IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SCOTT MCLEAN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Case No. 1:14-CV-1398
	)	
CITY OF ALEXANDRIA,	)	
a political subdivision of the	)	
Commonwealth of Virginia,	)	
	)	
Defendant.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The City of Alexandria (City) violated Scott McLean's First Amendment rights pursuant to a provision of the City Code[1] (Speech Ordinance), which until it was repealed on March 14, 2015, prohibited the display of a vehicle for sale while parked on a public street. It punished violators with a $40 civil fine. This content-based speech restriction violated McLean's First Amendment rights, preventing him from advertising first his car and then his truck for sale.

Under the Supreme Court's First Amendment precedent, the City bears the burden of proving —on the basis of actual evidence, not speculation—that such a prohibition on commercial speech directly advances a substantial government interest and is no broader than necessary. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). Here, however, the City relies solely on speculation to assert that its ban on advertising cars for sale advances public safety and is no broader than necessary to accomplish that goal. *See* Exhibit 1 to Martin Dec. at 2-6.

Under existing federal law, the City's speculation is insufficient to overcome the protections of the First Amendment. This Court should grant summary judgment in favor of McLean, because "there is no genuine issue as to any material fact" and McLean "is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

[1] Section 10-4-13(a) of the Alexandria, Virginia Code of Ordinances (before its repeal on March 14, 2015). A copy of this Ordinance is attached as Exhibit 1.

STATEMENT OF UNDISPUTED FACTS

1. On October 5, 2012, McLean placed two standard, store-bought "For Sale" signs in his 2008 Chevrolet Malibu and parked it on Old Dominion Boulevard, near West Glebe Road in Alexandria, about one block from where he lives.[2] McLean Dec. ¶ 2.

2. Later that day, City police cited McLean for violating section 10-4-13(a), which made it illegal to post "For Sale" signs on cars while parked on a public street. McLean Dec. ¶ 3; *see* Exhibit 2 to McLean Dec.

3. McLean paid the $40 fine and from that point on took the signs down whenever he was parked on Alexandria streets. McLean Dec. ¶¶ 3-4.

4. To advertise his car, he instead parked it each day, with the signs showing, just outside of Alexandria city limits, and walked the half-mile between his car and his home whenever he needed to use his car. *Id*. ¶ 4.

5. Four months later, he finally sold his car on February 6, 2013. *Id*.

6. More than a year later, McLean decided he wanted to sell his truck, a 2007 Dodge Ram 1500. *Id*. ¶ 5; Exhibit 3 ¶ 4.

7. He wanted to place a "For Sale" sign in the truck while it was parked on a city street near his home in Alexandria, but could not, because of the Speech Ordinance. McLean Dec. ¶ 5; Exhibit 3 ¶ 4.

[2] This location is not in the City's historic Old Town.

8. Fearing potential prosecution if he did so, he filed this case seeking prospective injunctive relief and nominal damages for his previous injury. McLean Dec. ¶¶ 5-6; *See* Dkt. 1, Verified Complaint at Prayer for Relief ¶¶ 1-4.

9. Between January, 2010, and October, 2014, when it suspended enforcement of the Speech Ordinance, the City issued over 700 tickets—equal to more than $28,000 in fines—for violations by people who advertised their cars for sale. *See* Exhibit 2 to Martin Dec. at 513-45.

10. From October 8, 2012, until February 6, 2013—the time in which McLean wanted to sell his 2008 Chevrolet Malibu—the City issued nearly 40 tickets to vehicle owners for violating the Speech Ordinance. *See id*. at 532-33.

11. And in just the month of October, 2014, the City issued 17 tickets, including its final ticket on the morning that McLean filed this lawsuit. *Id*. at 544-45.

12. The City is "not aware" of even a single instance where someone was ticketed under the Speech Ordinance for anything other than placing a "For Sale" sign in the window of a car. Exhibit 1 to Martin Dec. at 7.

13. On October 23, 2014, McLean filed this case for prospective declaratory and injunctive relief as well as nominal damages and declaratory relief for past violation of his right to free speech. *See* McLean Dec. ¶¶ 5-6; Dkt. 1, Verified Complaint at Prayer for Relief ¶¶ 1-4.

