IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

LABOREMO, LLC and ANDREW CUDDY, Plaintiffs, v. TOWN OF FLEMING and BILL GABAK, JR., the Zoning Officer for the Town of Fleming, Defendants.	No. 5:24-cv-1123 (MAD/TWD) Hon. Mae A. D'Agostino

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
TRO / MOTION FOR PRELIMINARY INJUNCTION

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STATEMENT OF FACTS

Plaintiff Laboremo, LLC is a company that is owned and controlled by Plaintiff Andrew Cuddy. Plaintiff Laboremo, LLC owns the property located within the Town of Fleming at 5693 South Street Road. As the owner of the company, Plaintiff Cuddy controls the use of this property. (Cuddy Decl. ¶ 2, at Ex. 1).

On September 4, 2024, Plaintiff Cuddy displayed political signs on the 5693 South Street Road property. Below are true and accurate photographs of the signs (Plaintiff Cuddy displayed two of each sign for a total of four signs).

(Cuddy Decl. ¶ 3, at Ex. 1).

The sign displays do not cause any adverse impact on public health, safety, or welfare. They do not block sight lines, obstruct vision or rights of way, and they are not dangerously distracting, nor do they cause any hazards to motorists or pedestrians. None of Plaintiffs' signs "exceed[s] ten (10) square feet per side in area." In fact, the Tenney signs are 24" x 18" in size and the Buschman signs are 26" x 16" in size. (Cuddy Decl. ¶¶ 4, 5 at Ex. 1).

A true and accurate photo showing the political signs on display on Plaintiffs' private property in the Town of Fleming appears below:

(Cuddy Decl. ¶ 6, at Ex. 1).

On or about September 5, 2024, Defendant Bill Gabak, Jr., the Town of Fleming Zoning Officer, issued Plaintiff Laboremo, LLC a Notice of Violation/Order to Remedy (hereinafter referred to as the "Notice"), directing and ordering the company, which is effectively Plaintiff Cuddy, to remove the signs by October 5, 2024. Pursuant to the Notice, "If the person or entity served with this order to remedy fails to comply in full with this order to remedy within the thirty (30) day period, that person or entity will be subject to a fine of not more than $1,000 per day of violation, or imprisonment not exceeding one year, or both." (Cuddy Decl. ¶ 7, Ex. A [Notice] at Ex. 1).

The Notice claims that Plaintiff Laboremo, LLC violated Article XII of the Town of Fleming's zoning law. Article XII contains the "Sign Regulations." More specifically, the Notice asserts that Plaintiff Cuddy's company (and thus him) violated the section that restricts "political signs." Defendant Gabak, the person who signed and was responsible for issuing the Notice, stated in the Notice that "[a]n apparent violation of the Zoning/Building laws exist on the above property [5693 South Street Road]. I observed: Political signs installed , (sic) too soon. No more than 45 days prior." (Cuddy Decl. ¶ 8, Ex. A [Notice], at Ex. 1).

Section 12-5 (N) of the Sign Regulations is the section that places restrictions on political signs, and it states as follows:

> N. Temporary signs announcing a campaign, drive or event of a civic, philanthropic, education or religious organization, and ***temporary political/election signs***. Such signs shall not exceed ten (10) square feet per side in area, ***shall be posted no more than forty-five (45) days before the campaign***, drive or event and ***shall be removed within seven (7) days upon its completion***. If the sign is not removed within seven (7) days, the sign will be removed by the Town and the costs incurred will be paid by the owner of the sign.

(Cuddy Decl. ¶ 9, Ex. B [Town's Sign Regulations], at Ex. 1) (emphasis added).

American flags; sports teams' flags or banners; Blue Lives Matter flags, signs, or banners; Black Lives Matter flags, signs, or banners; or garden banners or signs, among others, are not similarly regulated or restricted as political signs by the Sign Regulations. Temporary signs advertising a business or the sale of property are also not similarly restricted as political signs by the Sign Regulations. Examples of signs or banners exempted from the political sign restriction that are currently on display in the Town of Fleming appear in the photographs below.

(Cuddy Decl. ¶ 10, at Ex. 1).

The State of New York, like so many other states, allows for voting by early mail ballot or absentee ballot well before the election day. *See* https://elections.ny.gov/request-ballot. Moreover, "campaigns" for candidates typically run far longer than just 45 days prior to an election. Consequently, it is important to be able to display political signs longer than the limited duration allowed by the Town's Sign Regulations. (Cuddy Decl. ¶ 11, at Ex. 1).

