FILED

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

WAG MORE DOGS, LLC **Plaintiff,** **v.** **MELINDA M. ARTMAN,** ***et al.*** **Defendants.**	**Civil Action No.** 1:10cv1347

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Kim Houghton owns Plaintiff Wag More Dogs, LLC, a small dog daycare and grooming business that is challenging a zoning ordinance that forces her to choose between her right to speak and her right to earn an honest living. As part of opening, Ms. Houghton[1] commissioned a large mural of happy cartoon dogs, bones, and paw prints on its rear wall. Arlington County[2] has claimed that that artwork is an illegal sign because it, in their view, is too related to Wag More Dogs' business. Based on this, Wag More Dogs has had to cover its mural with tarps for the past three months. Because this restraint on speech violates the First Amendment, Ms. Houghton respectfully requests that this Court enjoin Arlington County from taking any action against Wag More Dogs for unveiling its artwork during the pendency of this lawsuit.

FACTS

Kim Houghton is the owner of "Wag More Dogs, LLC," a canine daycare, boarding, and grooming facility that is located in the Shirlington neighborhood of Arlington, Virginia. Decl. of Kim Houghton in Supp. of Mot. for Prelim. Injun. (Houghton Decl.) ¶ 2. Ms. Houghton first came up with the idea for Wag More Dogs after asking herself what personal activities she most enjoyed. *Id.* Recognizing that she loved dogs and would often spend hours at the nearby dog park, Ms. Houghton founded Wag More Dogs as an upscale facility that would employ a professional staff that was specially trained in dog behavior and handling. *Id.*

Ms. Houghton began work on Wag More Dogs in July 2009 when she rented an empty space in an industrial park at 2606 South Oxford Street in Arlington, Virginia. *Id.* at ¶ 3. The industrial park where 2606 South Oxford Street is located is in an area of Arlington County that

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[1] Here and throughout this brief, Plaintiff will be referred to as "Ms. Houghton" for readability.
[2] Here and throughout this brief, Defendants will be collectively referred to as "Arlington County."

is zoned as a "Light Industrial District." *See id.*, Ex. 4. The rear wall of the building that Wag More Dogs rented abuts the Shirlington Dog Park, a popular recreational area for local dog owners where Ms. Houghton had taken her dogs for years. *Id.* at ¶ 4. As part of her renovations, Ms. Houghton commissioned a local artist to paint an illustration of dogs, bones, and paw prints on the bare cinder block wall behind her building. *Id.* at ¶ 5. She commissioned the artwork both to give back to the community and create goodwill towards the business. *Id.* at ¶ 4. The artist completed Ms. Houghton's artwork (seen below and in Houghton Decl., Ex. 1) in May 2010 at a cost of $4,000.

Many patrons of the dog park told Ms. Houghton about how they liked the art and how much it improved the area. Houghton Decl. ¶ 5.

Arlington, Virginia's Zoning Ordinance

Like many other municipalities, Arlington, Virginia, has a zoning ordinance to regulate land use in the county. Section 34 of that ordinance concerns signs, which are defined as "[a]ny word, numeral, figure, design, trademark, flag, pennant, twirler, light, display, banner, balloon or

other device of any kind which, whether singly or in any combination, is used to direct, identify, or inform the public while viewing the same from outdoors." Arlington County, Va., Zoning Ordinance § 34(B). Commercial buildings in light-industrial districts may secure permits for "up to three (3) signs for each tenant, up to a maximum total sign area of sixty (60) square feet per tenant." *Id.* at § 34(G)(1).

Arlington County's zoning ordinance, in addition to offering some sign permits as of right, also lets Arlington officials issue certain permits known as "comprehensive sign plans" as a "special exception" to the generally applicable sign rules. The Arlington County Board, after finding that a sign will not "affect adversely the health or safety of persons residing or working in the neighborhood" or "be detrimental to the public welfare or injurious to property," may or may not grant or deny a plan as it sees fit. *Id.* at §§ 34(a)(3) & 36(G)(1). To apply for a comprehensive sign plan, a would-be speaker must complete a permit application and submit a non-refundable $1,782 fee to cover the cost of processing the application.

Zoning Controversy

On Friday, August 13, 2010, Defendant Melinda M. Artman, the Arlington County Zoning Administrator, emailed Ms. Houghton to tell her that Wag More Dogs' artwork violated the Arlington County zoning ordinance because it was "showing dogs at play and leading to your emergency exit door." Houghton Decl. ¶ 6. That same day, Ms. Artman placed a "lock" on Ms. Houghton's building permit, which prevented Wag More Dogs' contractor from scheduling a final building inspection. *Id.* Ms. Artman stated that Ms. Houghton could either paint over the artwork or apply for a comprehensive sign plan. If she chose the latter route, Ms. Houghton was to cover the artwork with a tarp until the County Board acted on her application. *Id.*

On Monday, August 16, 2010, Ms. Houghton emailed Ms. Artman to ask what she could do in order to display her artwork. *Id.* at ¶ 7. Ms. Artman responded that "[f]or the mural to NOT be considered a sign, it may depict anything you like EXCEPT something to do with dogs, bones, paw prints, pets, people walking their dogs, etc. In other word [sic], the mural can not show anything that has any relationship with your business. If it does, then it becomes a sign." *Id.*; *see also id.*, Ex. 3.