14. McLean filed a Motion for Preliminary Injunction on October 23, 2014,[3] but just five days later, the City suspended enforcement of the Speech Ordinance.[4]

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[3] *See* Dkt. 4, Plaintiff's Motion for Preliminary Injunction.

[4] *See* Dkt. 14, Joint Notice of Cancellation of Hearing at Exhibit 2.

15. Five months later, on March 14, 2015, the City at last repealed the Speech Ordinance, acknowledging that "the decades-old restriction against parking a vehicle in the right of way for the purposes of sale is no longer necessary, given the significant changes in how used vehicles are sold and the existing, content-neutral controls already in places [*sic*] in many places in the City that already prevent a vehicle from being parked in the right of way for any purpose for an extended period of time." Exhibit 3 to Martin Dec. at 2.

16. The City cannot explain why the City Council originally passed the Speech Ordinance. Exhibit 1 to Martin Dec. at 2.

17. Nor does it know why the Council amended it in 1978, 1984, or 1994. *Id*.

18. Instead, "[t]he City assumes, without limitation, that the Speech Ordinance was originally adopted for the general purposes of promoting traffic and pedestrian safety." *Id.* Yet the City is "not currently aware" of even one traffic accident ever caused by a "For Sale" sign on a parked car. *Id*. at 6.[5]

ARGUMENT

I

STANDARD OF REVIEW

Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323-34 (1986). To prevail, McLean must demonstrate the absence of a genuine dispute of material fact. *Id.* at 323. The

[5] The City's answers were verified by all four of the City's proposed witnesses.

burden then shifts to the nonmoving party to show that there is a factual dispute for trial. *Id*. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), and must identify specific facts in evidentiary materials revealing a genuine issue for trial. *Celotex*, 477 U.S. at 323. The issue here—whether the City's Speech Ordinance violated McLean's First Amendment rights—is a legal question appropriate for summary judgment.

II

THE GOVERNMENT BEARS THE BURDEN OF SHOWING THAT CONTENT-BASED RESTRICTIONS OF COMMERCIAL SPEECH SATISFY HEIGHTENED SCRUTINY

The Constitution protects all types of speech from content-based restrictions, regardless of whether the speech is commercially motivated. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667 (2011). A restriction is content-based when government censors speech based on the message it conveys. *Id*. Such content-based regulations of speech are presumptively invalid. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992). Commercial speech is no exception. *Sorrell*, 131 S. Ct. at 2664.

Heightened scrutiny is at least as demanding as an ordinary commercial speech evaluation under *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980). *See Sorrell*, 131 S. Ct. at 2664; *id.* at 2677 (Breyer, J., dissenting). Thus, if a speech restriction fails to meet the requirements of *Central Hudson*, it would also fail under *Sorrell*'s heightened scrutiny standard. *See id.* at 2667 ("[T]he outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied."). Here, Alexandria's law fails under *Central Hudson*. Thus this Court need not embark upon defining heightened

scrutiny. *Educ. Media Co. at Virginia Tech, Inc. v. Insley*, 731 F.3d 291, 298 (4th Cir. 2013) ("[L]ike the Court in *Sorrell*, we need not determine whether strict scrutiny is applicable here, given that . . . the challenged regulation fails under intermediate scrutiny set forth [in] *Central Hudson*.").

In *Central Hudson*, the Supreme Court set out a test to analyze the validity of governmental restrictions on commercial speech. 447 U.S. at 566. First, such speech must concern lawful activity, and not be actually or inherently misleading. *Id*. Second, the government may regulate the speech only if it has a substantial interest in doing so. *Id*. Third the restriction must directly advance that interest. *Id*. Finally, the restriction must be no broader than necessary to accomplish that interest. *Id*.

Under *Central Hudson*, the government bears the burden of proving that its restriction on speech satisfies this test. *Walraven v. N.C. Bd. of Chiropractic Examiners*, 273 Fed. Appx. 220, 224 (4th Cir. 2008); *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625-26 (1995). It may not satisfy its burden by mere speculation or conjecture. *Edenfield*, 507 U.S. at 770-71; *Went For It*, 515 U.S. at 625-26. Instead, the City must demonstrate with factual evidence that the restriction targets real harms, and that it "will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71; *Went For It*, 515 U.S. at 625-26 ("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"). The City's restriction of McLean's commercial speech cannot fail the *Central Hudson* test.