Plaintiffs want to keep their political signs on display. However, they now face fines and possible imprisonment if they continue to do so. Plaintiffs intend to display political signs on their private property early for other elections as well. However, the Town's restriction on the display of political signs on private property subjects Plaintiffs to punishment (fines and possible imprisonment) if they do so. All of this causes a chilling effect on Plaintiffs' political speech. (Cuddy Decl. ¶ 12 at Ex. 1).

Additionally, Plaintiff Cuddy has purchased Trump campaign signs that he wants to immediately display on his private property in the Town of Fleming and that he wants to remain on display through inauguration day in January 2025 and beyond regardless of whether Donald Trump wins the presidency as he wants these signs to show his support for the Trump campaign and the Republican Party. However, the Town of Fleming's Sign Regulations, specifically including its restriction on political signs, prevents him from doing so by subjecting him to onerous fines and possibly imprisonment. (Cuddy Decl. ¶ 13 at Ex. 1).

ARGUMENT

I. Standard for Issuing a TRO / Preliminary Injunction.

Plaintiffs understand that *ex parte* relief by way of a temporary restraining order is an emergency procedure. However, given that Plaintiffs will be subject to significant fines and possible imprisonment if they do not surrender their First Amendment right to freedom of speech

by October 5, 2024, Plaintiffs believe that the immediacy component has been met. The purpose of a TRO "is limited to preserving the *status quo* and preventing irreparable harm 'just so long as is necessary to hold a hearing, and no longer,' such that the court will be able to provide effective final relief." *Goldstein v. Hochul*, No. 22-CV-8300 (VSB), 2022 U.S. Dist. LEXIS 243665, at *2-3 (S.D.N.Y. Sep. 30, 2022). Accordingly, "the Court must examine whether the movants have demonstrated a threat of irreparable harm that will occur *immediately* to justify a temporary restraining order, while the temporal context of a preliminary injunction takes a longer view." *Omnistone Corp. v. Cuomo*, 485 F. Supp. 3d 365, 367-68 (E.D.N.Y. 2020). As noted, Plaintiffs have met this immediacy threshold. (*See* Cuddy Decl. ¶¶ 7, 8; *see also* Muise Decl.).

Aside from the immediacy issue, the standard for issuing a TRO is the same as for a preliminary injunction. *Andino v. Fischer*, 555 F. Supp. 2d 418, 419 (S.D.N.Y. 2008) ("It is well established that in this Circuit the standard for an entry of a TRO is the same as for a preliminary injunction.").

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Metro. Taxicab Bd. of Trade v. City of N.Y.*, 615 F.3d 152, 156 (2d Cir. 2010) ("In order to justify a preliminary injunction, a movant must demonstrate 1) irreparable harm absent injunctive relief; 2) either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in the plaintiff's favor.").

Plaintiffs satisfy the requirements for granting the requested injunctive relief.

II. Plaintiffs Satisfy the Factors for Granting a TRO / Preliminary Injunction.

A. Plaintiffs Will Succeed on the Merits of Their Constitutional Claims.

1. Plaintiffs' Political Signs Are Protected Speech.

Plaintiffs' sign displays are a form of expression protected by the First Amendment. *See Hill v. Colo.*, 530 U.S. 703, 714-15 (2000) ("[S]ign displays . . . are protected by the First Amendment."). In fact, Plaintiffs' political signs address matters of public concern, and the U.S. Supreme Court "has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'" *NAACP v. Claiborne Hardware Co,* 458 U.S. 886, 913 (1982) (citations omitted).

As the Supreme Court noted in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), signs conveying political messages are "absolutely pivotal speech." *Id*. at 54. Indeed, speech addressing candidates and political campaigns "occupies the core of the protection afforded by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995). Accordingly, Plaintiffs' political signs displayed are clearly protected by the First Amendment.

2. Defendants' Restriction on Plaintiffs' Speech Is Content Based.

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *see also Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980) (noting that a content-based regulation "restrict(s) expression because of its message, its ideas, its subject matter, or its content"); *Glendale Assocs., Ltd. v. N.L.R.B.*, 347 F.3d 1145, 1155 (9th Cir. 2003) ("A rule is defined as a content-based restriction on speech when the regulating party must examine the speech to determine if it is acceptable.").