Ms. Houghton told Ms. Artman on August 17, 2010, that she would cover the artwork with a tarp until she could hire painters to "change the dogs to flowers." *Id.* at ¶ 8. Ms. Houghton covered most of the art with a series of tarps, but Ms. Artman refused to release the "lock" because some dogs remained visible due to the presence of an emergency exit and roof access ladder. *Id.* at ¶ 11. After Ms. Houghton completely covered the art with an additional tarp, Ms. Artman released the building lock. *Id.* at ¶ 12.

On September 10, 2010, Ms. Houghton received a temporary certificate of occupancy for 2606 South Oxford Street, which stated that "[t]his permit is valid as long as the tarp covering a mural that also meets the definition of a sign as determined by the Zoning Administrator and which faces Shirlington Dog Park remains in place." *Id.* at ¶ 15. Ms. Houghton opened for business on Wednesday, September 15, 2010. *Id.* Wag More Dogs had to adjust the tarp several more times, including one time because, in the words of an Arlington County inspector, "[t]he tarp is not adequately secured behind and to the sides of the black metal fire ladder exposing parts of the mural including a depiction of a dog bone." *Id.* at ¶ 17. Once the tarp was secured in a manner than Ms. Artman approved, she issued a final certificate of occupancy on September 27, 2010, which was conditioned on the tarp's continued presence. *Id.* at ¶ 18.

Arlington County's Suggested Alternative

Several weeks later, Arlington officials contacted Ms. Houghton with another option. In an October 8, 2010 email, Laiza N. Otero, Constituent Services Manager for the Office of the County Manager, suggested that if Ms. Houghton, at her own expense, painted "the official name of the [Shirlington Dog Park] on the mural" then "the mural becomes an informational sign" under Section 34(E)(4) of the Arlington County Zoning Ordinance and would not require a permit. Houghton Decl. ¶ 20.

Under that option, Ms. Houghton must first "provide the County [with] a sketch prior to painting the lettering to ensure it will be in compliance." *Id.* The official said that the lettering must run the length of the art and estimated "that the lettering would have to be at minimum 48 inches tall." In an email dated October 15, 2010, Ms. Otero noted that the park's official name was "Shirlington Park's Community Canine Area" so that the entire lettering would read "Welcome to Shirlington Park's Community Canine Area." *Id.* at ¶ 21. Due to the message's length, Ms. Otero said that Ms. Houghton may need to use two lines (or eight feet of vertical wall space) to accommodate it. *Id.*

SUMMARY OF ARGUMENT

Ms. Houghton has opened a new business that has painted a piece of art to beautify the Shirlington Dog Park and create goodwill with the park's patrons. But because her art depicts happy cartoon dogs, bones, and paw prints rather than flowers, dragons, or ponies, Ms. Houghton has had to cover it with a series of tarps. Arlington County told Ms. Houghton that the tarps may come down only if she (1) replaces the mural's message with one that does not have "any relationship" with its business, (2) applies for and secures special permission from Arlington County officials, or (3) adds a new message that Arlington County has chosen. Taking down the tarps without doing one of these things will expose Ms. Houghton to civil and criminal penalties.

This controversy is the logical consequence of a profoundly flawed sign code that is unconstitutional both in how it is drafted and in how it is enforced. In Part I.A, Ms. Houghton demonstrates how both the ordinance's "directs, identifies, or informs" language and Ms. Artman's "has any relationship" test are content-based regulations that require government officials to divine a mural's message in order to decide whether it requires a permit. Part I.B. shows how the ordinance is vague on its face when it asks if a piece of art "directs, identifies, or informs" the public. It also shows how the ordinance is also vague as enforced, since Ms. Artman's inquiry into whether a painting "has any relationship" with one's business is wholly unpredictable. And, in Part I.C., Ms. Houghton shows how the "options" that Arlington County has put forward all violate the First Amendment in that they either compel her to mouth Arlington County's words or would subject her to a standardless approval process.

Arlington County cannot justify imposing these harms on Ms. Houghton. All of Arlington County's restrictions and commands rest on a desire to regulate the specific message that Ms. Houghton wishes to express. Accordingly, the County must show how they satisfy strict scrutiny. In other words, for the sign code to survive, Arlington County must produce evidence that the ordinance is narrowly tailored to serve a compelling government interest. It cannot make such a showing.

Because there is no possibility that Arlington County's ordinance as enforced will pass First Amendment muster, and because the other factors involved in issuing a preliminary injunction weigh in Ms. Houghton's favor, Ms. Houghton respectfully request that this Court enjoin Arlington County from revoking her certificate of occupancy or otherwise subjecting her to civil and criminal penalties for displaying her artwork for the duration of this litigation.

ARGUMENT

Kim Houghton has been silenced for more than three months, unable to display a mural that poses no risk of harm and was previously enjoyed by all. She asks this Court to grant her a preliminary injunction allowing her to once more display her mural. Plaintiffs seeking such an injunction must show "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." *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir. 2009) (quoting *Winter v. NRDC, Inc.*, 129 S. Ct. 365, 374 (2008)), *vacated by* 130 S. Ct. 2371 (2010), *reinstated in relevant part by* 607 F.3d 355 (4th Cir. 2010).

