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United States Court of Appeals
Tenth Circuit

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

COZY INN, INCORPORATED, d/b/a The Cozy Inn; STEPHEN HOWARD,

Plaintiffs – Appellees,

v.

CITY OF SALINA, KANSAS,

Defendant – Appellant.

ALLIANCE DEFENDING FREEDOM; GOLDWATER INSTITUTE; LIBERTY JUSTICE CENTER; INSTITUTE FOR JUSTICE; MANHATTAN INSTITUTE; NATIONAL FEDERATION OF INDEPENDENT BUSINESS, INC.; PACIFIC LEGAL FOUNDATION,

Amici Curiae.

No. 25-3225

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 6:24-CV-01027-TC)

Todd G. Messenger (Amanda C. Jokerst and Lee Katherine Goldstein with him on the briefs), Fairfield and Woods, P.C., Denver, Colorado, for Defendant-Appellant.

Samuel G. MacRoberts (Jeffrey S. Shaw with him on the brief), Kansas Justice Institute, Overland Park, Kansas, for Plaintiffs-Appellees.

Brendan J. Philbin, Liberty Justice Center, Austin, Texas, filed an amicus curiae brief in support of Plaintiffs-Appellees.

John J. Bursch, Alliance Defending Freedom, Washington, District of Columbia; James A. Campbell and Christine N. Marsden, Alliance Defending Freedom, Lansdowne, Virginia; filed an amicus curiae brief in support of Plaintiffs-Appellees.

Ilya Shapiro and Trevor Burrus, Manhattan Institute, New York, New York; and Timothy Sandefur, Scharf-Norton Center for Constitutional Litigation at the Goldwater Institute, Phoenix, Arizona; filed an amicus curiae brief in support of Plaintiffs-Appellees and reversal.

Robert Frommer and Elizabeth (Betsy) Sanz, Institute for Justice, Arlington, Virginia; and Riley Grace Borden, Institute for Justice, Seattle, Washington; filed an amicus curiae brief in support of Plaintiffs-Appellees.

Jeremy Talcott and Amy L. Peikoff, Pacific Legal Foundation, Sacramento, California, filed an amicus curiae brief in support of Plaintiffs-Appellees.

J. Michael Connolly and Paul R. Draper, Consovoy McCarthy PLLC, Antonin Scalia Law School, Free Speech Clinic, Arlington, Virginia, filed an amicus curiae brief in support of Plaintiffs-Appellees and in favor of affirmance.

Before **MATHESON** and **PHILLIPS**, Circuit Judges, **URIAS**,[*] District Judge.

MATHESON, Circuit Judge.

This case arises from a dispute between Stephen Howard, owner of Cozy Inn, and the City of Salina, Kansas. Mr. Howard and Cozy Inn (collectively "Cozy Inn")

[*] The Honorable David H. Urias, U.S. District Judge, District of New Mexico, sitting by designation.

sued Salina, alleging that (1) its sign code violated the First Amendment and (2) its processing of Mr. Howard's application for a sign permit was a prior restraint. The district court granted summary judgment to Cozy Inn on both claims. Salina appeals. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

A. *Factual History*[1]

Displays in Salina are signs or murals. Salina regulates signs, which the sign code defines as:

> any writing (including letters, words or numerals), pictorial representation (including illustrations or decorations), emblem (including devices, symbols, or trademarks), flag, banner, streamer, pennant, string of lights, or display calculated to attract the attention of the public, or any other figure of similar character which:
>
> (1) Is a structure or any part thereof, or a portable display, or is attached to, painted on, or in any other manner represented on a building or other structure on the ground;
>
> (2) Is used to announce, direct attention to, or advertise; and
>
> (3) Is not located inside a building.

Salina, Kan., Code of Ordinances ch. 42, art. XIV, § 42-764 (2023) ("Salina Code"). The sign code states as its purposes "improv[ing] pedestrian and traffic safety,"

[1] We draw the facts from the summary judgment record.

"protect[ing] the aesthetic appearance of the city[]," "prevent[ing] property damage," and "protect[ing] property values." Salina Code § 42-500.

If individuals or businesses wish to paint or construct a sign, they must first obtain a permit. *Id.* § 42-501. A permit "shall be either issued or refused by the zoning administrator within ten (10) days after the receipt of an application therefore or within such further period as may be agreed to by the applicant." *Id.* § 42-502. Salina will issue a permit only if the proposed sign complies with all aspects of the code. *Id*. Salina will not issue a permit if the sign would be larger than the amount of surface area the property is authorized to use for signage. *See id*. § 42-521.

In contrast, Salina does not regulate murals. Salina does not restrict their size, limit their number, or subject them to the permitting requirement. Salina is home to many murals. For example, the Mural at the Mill is painted on an abandoned grain elevator in Salina and features children playing Ring Around the Rosie. The Yard, a baseball training facility, features a large display on its exterior wall that shows baseball players during a baseball game with phrases like "Outta the Park!" and "Major League Citizens." App., Vol. 5 at 74; App., Vol. 6 at 58-61; App., Vol. 14 at 42. A music-related business has a display on its exterior walls called "Symphony of Sunflowers" that features paintings of music notes and sunflowers. App., Vol. 1 at 174; App., Vol. 14 at 50.