The sign regulations at issue here, specifically including the restriction on political signs, are unquestionably content-based. On its face, the Town's zoning law (Article XII, Sign Regulations) restricts signs based on their content and thus makes content-based distinctions. For example, this provision of the zoning law makes content-based distinctions based on whether the sign advertises "the sale of farm products, nursery products or livestock produced or raised on premises," denotes "membership in agricultural associations, cooperatives or indicat[es] specialization in a particular breed of cattle, hogs, etc., or in particular hybrids or strains of plants," identifies "signs for schools, churches, hospitals, [or] recreation areas," advertises "the sale or rental of property," is a "[t]emporary contractors, developers, architects, or builders" sign or a "[t]resspassing sign[], sign[] indicating the private nature of a road, driveway, or premises, [or a] sign[] controlling fishing or hunting on the premises," or a "memorial sign[] or tablet[]." (*See* Cuddy Decl. ¶ 9, Ex. B [Sign Regulations] at Ex. 1).

More to the point, the specific section at issue here (§ 12-5 (D)) explicitly targets "political signs" (specifically including Plaintiffs' signs at issue) for disfavored treatment (*i.e.*, specific restrictions on when they can be displayed) and is thus unquestionably content based. This section states as follows:

> N. Temporary signs announcing a campaign, drive or event of a civic, philanthropic, education or religious organization, and ***temporary political/election signs***. Such signs shall not exceed ten (10) square feet per side in area, ***shall be posted no more than forty-five (45) days before the campaign***, drive or event and shall ***be removed within seven (7) days upon its completion***. If the sign is not removed within seven (7) days, the sign will be removed by the Town and the costs incurred will be paid by the owner of the sign.

(Cuddy Decl. ¶ 9, Ex. B, at Ex. 1) (emphasis added).

Because the restriction on Plaintiffs' speech (their political signs) is content based facially and as-applied, Defendants now have the burden to justify their restriction under strict

scrutiny. As stated by the Supreme Court, "[c]ontent-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. And "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 165.

3. Defendants Cannot Satisfy Strict Scrutiny.

Strict scrutiny is the "most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997); *see also Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) ("[S]trict scrutiny requires the State to further 'interests of the highest order' by means 'narrowly tailored in pursuit of those interests.' . . . That standard 'is not watered down'; it 'really means what it says.'") (internal citation omitted). As a result, content-based restrictions on speech are "presumptively unconstitutional." *Reed*, 576 U.S. at 163.

Per the Supreme Court, "It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (internal quotations and citation omitted) (emphasis added).

Here, Defendants do not have a compelling interest that is narrowly tailored to justify the Town's content-based restriction on Plaintiffs' political speech. Plaintiffs' signs are small in size (24" x 18" and 26" x 16"), and they cause no adverse impact on public health, safety, or welfare. They do not block sight lines, obstruct vision or rights of way, and they are not dangerously distracting, nor do they cause any hazards to motorists or pedestrians. (Cuddy Decl. ¶¶ 3-6 at Ex. 1). Indeed, the fact that the Town permits these very signs to be displayed for at least some

duration of time (45 days prior to until 7 days after an election) demonstrates that there is no compelling governmental interest that justified this restriction on core political speech.

Additionally, the imposed time period restriction undermines core political speech even more so today as New York, like many states, allows for voting by early mail ballot or absentee ballot well before the election day. *See* https://elections.ny.gov/request-ballot. And "campaigns" for candidates typically run far longer than just 45 days prior to an election. Consequently, it is important to be able to display political signs longer than the limited duration allowed by the Town's Sign Regulations. (Cuddy Decl. ¶ 11 at Ex. 1).

Indeed, many courts that have addressed such restrictions on core political speech have enjoined their enforcement. *See, e.g.*, *Whitton v. Gladstone*, 54 F.3d 1400 (8th Cir. 1995) (ordinance deemed unconstitutional which limited placement or erection of political signs to thirty days prior to the election to which the sign pertains until seven days after the election); *Knoeffler v. Mamakating*, 87 F. Supp. 2d 322, 327 (S.D.N.Y. 2000) (noting that "durational limits on signs have been repeatedly declared unconstitutional"); *Dimas v. Warren*, 939 F. Supp. 554 (E.D. Mich. 1996) (ordinance deemed unconstitutional which prohibited posting of political yard signs earlier than forty-five days prior to any election, and ordering removal within seven days after); *Orazio v. North Hempstead*, 426 F. Supp. 1144 (E.D.N.Y. 1977) (holding that no time limit on the display of pre-election political signs is permissible under the First Amendment); *Antioch v. Candidates' Outdoor Graphic Serv.*, 557 F. Supp. 52 (N.D. Cal. 1977) (ordinance deemed unconstitutional which limited the display of political signs to the period sixty days before election); *Collier v. Tacoma*, 121 Wash. 2d 737, 854 P.2d 1046 (1993) (ordinance deemed unconstitutional which limited posting of political signs to the period sixty days prior to election to seven days after, where no time restrictions were imposed on other

temporary signs); *Curry v. Prince George's Cnty.,* 33 F. Supp. 2d 447 (19999) (ban on political campaign signs posted on private residences for all but forty-five days before and ten days after an election deemed unconstitutional).