In this case, each factor strongly favors the issuance of an injunction. Ms. Houghton is certain to succeed on the merits for the simple reason that Arlington County cannot show how its actions are narrowly tailored to serve a compelling government interest. Furthermore, Ms. Houghton has suffered and continues to suffer irreparable harm as Arlington County's actions have prevented her from displaying her artwork under the threat of closure, fines, and even jail time. Moreover, there are no third parties that an injunction might injure, nor is there any public interest in the continued enforcement of an unconstitutional law. Finally, because there is no financial risk to Arlington County, Ms. Houghton respectfully asks that the Court set the security requirement of Federal Rule of Civil Procedure 65(c) at either zero or at a nominal amount.

I. Ms. Houghton Is Likely to Succeed on the Merits of Her First Amendment Claim.

The First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, states that government "shall make no law . . . abridging the freedom of speech." Both as written and as interpreted, Arlington County's zoning ordinance is unconstitutionally vague and a content-based restriction on speech. Its comprehensive sign plan,

far from rectifying any constitutional infirmities, acts as a prior restraint. And lastly, Arlington County's suggested "compromise," which would require Ms. Houghton to paint the County's message over her art, compels her to convey Arlington County's message rather than her own.

Because Arlington County's actions restrict Ms. Houghton's First Amendment rights, they are "presumptively invalid" and must be justified by the government. But Arlington County cannot hope to meet this burden, either now or at final judgment.[3] For that reason, Ms. Houghton asks that this Court grant her motion and let her display her artwork once again.

A. Arlington County's Sign Code, Both As Written and Enforced, Is an Impermissible Content-Based Restriction on Speech.

Both as written and interpreted, Arlington County's sign ordinance requires government officials to intensely scrutinize a would-be speaker's message. But laws that burden speech based on what it says are highly disfavored under the First Amendment and may survive only in the narrowest of circumstances. Those circumstances do not exist here.

1. Arlington's sign code, as written and enforced, has Arlington County officials inquire into both a putative sign's message and a speaker's identity in order to decide whether to regulate that speech.

Inquiries that turn on the particular message that speech conveys are content-based restrictions on speech. *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 429 (1993) (holding that under a "commonsense understanding of the term," Cincinnati's newsrack policy, which banned certain newsracks depending on the content of the publication resting inside them, was a content-based restriction); *see also Satellite Broad. & Communs. Ass'n v. FCC*, 275 F.3d 337, 353 (4th Cir. 2001) (stating that for a regulation to be deemed content neutral, it may not "on its face . . . confer[] benefits or impose[] burdens based upon the content of the speech it

[3] "[T]he burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006).

regulates"). As Arlington County's sign code is both written and administered, whether a piece of art is a "sign" depends on what it says and who is doing the speaking.

To decide whether any word, design, or banner is a sign, Arlington officials must conduct a rigorous inquiry to determine whether it is used to "direct, identify, or inform." In this case, Ms. Artman told Ms. Houghton that her artwork was a sign because, in Ms. Artman's opinion, it portrayed "dogs at play and leading to your emergency exit door." Houghton Decl. ¶ 6. Since Ms. Houghton grooms and boards dogs, Ms. Artman concluded that the mural directed and informed the public. When Ms. Houghton asked what modifications she could make to the mural so it would not be considered a sign, Ms. Artman responded, "For the mural to NOT be considered a sign, it may depict anything you like EXCEPT something to do with dogs, bones, paw prints, pets, people walking their dogs, etc." *Id.* at ¶ 7; *see also id.*, Ex. 3. In other words, Ms. Houghton's artwork would be exempted if she would only put forward a different message.

Regulating what subjects a speaker may discuss is "an objectionable form of content-based regulation." *Hill v. Colorado*, 530 U.S. 703, 723 (2000). Courts across the country that have looked at similar statutes have repeatedly declared them to be unconstitutional. For instance, in *Solantic, LLC v. City of Neptune Beach*, the Eleventh Circuit held that a sign code was a content-based restriction on speech because "some types of signs are extensively regulated while others are exempt from regulation based on the nature of the messages they seek to convey." 410 F.3d 1250, 1266 (11th Cir. 2005). Similarly, the Eighth Circuit in *Whitton v. City of Gladstone* concluded that a statute was content-based because it imposed burdens "based *solely* on the content or message conveyed by the sign." 54 F.3d 1400, 1404 (8th Cir. 1995) (emphasis in original). And in *Matthews v. Town of Needham*, the First Circuit struck down a

town bylaw as a content-based restriction because it conveyed a preference for certain messages over others. 764 F.2d 58, 60 (1st Cir. 1985).

The Fourth Circuit's doctrine is in harmony with its sister circuits on this point. In *Covenant Media of S.C., LLC v. City of N. Charleston*, the Fourth Circuit considered a law that permitted on-site signs while restricting the number and size of new "billboards," which the law defined as signs "advertising a business, person, or activity . . . not located on the premises where the sign is installed." 493 F.3d 421, 424-25 (4th Cir. 2007). Appellants argued that the law's procedural safeguards were inadequate under *Maryland v. Freedman*, 380 U.S. 51 (1965).