Mr. Howard hired an artist to paint a display on the previously white exterior wall of Cozy Inn, a hamburger restaurant in downtown Salina, Kansas that has served sliders for more than 100 years. Once completed, the "UFO-themed" display would

"include whimsical hamburger-esque flying saucers piloted by aliens attacking The Cozy [Inn] with blasts of ketchup and mustard," and read, "Don't Fear the Smell![] The Fun is Inside!!" App., Vol. 13 at 194. The following are pictures of the unfinished display and a mocked-up final version:

App., Vol 1 at 30. Mr. Howard wished to partake in Salina's mural culture and show his and Cozy Inn's personality by constructing this display.

On November 3, 2023, the artist began painting the display. Salina employees noticed it almost immediately. City officials, including Lauren Driscoll, the Director of Community and Development Services; Dean Andrew, the Planning and Zoning Administrator; and Dustin Herrs and Dustin Michelson, two city planners, began discussing whether the display constituted a regulated sign or an unregulated mural. Based on analysis of the sign code and a photograph of the artist's work in progress, the officials concluded that the display was a sign and subject to regulation. They also "did the math" and concluded that the sign was too large. App., Vol. 5 at 16.

On November 6, 2023, city officials told Mr. Howard to pause the artist's work. They explained that the display was a sign subject to the code because the "hamburgers are basically the same thing [Cozy Inn] sells, and therefore, it would be signage." App., Vol. 4 at 217-18; App., Vol. 7 at 235. They also told Mr. Howard "that the painting would be too large to qualify for a sign permit" because it exceeded the allowable size by about eight times. App., Vol. 1 at 73, 75; App., Vol. 5 at 239-40; App., Vol. 7 at 235; App., Vol. 9 at 14.

On November 8, 2023, the City Manager, Michael Schrage, wrote in an email to the mayor and city commissioners that while the Cozy Inn display "might look similar to murals in the downtown and elsewhere, it contains a commercial message promoting a business and its product which makes it a wall sign." App., Vol. 5 at 151; App., Vol. 9 at 54-55. On November 9, 2023, Mr. Schrage generated talking

points, in which he noted that "[a] distinction is commonly made between murals and art when compared to commercial speech." App., Vol. 5 at 155.

City officials told Mr. Howard to submit a permit application, which he did on November 13, 2023. For the next three months, the parties did not communicate. On February 8, 2024, Salina sent Mr. Howard a letter, which neither granted nor denied his application, but instead put it on indefinite hold:

> This letter is to inform you that the City is engaging in a comprehensive review of the City's sign regulations, which will include a review of the regulations pertaining to painted wall signs. As a result of this, and due to the unique nature of the existing signs at The Cozy Inn, our office will be placing your . . . sign permit application on-hold until our review of the sign regulations is complete. Once we have completed that code review process, Staff will then be able to . . . review your sign permit application in the context of any sign regulations that may be revised during our code review.

App., Vol. 9 at 232; App., Vol. 7 at 166.

City officials believed that Mr. Howard agreed to Salina keeping his application on hold. Mr. Howard agrees that city officials informed him that his application was on hold, but disputes consenting to that decision. The record lacks evidence he agreed to an indefinite hold. Two weeks after receiving Salina's letter, Cozy Inn filed this lawsuit.

B. *Procedural History*

Cozy Inn's amended complaint alleged that the sign code and Salina's enforcement practices violated the First Amendment because (a) the distinction between regulated signs and unregulated murals is content-based and cannot survive

strict scrutiny, and (b) the sign code and its enforcement is an unconstitutional prior restraint.[2]

Cozy Inn sought a "declaratory judgment that Salina's written sign code, its unwritten policies and practices, its sign-permit requirement, and its enforcement mechanisms are an impermissible content-based restriction on speech, [and] an unlawful prior restraint on speech." *Cozy Inn, Inc. v. City of Salina*, No. 24-cv-01027-TC, 2025 WL 3223806, at *6 (D. Kan. Nov. 19, 2025). Alternatively, they sought "a declaration that the sign policies fail to satisfy intermediate scrutiny, assuming they are found to be content-neutral restrictions on speech." *Id.* Finally, they sought "permanent injunctive relief enjoining Salina and its officials from enforcing the entire sign code and any associated practices against them if they complete their unfinished display." *Id.*

The parties filed cross-motions for summary judgment on all claims. Relevant here, the district court denied summary judgment to Salina on the First Amendment claims and granted Cozy Inn summary judgment on those claims. The court granted declaratory relief to Cozy Inn but denied a permanent injunction.