III

THE CITY FAILED TO SHOW THAT THE SPEECH ORDINANCE DIRECTLY ADVANCED A SUBSTANTIAL GOVERNMENT INTEREST

Because McLean's speech was truthful, not misleading,[6] and concerned lawful activity,[7] this Court must determine whether the challenged regulation advanced the City's interest "in a direct and material way." *Edenfield*, 507 U.S. at 767. The City bears the burden of proving this, and it cannot meet this burden "by mere speculation or conjecture." *Id*. Instead, the City must prove that the harms the Speech Ordinance was supposed to alleviate were "real" and that its restriction "in fact alleviate[d] them to a material degree." *Id*.

In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418 (1993), the Supreme Court found that an ordinance banning newsracks that dispensed commercial handbills was unconstitutional, because it failed to directly advance the government's interests. The City claimed the ordinance advanced its substantial interests in aesthetics and pedestrian safety, "because every decrease in the number of such dispensing devices necessarily effects an increase in safety and an improvement in the attractiveness of the cityscape." *Id*. But the Court was not persuaded, because "all newsracks, regardless of whether they contain commercial or noncommercial publications, are equally at fault" for aesthetic or safety problems. *Id*. at 426. The First Amendment required the City

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[6] It is undisputed that McLean's "For Sale" signs were and are truthful and not misleading. Exhibit 3 ¶ 4.

[7] At all times relevant to this case, it has been legal for a car owner to sell his own car in Alexandria. *See* Exhibit 1. In *Pagan v. Fruchey*, 492 F.3d 766, 772 (6th Cir. 2007), the government argued that the ban on displaying a car for sale was really a ban on conduct and not speech. The court rejected that argument, because even "even if we construed the literal language of [the ordinance] as not implicating the First Amendment, [the City] concedes that it enforces the ordinance in a manner that does." *Id*.

to instead show that discriminating between commercial and noncommercial speech would directly advance those interests. *Id*. The City's only justification for distinguishing between types of speech was that commercial speech was of "low value." *Id*. at 428. But the Court bluntly rejected that statement, stating that the City "seriously underestimates the value of commercial speech." *Id*. at 419. The First Amendment forbids discriminating against one form of speech just because the government does not value it.

Accordingly, courts have struck down laws almost identical to the Alexandria ordinance, because the government failed to carry its burden of showing the law adequately advanced its substantial interests. *See, e.g.*, *Linmark Assocs, Inc. v. Twp. of Willingboro*, 431 U.S. 85, 94 (1977) (ordinance banning "For Sale" signs in front of homes was unconstitutional content-based ban on speech); *Pagan v. Fruchey*, 492 F.3d 766, 772 (6th Cir. 2007) (ordinance banning display of vehicles for sale was unconstitutional content-based ban on commercial speech); *City of Milwaukee v. Blondis*, 460 N.W.2d 815 (Wis. Ct. App. 1990) (same); *People v. Moon*, 152 Cal. Rptr. 704 (App. Dep't Super. Ct. 1978) (same).

In *Pagan*, the Sixth Circuit overturned an ordinance banning "For Sale" signs on cars, because it did not directly advance the government's purported interests of safety and aesthetics. 492 F.3d at 773. As evidence, the government offered assertions of "common sense" and "obviousness," *id*. at 774, and an affidavit by a government official asserting "the sort of speculation that might just as well be offered by a person unconnected with the Village about the rationale for the ordinance." *Id*. at 773 n.5. The court explained that, "[i]f 'For Sale' signs are a threat to the physical safety of Glendale's citizens or implicate aesthetic concerns, it seems no great burden to require Glendale to come forward with some evidence of the threat or the particular concerns." *Id*.

at 775. But as with the City here, the government in that case could offer no actual evidence, only speculation. *Id*. Because the government failed to meet its burden of showing that the harms of commercial advertisement were real, the court held the sign ban unconstitutional. *Id*.