The Fourth Circuit rejected the challenge, first holding that *Freedman*'s protections applied only when the government restricts speech based on its content. *Covenant Media*, 493 F.3d at 432. The Court then concluded that North Charleston's ordinance was content neutral because its purpose was to regulate "where particular signs were located" in order to "enhance the visual environment" of the city. *Id.* at 433-34. Although officials had to ask whether a sign's message was related to its location, that "kind of cursory inspection" did not make the regulation content-based. *Id.* at 434. Instead, the Fourth Circuit said that in order to classify a sign ordinance as content-based "there must be a more searching inquiry into the content." *Id.*

Arlington County's ordinance, both as written and as enforced, requires that searching inquiry. To decide whether a mural is a sign or a piece of art under its zoning ordinance, Arlington officials must divine not only if a mural "directs, identifies, or informs," but whether it bears "any relationship" with the would-be speaker's business. *See* Arlington County, Va., Zoning Ordinance § 34(B); *see also* Houghton Decl. ¶ 7. The only way to accomplish that, however, is to conduct a probing inquiry that asks what the speaker is trying to say and whether

that message is related to the speaker's economic, social, or philanthropic activities.[4] This is impermissible. *See Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (holding that "official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment").

One recent example of this phenomenon occurred in the Ballston neighborhood of Arlington County. The organizers a mixed-use development project named Founders Square wanted to put a banner around their construction site next to the Ballston Common Mall. Because the project's goal was to put up several new buildings, Arlington County told the organizers that they could not have anything that either depicted the project itself or any details of the buildings. In order to avoid a fight, the organizers instead put up a banner of other images (including a waterfall, trees, and clouds) that Arlington County did not feel informed anyone.[5] Likewise, Arlington County has told Ms. Houghton that she may have a mural on her rear wall without securing a permit so long as it conveys a different message. Because the very basis for Arlington County's regulation turns on what Ms. Houghton's artwork says and who says it, it is a content-based restriction on speech. *Discovery Network*, 507 U.S. at 429.

Burdening speech on the basis of its message is anathema to the First Amendment. *See, e.g.*, *Carey v. Brown*, 447 U.S. 455, 461 (1980) (striking down an Illinois statute that permitted residential picketing only if it concerned a labor dispute); *Police Dep't of Chicago v. Mosley*,

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[4] Furthermore, the court in *Covenant Media* was construing a law that dealt specifically with billboards. The Supreme Court in *Metromedia, Inc. v. City of San Diego* cautioned that "[e]ach method of communicating ideas is a law unto itself and that law must reflect the differing natures, values, abuses and dangers of each method." 453 U.S. 490, 501 (1981) (internal quotation marks omitted). It then went on to state that "[w]e deal here with the law of billboards." *Id.* Therefore, the on-site/off-site inquiry that the Fourth Circuit discussed in *Covenant Media* has little utility outside that specific context.

[5] Rebecca Cooper, *New Ballston Development Gets Artists' Treatment*, TBD.com (Oct. 11, 2010, 10:39 AM), http://tbd.ly/9CuIyh.

408 U.S. 92, 95 (1972). Nor may the government single out particular speakers for special burdens. *Citizens United v. Federal Election Commission*, 130 S. Ct. 876, 898 (2010).[6] Whether a piece of art is a sign in Arlington County's eyes turns on whether it had "any relationship with [the speaker's] business." Houghton Decl. ¶ 7. This means that an auto-part shop could display Wag More Dogs' artwork without it being considered a sign. Likewise, Wag More Dogs may paint a picture of flowers, dragons, or ponies. But "such discrimination among different users of the same medium for expression . . . is another form of content-based speech regulation." *Solantic*, 410 F.3d at 1266 (internal quotations omitted). Because Arlington County's sign ordinance relies on government officials' deep inspection of a sign's message, it is a content-based restriction on speech that is subject to strict scrutiny.

2. Arlington County cannot justify its content-based restriction on speech under strict scrutiny.

Content-based regulations of speech "normally are invalid under the First Amendment unless narrowly tailored to promote a compelling state interest." *E.g.*, *Ostergren v. Cuccinelli*, 615 F.3d 263, 271 (4th Cir. 2010). Arlington County cannot come close to meeting either aspect of that burden here.

Arlington County have no compelling interest in forbidding Ms. Houghton from displaying her artwork while exempting murals on other topics from regulation altogether. Although the Fourth Circuit has said that the interests that generally motivate local sign ordinances—traffic safety and aesthetics—are substantial, it has never held them to be compelling. *Cf. Lytle v. Doyle*, 326 F.3d 463, 470 (4th Cir. 2003) (declaring governmental interest in traffic safety to be "substantial and legitimate"); *Am. Legion Post 7 v. City of Durham*,

[6] *See also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue.").

239 F.3d 601, 609 (4th Cir. 2001) (deeming government interest in aesthetics to be "substantial"). Indeed, counsel for Ms. Houghton can locate no case in which a court has held otherwise.[7]

But even assuming for the sake of argument that traffic safety and aesthetics are compelling interests, the inquiry does not end there: Arlington County must also show how its sign code directly advances those interests in a narrowly tailored manner. *Psinet, Inc. v. Chapman*, 362 F.3d 227, 238 (4th Cir. 2004). This requires actual proof, not mere conjecture. *Edenfield v. Fane*, 507 U.S. 761, 771 (1993); *see also News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.*, 597 F.3d 570, 579 (4th Cir. 2010) (striking down ban on newsracks in airport in part due to Authority's failure to adduce evidence showing that "placing news-racks inside the Airport's terminals would cause substantial and widely recognizable aesthetic harm"). It is inconceivable that banning signs of frolicking dogs can be proven to advance a compelling government interest.