In the final analysis, Plaintiffs are clearly likely to succeed on the merits of their First Amendment claim.

B. Plaintiffs Will Suffer Irreparable Harm in the Absence of Injunctive Relief.

The proof of irreparable harm suffered by Plaintiffs is clear and convincing, and it is established upon finding a violation of their constitutional rights. As stated by the Second Circuit, "[W]e have 'held that the alleged violation of a constitutional right triggers a finding of irreparable injury.'" *Conn. Dep't of Envtl. Prot. v. OSHA*, 356 F.3d 226, 231 (2d Cir. 2004); *Statharos v. N.Y.C. Taxi & Limousine Comm'n*, 198 F.3d 317, 322 (2d Cir. 1999) ("Because plaintiffs allege deprivation of a constitutional right, no separate showing of irreparable harm is necessary."); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("[I]t is the *alleged* violation of a constitutional right that triggers a finding of irreparable harm."); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod,* 427 U.S. at 373); *see also Bonnell v. Lorenzo,* 241 F.3d 800, 809 (6th Cir. 2001) ("[W]hen reviewing a motion for preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated.").

Absent the requested injunctive relief, Plaintiffs will be subject to serious fines and possible imprisonment for displaying political signs outside of the narrow window that Defendants allow for no compelling reason. The harm to Plaintiffs is immediate and irreparable.

C. The Balance of Equities Tips Sharply in Favor of Granting the Injunction.

The likelihood of harm to Plaintiffs without the injunction is substantial because the deprivation of constitutional rights constitutes irreparable injury. (*See supra* § II.B.). On the other hand, if Defendants are restrained from unlawfully enforcing their political sign restriction, they will suffer no harm because the exercise of constitutionally protected rights can never harm any of Defendants' or others' legitimate interests. *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). Indeed, there has been no reported harm by the display of Plaintiffs' political signs since September 5, 2024, as these displays do not obstruct or cause any harm to the public safety (and as demonstrated by the fact that these very signs would be permitted closer to the election day).

In the final analysis, the question of harm to others as well as the impact on the public interest "generally cannot be addressed properly in the First Amendment context without first determining if there is a constitutional violation. . . ." *Connection Distribution Co.*, 154 F.3d at 288. For if Plaintiffs show that their constitutional rights have been violated (which they have shown here), then the harm to others is inconsequential. *See infra*.

D. Granting the Injunction Is in the Public Interest.

"Because Plaintiff [has] shown both a likelihood of success on the merits and irreparable harm, it is also likely the public interest supports preliminary relief." *Saget v. Trump*, 375 F. Supp. 3d 280, 377 (E.D.N.Y. 2019); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[E]nforcement of an unconstitutional law is always contrary to the public interest."); *Dayton*

Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws"); *Sajous v. Decker*, No. 18-cv-2447 (AJN), 2018 U.S. Dist. LEXIS 86921, at *45 (S.D.N.Y. May 23, 2018) ("The public interest is best served by ensuring the constitutional rights of persons within the United States are upheld.") (citing *Mitchell v. Cuomo*, 748 F.2d 804, 808 (2d Cir. 1984)); *Coronel v. Decker*, No. 20-cv-2472 (AJN), 2020 U.S. Dist. LEXIS 53954, at *23 (S.D.N.Y. Mar. 27, 2020) ("First, as this Court has previously stated, the 'public interest is best served by ensuring the constitutional rights of persons within the United States are upheld.'").

In sum, "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994). It is in the public interest to grant the requested injunctive relief.

CONCLUSION

For the foregoing reasons, this Court should grant the motion and issue the requested injunctive relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2024 a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

I further certify that on this day I caused to be served a copy of the foregoing and associated filings on Defendants by having them hand-delivered on September 18, 2024 to the Clerk of the Town of Fleming located at 2433 Dublin Road, Auburn New York 13021.

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
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