Another federal district court enjoined a similar law in *Burkow v. City of Los Angeles*, 119 F. Supp. 2d 1076, 1082 (C.D. Cal. 2000). The city tried to show that the law directly advanced safety and aesthetics by offering speculation, suggesting that "historically" problems with signs "were serious enough to warrant restrictive legislation." *Id*. at 1080. Yet the city did not cite a single problem actually caused by such signs. *Id*. Instead, the city asked, "would the prevention of one serious accident per year materially advance the government interest?" *Id*. Unsurprisingly, the court rejected the city's argument. *Id*.

Here, the City attempts to support the validity of its now repealed Speech Ordinance in like manner. Admitting it does not know why the Ordinance was passed, the City nonetheless "assumes, without limitation, that the Ordinance was originally adopted for the general purposes of promoting traffic and pedestrian safety." Exhibit 1 to Martin Dec. at 2. Yet the City is "unaware" of even one traffic accident that has ever been caused by a "For Sale" sign. *Id*. at 6. The City also offers a series of hypothetical scenarios to support a law it had on the books for more than a half-century, stating

that "For Sale" signs "could potentially"[8] or "could very well"[9] cause a safety or parking[10] problem. The City did not offer any actual instance where any of its hypothetical scenarios occurred, or any empirical research, expert witness testimony, or any other facts substantiating its conjecture. In fact, the City did the opposite and admitted that the law was "no longer necessary" and "outdated" when it repealed the Ordinance. Exhibit 3 to Martin Dec. at 2 ("[S]taff believes that the decades-old restriction against parking a vehicle in the right of way for the purposes of sale is no longer necessary, given the significant changes in how used vehicles are sold and the existing, content-neutral controls already in places [*sic*] in many places in the City that already prevent a vehicle from being parked in the right of way for any purpose for an extended period of time."). If the law was "outdated" and "no longer necessary" on March 14, 2015, then how can the City argue that it was necessary in 2014 when McLean was forced to delay advertising his truck, or in 2012 when McLean was first ticketed? The City has made no effort to make such a showing, which it has the burden to do.

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[8] Exhibit 1 to Martin Dec. at 2-3 ("The act of parking a car on a city street for purposes of displaying it for sale could very well constitute a threat to the public health, safety, or welfare. Such an act could potentially (1) cause pedestrians to enter the roadway for the non-traffic purposes of viewing for-sale signs or otherwise inspecting the car in question, (2) distract drivers' attention away from the roadway, (3) cause drivers to slow down or stop in the roadway in order to inspect the car or any provided contact information, or (4) cause drivers to double park in the roadway and exit their own cars . . . .").

[9] Exhibit 1 to Martin Dec. at 2-3.

[10] Exhibit 1 to Martin Dec. at 6 ("Without Section 10-4-13(a) in place, it is possible that commercial entities could use the public right of way to advertise their inventory of vehicles or to conduct transactions without first obtaining a required business license or otherwise complying with the rules and regulations of the City. The City, without limiting its right to supplement this response in the future, is not presently aware of any other such interests.").

The City failed to offer any actual facts to demonstrate the Speech Ordinance directly advanced a substantial government interest. And how could it? The Ordinance was supposed to promote traffic safety by limiting the use of distracting signs, yet it allowed the identical signs on *moving* cars and on cars parked on private property. And it allowed parked cars to bear all other kinds of distracting advertisements—signs promoting services, or jewelry, or even sexually explicit magazines—even though these could be even more distracting to passing motorists. Indeed, the Ordinance allowed a person to post a sign on a parked car that advertised *another* car for sale. The City has failed to justify the Speech Ordinance's arbitrary discrimination between types of messages, just as in *Discovery Network*, 507 U.S. 410. This Court should hold that the Speech Ordinance violated McLean's rights, because it failed to directly advance a substantial government interest.