The Arlington ordinance fails the narrow-tailoring requirement for another reason: It is under-inclusive. *See Fla. Star v. B.J.F.*, 491 U.S. 524, 540 (1989) ("[T]he facial underinclusiveness [of a speech regulation] raises serious doubts about whether [the government] is, in fact, serving . . . the significant interests which [it] invokes . . . ."). A law is underinclusive, and hence not narrowly tailored, "when it discriminates against some speakers but not others without a legitimate 'neutral justification' for doing so." *Nat'l Fed'n of the Blind v. FTC*, 420

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[7] *See, e.g.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981) (plurality opinion) (concluding that aesthetics and traffic safety constituted "substantial" but not "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."); *Dimmitt v. Clearwater*, 985 F.2d 1565, 1570 (11th Cir. 1993) (holding that the "deleterious effect of graphic communication upon visual aesthetics and traffic safety . . . is not a compelling state interest"); *Vill. of Schaumburg v. Jeep Eagle Sales Corp.*, 676 N.E.2d 200, 204 (Ill. App. Ct. 1996).

F.3d 331, 345 (4th Cir. 2005) (quoting *Discovery Network, Inc.*, 507 U.S. at 429-30). Here, Arlington County treats Ms. Houghton's artwork as a prohibited "sign," yet it would allow an auto-repair shop to display that exact same art. Likewise, Ms. Houghton could paint a mural of a similar size and style as long as it displayed flowers, dragons, or ponies instead of happy cartoon dogs. The fact that Arlington County's ordinance would exempt the same artwork if a different person displayed it, or similar artwork if only it had a slightly different message, demonstrates how Arlington's sign code is woefully underinclusive and not narrowly tailored. *See Solantic*, 410 F.3d at 1268. Because Arlington County cannot prove that the sign ordinance serves a compelling interest, or does so in a narrowly tailored manner, it is unconstitutional.

B. Arlington County's Sign Code, Both as Written and Interpreted, Is Unconstitutionally Vague.

Beyond being an impermissible content-based restriction on speech, Arlington County's ordinance fails to give Arlington residents and business any guidance as to which paintings may be freely displayed and which paintings will be regulated as signs. In Section 1, Ms. Houghton demonstrates how the plain language of the ordinance, which asks whether a painting "is used to direct, indentify, or inform," is unconstitutionally vague. And in Section 2, Ms. Houghton shows that the "any relationship" test that Ms. Artman employs likewise leaves would-be speakers guessing.

1. The ordinance's definition of a sign as any design "used to direct, identify, or inform" is unconstitutionally vague.

Arlington County's Zoning Ordinance defines a "sign" as "[a]ny word, numeral, [or] figure . . . [which] is used to direct, identify, or inform the public." Arlington County, Va., Zoning Ordinance § 34(B). The problem with this definition comes from the phrase "used to

direct, identify, or inform the public." The ordinance does not define any of these terms,[8] and applying each word's common meaning leaves would-be speakers unable to know in advance if a piece of art is a "sign." As a result, every would-be speaker must guess at whether Arlington County will later decide that he or she should have asked for permission before speaking.[9]

This uncertainty is fatal to Arlington County's ordinance. Governments that seek to regulate protected expression may regulate "only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963); *see also Marks v. United States*, 430 U.S. 188, 196 (1977) ("We have taken special care to insist on fair warning when a statute regulates expression and implicates First Amendment values."). As the Supreme Court has recognized, "vague laws may not only trap the innocent by not providing fair warning or foster arbitrary or discriminatory application but also operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Buckley v. Valeo*, 424 U.S. 1, 41 n.48 (1976) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)). Likewise, a vague and unknowable standard begs for government officials to "clarify" it in a way that leaves them with unrestrained discretion.

To protect freedom of expression, the Fourth Circuit asks whether a statute either (1) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or (2) "authorizes or even encourages arbitrary and discriminatory enforcement." *Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074, 1079 (4th Cir. 2006) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). The inquiry ultimately turns on whether a statute is

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[8] *See* Arlington County, Va., Zoning Ordinance § 1.

[9] The definition of "direct" is "to show or point out the way for," according to Merriam-Webster.com. Likewise, "identify" is defined as "to establish the identity of" or "to conceive as united (as in spirit, outlook, or principle)," while "inform" means to "to impart information or knowledge." Merriam-Webster, http://www.merriam-webster.com/dictionary (last visited Nov. 30, 2010).

"set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973) (quoting *U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973)). If a statute or policy's terms fail to provide sufficient guidance, or leave decisions to the discretion of government officials, the Fourth Circuit will declare them invalid.

In *North Carolina Right to Life, Inc. v. Leake*, for instance, North Carolina law dictated that all "political committees" had to register with the state and face significant regulatory burdens. 525 F.3d 274, 286 (4th Cir. 2008). But whether a group was treated as a political committee depended on whether it had "as a major purpose to support or oppose the nomination or election of one or more clearly identified candidates." *Id.* (quoting N.C. Gen. Stat. § 163-278.6(14)(d)). The Court held that an ordinary citizen, facing that definition, would never be able to tell when "the 'purpose' of supporting or opposing a candidate becomes 'a major purpose.'" *Id.* at 290. Furthermore, leaving it to North Carolina officials to determine when that line was crossed gave them unguided discretion and left application of the code "open to the risk of partisan or ideological abuse." *Id.* The Court thus held the North Carolina's definition of "political committee" to be facially unconstitutional.

