum size area in Section 9.050(A) based on the linear foot of tenant frontage (the width) of a building and not the total wall surface area? The Village acts as if it is obvious that different aesthetic interests justify these deviations from the size and number restrictions, but it fails to explain what these aesthetic differences are *at all*.

In response to Leibundguth's observation that properties abutting the right-of-way of I-88 or I-355 are allowed an additional monument sign up to 225 square feet that does not count against total sign area (Appellant Br. at 35), the Village asserts that "[t]he number of vehicles, speed limit, complexity of driving environment, and topographical variation between the interstate and adjacent properties are all very different from those for interior residential and commercial streets within the Village" (Appellee Br. at 52-53). But if the Village has an aesthetic interest in having signs be visible to passing vehicles, then why does it place a limit on the maximum size of signs and not a minimum size? And does the fact that these signs

are visible to drivers on I-88 and I-355 alleviate the perception that these signs are an aesthetic harm, particularly when numerous? The Village provides no explanation.

The Village asserts that differences between wall signs and menu boards, multi-tenant shopping center signs, and other types of signs "drive different regulations." (Appellee Br. at 53.) But when the Village simply asserts a generic aesthetic interest in defending wall signs, one must ask what specific aesthetic interest applies to wall signs that does not also apply to other kinds of signs. Because the Village has not articulated a specific aesthetic harm that signs of certain a size and number create, and has not presented evidence of such harm, it cannot adequately defend the Ordinance when it allows deviations from these restrictions. In other words, these exceptions to the size and number restrictions show – in the absence of any meaningful explanation by the Village – that the size and number restrictions are not narrowly tailored to serve the Village's purported interest in general aesthetics.

Finally, the Village asserts that Leibundguth "demands that this Court scrutinize the propriety of the Village granting variations . . . for another Village property . . . to infer that the sign regulations are not narrowly tailored." (Appellee Br. at 53-54.) But Leibundguth is not demanding that this Court scrutinize the propriety of a specific variation at all. Leibundguth is simply pointing out that, if the Village is contending that it has a strong aesthetic interest is restricting the size and number of signs, its provision of exemptions from such restrictions, the

restrictions on the size and number of signs may not be narrowly tailored to serve that aesthetic interest. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994); *Joelner*, 508 F.3d at 433 (ordinance allowing certain adult establishments, but not others, to serve alcohol fatally underinclusive).

The Village has failed to meet its burden of showing that the size and number restrictions are narrowly tailored to serve a specific aesthetic interest. Thus, the Court should find the size and number restrictions unconstitutional.

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 6,409 words.

/s/ Jeffrey M. Schwab
Jeffrey M. Schwab

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2017, I served the foregoing brief upon all counsel of record by electronically filing it with the appellate CM/ECF system.

/s/ Jeffrey M. Schwab
Jeffrey M. Schwab