IV

THE CITY FAILED TO SHOW THAT THE SPEECH ORDINANCE WAS NOT BROADER THAN NECESSARY

Even if the City had been able to show that the Ordinance directly advanced a substantial government interest, the Ordinance was broader than necessary. "[I]f there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *Discovery Network, Inc.*, 507 U.S. at 418 n.13. The government bears the burden of showing that a restriction on speech is no broader than necessary. *Id.*; *Pagan*, 492 F.3d at 778.

In *Burkow*, the court reasoned that the Los Angeles ban on "For Sale" signs on parked cars was broader than necessary, because there were many content-neutral ways for the City to advance its interests. 119 F. Supp. 2d at 1082. For example, it could protect its aesthetic interests by

limiting the amount of time cars could be parked, or by limiting the number of signs any one individual would be allowed to post on a given street at a time. *Id*. at 1081. Likewise, even the City of Alexandria's staff recognized that the law was unnecessary and that there were other "content-neutral controls already in places [*sic*] in many places in the City that prevent a vehicle from being parked in the right of way for any purpose for an extended period of time." Exhibit 3 to Martin Dec. at 2. Thus, as the City itself recognized, it had plentiful other options available to protect any alleged traffic safety or aesthetic concerns. For example, the City can better protect traffic safety by forbidding cars from stopping and blocking the right of way, or punishing drivers who block traffic to look at signs on cars.

The existence of many narrower ways to address the City's purported interests shows that the speech restriction is broader than necessary. And because the City failed to meet its burden of showing that its restriction is sufficiently narrow, this Court should hold that the Speech Ordinance was unconstitutional.

V

MCLEAN IS ENTITLED TO VINDICATION OF HIS FIRST AMENDMENT RIGHT AND NOMINAL DAMAGES

When government violates an individual's First Amendment rights, he is entitled to nominal damages. *Covenant Media of SC, LLC v. City of N. Charleston*, 493 F.3d 421, 428-29 (4th Cir. 2007); *Comm. for First Amendment v. Campbell*, 962 F.2d 1517, 1526-27 (10th Cir. 1992); *Carey v. Piphus*, 435 U.S. 247, 266 (1978) (plaintiff entitled to at least nominal damages for violation of absolute rights); *Fyfe v. Curlee*, 902 F.2d 401, 406 (5th Cir. 1990) (nominal damages for First Amendment violation). Nominal damages allow citizens to hold government accountable for past

violation of absolute rights. *Carey*, 435 U.S. at 266. Supreme Court precedent "obligates a court to award nominal damages when a plaintiff establishes the violation" of constitutional rights. *Farrar v. Hobby*, 506 U.S. 103, 112 (1992).

In *Campbell*, a university banned a student organization from showing the movie *The Last Temptation of Christ*. 962 F.2d at 1519. When the plaintiffs challenged the ban, the university amended its policies and allowed them to show the film. *Id*. The trial court granted summary judgment to the university, holding that the lawsuit was moot, but the appellate court reversed, explaining that while the injunctive relief claim was now moot, "the district court erred in dismissing the nominal damages claim which relates to past (not future) conduct." *Id*. at 1526-27. The court held that if the plaintiffs proved the university violated their First Amendment rights, they would be entitled to nominal damages. *Id*.

Likewise, McLean seeks vindication of his First Amendment rights through the award of nominal damages, which allows the Court to issue "a judicial pronouncement that the defendant has violated the Constitution." *Farrar*, 506 U.S. at 112. Because the City punished McLean by citation and fine for exercising his First Amendment right to advertise—and deterred him from advertising a second time, until it finally repealed the Speech Ordinance—without any constitutionally sufficient basis, McLean is entitled to redress by an award of nominal damages.

CONCLUSION

The City of Alexandria violated McLean's right to truthfully advertise for sale his car and, later, his truck. The Speech Ordinance singled out one type of message for censorship. Though lucrative for the City's coffers, the Ordinance did not directly advance any substantial interest in traffic safety or aesthetics. Nor was it reasonably narrow as required by *Central Hudson*.

Accordingly, the City violated McLean's First Amendment rights and McLean is entitled to judgment as a matter of law.

DATED: March 31, 2015.

Respectfully submitted,

By: /s/

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the Clerk this 31st day of March, 2015, using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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/s/
SHAWN SHEEHY