Similar concerns motivated the Fourth Circuit in *Child Evangelism Fellowship v. Anderson School District Five*, 470 F.3d 1062 (4th Cir. 2006). There, a local school district denied a nonprofit religious organization's request for a fee waiver for religious club meetings to be held in the district's facilities. Generally, the district would charge those who used school facilities a fee in order to recoup the district's personnel and operating expenses, but the district reserved the right to waive "any or all charges as determined to be in the district's best interest." *Id.* at 1065. The Fourth Circuit held the phrase "in the district's best interest" to be "a virtual

prescription for unconstitutional decision making," because its vagueness granted to government officials the power "to regulate speech guided only by their own ideas of what constitutes the good of the community." *Id.* at 1070 (internal quotations and citations omitted).

The zoning ordinance's definition of a "sign" is just as incomprehensible and vests in Arlington officials just as much discretion as the terms in *Leake* and *Child Evangelism Fellowship*. Whether a piece of art "directs, identifies, or informs" asks a government official to decide for herself if that art conveys a specific meaning. Because that determination is irreducibly subjective, a would-be speaker has no way to predict what the official will decide.

Imagine that an Arlington business reproduces a Salvador Dali painting on its exterior wall. Does that reproduction direct, identify, or inform the public? About what? Does the answer to that question turn on what type of business put the artwork up? Or imagine a mural that depicts an image of a Star of David. Does that image "identify" the building to passers by? Does the answer to that question turn on whether the painting is on the outside of a synagogue or a grocery store? What if the grocery store prides itself on strictly observing Jewish dietary rules?

The answers to these questions are unknowable without first asking an Arlington county official. And this uncertainty is not merely hypothetical. For instance, a local area church wanted to put up a series of banners that portrayed a tree branch with a bird upon it.[10] Arlington County stated that the banners were a sign because, in the view of officials, they "directed" parishioners to the church's door.[11] But the means by which Arlington County came to that conclusion remain a mystery. Ultimately, the church secured a use permit which required it to reduce the size of the banners by approximately fifty percent. *Id.*

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[10] Rebecca Cooper, *Arlington Temple church looks to brighten up Rosslyn*, TBD.com (Oct. 5, 2010, 05:00 AM), http://tbd.ly/9XzvcT.

[11] Rebecca Cooper, *Church's banners raise more questions on sign laws*, TBD.com (Oct. 25, 2010, 11:43 AM), http://tbd.ly/aWIgiS.

The ordinance's definition of a sign gives would-be speakers no way to know if they have crossed Arlington County's arbitrary line. Nor does it give local officials any objective constraints to guide their decision making. *See Leake*, 525 F.3d at 290 (holding that a "'we'll know it when we see it approach' simply does not provide sufficient direction to either regulators or potentially regulated entities" and is therefore unconstitutionally vague). The ordinance is unconstitutionally vague not because it is written in a manner that "requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). The only remedy for such an unclear ordinance is to declare it unconstitutional on its face and have Arlington County redraw it in a way that comports with the First Amendment.

2. Ms. Artman's construction of the ordinance's definition of a sign—whether a piece of art has "any relationship with your business"— is also unconstitutionally vague.

Whether a piece of art in Arlington County is deemed to be a sign does not rest solely on whether it "directs, identifies, or informs." Correspondence between Ms. Houghton and Ms. Artman showed that, in practice, Arlington County employs a definition of "sign" that is even more vague than the statutory definition. According to Ms. Artman, a piece of art will be considered a sign unless it avoids "show[ing] anything that has any relationship with [the] business" to which it is attached. Houghton Decl. ¶ 7. But far from fixing the vagueness problems in the ordinance as written, this construction only compounds them.

Declaring that Ms. Houghton's artwork cannot "show anything that has any relationship with [her] business" only results in Ms. Houghton and others asking what "any relationship with your business" means. Consider the happy cartoon dogs, bones, and paw prints that are at issue in this case. Although they may have a relationship with Ms. Houghton's business, would Ms. Artman consider them a sign if they were put up by a grocery store? Would the answer to that

question turn on what particular items the grocery store sold (say, whether it sold pet food) or what percentage of its inventory was taken up by those products? What about a business that did not itself sell any pet-related products but held itself out to the community as a pet-friendly establishment? And, most importantly, how could any speaker be able to predict any of this?

Ms. Artman previously said about the Founders Square project that "we would consider art something that has absolutely nothing to do with what you're going to put up on this site. If you have a painting of fuffy clouds, which achieves the purpose of masking the hole, but doesn't direct identify or inform anybody of the project, that's fine."[12] In other words, Arlington County has created a test that turns solely on its determination of whether a painting, in its mind, either "directs, identifies, or informs" or "has any relationship" with a business. But these subjective standards do not give fair warning to the public, meaningfully cabin the discretion of County officials, or guard against the threat that speakers will "steer far wider of the unlawful zone" to avoid liability. *See Grayned*, 408 U.S. at 108-09. Because Arlington County's definition of a sign fails to meet the stringent vagueness test that must apply to any statute that "threatens to inhibit the exercise of constitutionally protected rights," *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982), it must fail.

C. The "Options" Arlington County Offered to Ms. Houghton Violate the First Amendment.

A series of large blue tarps now obscure Ms. Houghton's artwork. Arlington County has stated that for Ms. Houghton to remove the tarps without forfeiting her certificate of occupancy, she must paint over the offending dogs, bones, and paw prints. The only other options available are for Ms. Houghton to either secure a "comprehensive sign plan" or paint "Welcome to Shirlington Park's Community Canine Area" in four-foot high letters. Houghton Decl. ¶ 20. But

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[12] Rebecca Cooper, *Church's banners raise more questions on sign laws*, TBD.com (Oct. 25, 2010, 11:43 AM), http://tbd.ly/aWIgiS.

these "options," far from resolving any constitutional infirmities, merely introduce new ways in which Arlington County is stifling speech.

1. Arlington County's "comprehensive sign plan" would require Ms. Houghton to secure the arbitrary approval of government officials and acts as an unconstitutional prior restraint.

Ms. Artman has stated that Ms. Houghton may apply for a "comprehensive sign plan," which lets the Arlington County Board grant a "special exception" to the generally applicable sign laws. But applying for and securing a comprehensive sign plan is a burdensome and ultimately capricious process that does not adequately protect freedom of speech.

A law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51 (1969). But the standards by which the Arlington County Board may approve an application for a comprehensive sign plan are wholly discretionary.[13] Under the Arlington zoning ordinance, if the County Board finds that a proposed use will not adversely affect health or safety, be detrimental to the public welfare or injurious to property, or conflict with the purposes of the master plans of the County, the Board *may* issue a use permit.[14] Alternatively, the County Board may deny the permit request, defer its consideration until a later session, or simply choose to take no action whatsoever.[15] And it need give no reason for its action (or inaction). Nothing in the ordinance limits the discretion that the ordinance invests in the County Board.

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[13] Applications for a comprehensive sign plans may come before the Arlington County Board either as amendments to a "site plan" or as a "use permit." Arlington County, Va., Zoning Ordinance, § 34(A)(3). Ms. Houghton understands that, were she to apply for a comprehensive sign plan, she would be asking the Arlington County Board for the latter.

[14] Arlington County, Va., Zoning Ordinance, § 36(G)(1).

[15] Arlington Department of Community Planning, Housing and Development, *Use Permit*, http://www.arlingtonva.us/Departments/CPHD/planning/applications/use_permit/CPHDPlanningApplicationsUse_permitMain.aspx#board.

Arbitrary power of this kind amounts to an impermissible prior restraint under the First Amendment. *Staub v. Baxley*, 355 U.S. 313, 322 (1958) (defining prior restraint as "requiring a permit or license [to speak or publish] which may be granted or withheld in the discretion of such official"). The concern with prior restraints is that government officials may use their unfettered discretion to privilege or burden certain speakers because of who they are or what ideas they espouse. *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763-64 (1988).

In *Forsyth County v. Nationalist Movement*, the Supreme Court considered an ordinance allowing the county administrator to decide how much to charge for police protection or administrative time at a public parade or assembly. 505 U.S. 123 (1992). Neither the ordinance nor standard practice required the administrator to rely on any objective factors or provide any explanation for his decision. *Id.* at 133. Furthermore, the administrator's decision was unreviewable. *Id.* Because "[t]he First Amendment prohibits the vesting of such unbridled discretion in a government official," the Court held the ordinance facially unconstitutional. *Id.*

Even if Arlington County's ordinance were a justifiable content-neutral restriction on speech (which it is not), its procedure for applying for a "comprehensive sign plan" runs afoul of the standard articulated in *Forsyth*. The Board is not bound by any objective factors in making its decision, nor must it provide any explanation. Indeed, the Board can simply choose to do nothing and let an application molder indefinitely. The government simply "may not condition that speech on obtaining a license or permit from a government official in that official's boundless discretion," *Lakewood*, 486 U.S. at 764, but that is precisely what the comprehensive sign plan requires. The unfettered "exercise of judgment, and the formation of an opinion," by Arlington County officials creates a "danger of censorship and of abridgment of our precious First Amendment freedoms [that] is too great to be permitted." *Forsyth*, 505 U.S. at 131.

2. Converting Ms. Houghton's artwork into Arlington County's sign by painting "Welcome to Shirlington Park's Community Canine Area" compels Ms. Houghton to speak.

Arlington County officials have said that Ms. Houghton may keep her artwork if she paints the official name of the dog park above her mural. According to officials, "a permit would not be required for this mural as [it would become] an informational sign as authorized by Section 34.E.4 of the Zoning Ordinance." Houghton Decl. ¶ 20. Section 34(E)(4) exempts from permitting "[i]nformational or directional signs or historic markers, erected by any authorized County or State official." Arlington County's position, then, is that adding this language will cause Ms. Houghton's artwork to become the County's sign, which would not require a permit.

It is settled law that the First Amendment protects not only speech, but the right of individuals to refrain from speaking. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). What Arlington County has told Ms. Houghton is that in order to remove the tarps that currently cover her artwork, she must change its message to one that is more to the County's liking. This is flatly unconstitutional. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech," *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988), and any attempt by the government to compel a certain preferred message must be justified under strict scrutiny. *See id.* at 798.

Arlington County is unable to demonstrate either how this condition advances a compelling government interest or is narrowly tailored. In *Wooley v. Maynard*, the U.S. Supreme Court considered a New Hampshire law that compelled drivers to bear the State's motto, "Live Free or Die," on their license plates. 430 U.S. 705 (1977). The state argued that the law helped further the state's message about "history, state pride, and individualism." *Id.* at 717. The Court rejected that argument, holding that an interest in furthering a message "no

matter how acceptable to some . . . cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Id.* While county officials may welcome patrons to the park, they may not press Ms. Houghton into doing it for them.

II. Ms. Houghton Will Suffer an Irreparable Injury Without an Injunction.

It is well-established in this Circuit that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Newsom v. Albemarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Furthermore, courts frequently find that vague ordinances (like the law here) and content-based restrictions on what messages may be displayed constitute an irreparable harm. *See, e.g.*, *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 654 (6th Cir. 2007) (holding that preliminary injunction was "necessary" where rules governing adult dancers violated the First Amendment); *Blue Moon Entm't, LLC v. City of Bates City*, 441 F.3d 561, 565 (8th Cir. 2006) (finding irreparable harm could exist where city code required a conditional-use permit for "adult night clubs," even though plaintiff had not applied for a permit); *Burk v. Augusta-Richmond Cnty.*, 365 F.3d 1247, 1257 (11th Cir. 2004) (reversing lower court's denial of motion for preliminary injunction of public-demonstration permit requirement); *cf. H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 620 (6th Cir. 2009) (finding that a district court's refusal to enjoin a zoning ordinance after finding it unconstitutional was an abuse of discretion).

Absent relief from this Court, Ms. Houghton faces a series of untenable choices. The tarps that currently cover Wag More Dogs' rear wall have caused many would-be customers to think that the business is closed. *See* Houghton Decl. ¶ 19. The only way to remove the tarps, absent an injunction, is to materially change Ms. Houghton's artwork to remove the dogs, bones, and paws, paint "Welcome to Shirlington Park's Community Canine Area" on the mural in four-

foot letters, or apply for a wholly discretionary zoning variance. In short, Ms. Houghton is currently stuck between two unpalatable options: She may either speak, and shutter her business, or she may acquiesce to Arlington County's unconstitutional demands in order to keep operating.

Arlington County may not condition Ms. Houghton's right to earn an honest living on accepting these burdens. The First Amendment prevents Arlington County from forcing Ms. Houghton to choose "between the Scylla of intentionally flouting [the regulations] and the Charybdis of forgoing" their right to express themselves. *Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (refusing to abstain from constitutional challenge to prohibition on plaintiff's distribution of handbills). Unless she obtains judicial relief, every decision Ms. Houghton is forced to choose between sharing her message with the dog park and "refrain[ing] from doing so rather than risk[ing] prosecution . . . ." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985).

III. The Remaining Preliminary-Injunction Factors Favor the Issuance of an Injunction.

Ms. Houghton can identify no third parties with any interest in preventing her from displaying her artwork. And there can be no question that the public interest favors the issuance of an injunction: In contrast to the irreparable harm that Ms. Houghton has suffered and will continue to suffer from having to choose between displaying her art and remaining in business, the public risks no harm at all if Arlington County is enjoined for the pendency of this litigation. After all, "upholding constitutional rights serves the public interest." *Newsom*, 354 F.3d at 261; *see also United States v. U.S. Coin & Currency*, 401 U.S. 715, 728 (1971) (Brennan, J., concurring) (referring to the government's "nonexistent interest in enforcing an unconstitutional statute"). The only consequence of an injunction's issuing is that patrons of the Shirlington Dog Park will once again be able to see the same mural that they previously enjoyed without incident.

IV. The Bond Requirement of Rule 65(c) May Be Satisfied With a Nominal Amount.

Federal Rule of Civil Procedure 65(c) requires that a party requesting preliminary injunctive relief provide security sufficient to "pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Although this Court has the duty to consider a request for an injunction bond, it has the discretion to set the bond amount in whatever amount it deems proper. *See Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 (4th Cir. 1999). There is no danger that Arlington County in this action will suffer any financial damage from Ms. Houghton unveiling her artwork for the pendency of this litigation. In noncommercial cases like this one where the risk of harm is remote or nonexistent, the proper course of action is to set the bond at either a nominal amount or in the amount of zero. *See id.* at 421 n.3. Ms. Houghton therefore respectfully requests that this Court set the security requirement for the preliminary injunction in this case at zero or in the nominal amount of $1.00.

CONCLUSION

For the reasons above, Ms. Houghton respectfully requests that this Court enjoin the Arlington County from revoking her certificate of occupancy or otherwise fining or penalizing her for displaying her unaltered mural for the duration of this litigation.

Respectfully submitted,

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**Pro Hac Vice Pending*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of December, 2010, a true and correct copy of **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** was dispatched to a third-party process server for service to the following Defendants:

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Zoning Administration
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(703) 228-3883

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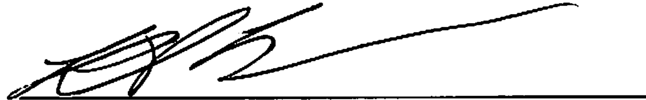

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