On the First Amendment claim challenging the sign code, the district court declined to determine whether the code was content based, which requires strict

[2] Cozy Inn also alleged that the sign code is impermissibly vague in violation of the Fourteenth Amendment's Due Process Clause. The district court denied summary judgment to Cozy Inn on the vagueness claim. This ruling is not part of this appeal.

scrutiny, or content neutral, which requires intermediate scrutiny. The court reasoned that "Salina's regulations fail even accepting that intermediate scrutiny applies" due to insufficient evidence "connecting its solution—distinguishing between signs that pertain to the goods and services sold on-site and murals that do not—to its stated interests." *Id*. at *13, *16.

II. DISCUSSION

Salina appeals the district court's grant of Cozy Inn's summary judgment motion on the First Amendment claims and the district court's denial of its summary judgment motion on those claims. "We review de novo cross-motions for summary judgment, viewing the evidence in the light most favorable to the non-prevailing party." *Davidson Oil Co. v. City of Albuquerque*, 108 F.4th 1226, 1230 (10th Cir. 2024) (citing *Allen v. Sybase, Inc.*, 468 F.3d 642, 649 (10th Cir. 2006)). A court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). If we affirm summary judgment for Cozy Inn, we do not need to address the denial of Salina's motion.[3]

[3] We do not typically review the denial of a summary judgment motion because it is not a final order under 28 U.S.C. § 1291. *See McWilliams v. Dinapoli*, 40 F.4th 1118, 1122 (10th Cir. 2022). "Where we reverse a summary judgment order in favor of one party, however, we will review the denial of the other party's cross-motion for summary judgment under the same standards applied by the district court so long as it is clear that the party opposing the cross-motion had an opportunity to dispute the material facts." *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251, 253 (10th Cir. 1993). But because we affirm summary judgment in favor of Cozy Inn, we need not review the denial of Salina's summary judgment motion.

On appeal, Salina argues (A) the sign code does not violate the First Amendment because it is content neutral and satisfies intermediate scrutiny and (B) it did not impose a prior restraint on Cozy Inn's speech when it placed Mr. Howard's application on indefinite hold. Aplt. Br. at 23, 25, 51.

A. *First Amendment Sign Code Challenge*

1. Legal Background

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. "By incorporation through the Fourteenth Amendment, this prohibition applies to states and their political subdivisions." *Aptive Env't, LLC v. Town of Castle Rock*, 959 F.3d 961, 979 (10th Cir. 2020). It therefore applies to municipal ordinances like the sign code. *See Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938). "[W]hen a law infringes on the exercise of First Amendment rights, its proponent bears the burden of establishing its constitutionality." *Brewer v. City of Albuquerque*, 18 F.4th 1205, 1217 (10th Cir. 2021) (quoting *Ass'n of Cmty. Orgs. for Reform Now v. Municipality of Golden*, 744 F.2d 739, 746 (10th Cir. 1984)).

"Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). "A regulation of speech is facially content based under the First Amendment . . . if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'" *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 69 (2022) (quoting *Reed*, 576 U.S. at 163). Content-based laws

are subject to strict scrutiny and "may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 155.

Laws that regulate speech without reference to content are subject to intermediate scrutiny. *See Hill v. Colorado*, 530 U.S. 703, 719 (2000). They survive First Amendment challenges "if [they] advance[] important governmental interests unrelated to the suppression of free speech and do[] not burden substantially more speech than necessary to further those interests." *TikTok Inc. v. Garland*, 604 U.S. 56, 70 (2025). Under intermediate scrutiny, the sign code thus must be "narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication." *McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1070 (10th Cir. 2020); *see Ward v. Rock Against Racism*, 491 U.S. 781, 791, 799 (1989).

This standard "demand[s] a close fit between ends and means." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). As such, the "regulation may [not] burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799. Narrow tailoring "ensures that restrictions on speech are not permitted when either the harms or the remedial effects of the government's restrictions are supported only by speculation or conjecture." *McCraw*, 973 F.3d at 1071. "The government has the burden of persuasion in this inquiry." *VoteAmerica v. Schwab*, 121 F.4th 822, 852 (10th Cir. 2024).

2. Analysis

Salina argues that the sign code is content-neutral, triggering intermediate scrutiny. Aplt. Br. at 23, 25. Mr. Howard and Cozy Inn argue that it is content based, triggering strict scrutiny. Aplee. Br. at 31. Like the district court, we need not resolve this dispute because we determine that Salina has not shown that the sign code meets intermediate scrutiny.[4]

The sign code lists as its purposes traffic and pedestrian safety, aesthetics, and property values. Salina Code § 42-500. Mr. Howard and Cozy Inn do not dispute the significance of these interests. Neither do we.[5] But the fact that Salina's interests are "substantial in the abstract do[] not allow [it] to justify any regulation simply through talismanic invocation of that interest." *Aptive Env't*, 959 F.3d at 995-96. The sign code must also be narrowly tailored to achieve those interests.

[4] We conducted the same analysis in *McCraw*, 973 F.3d at 1070: "Plaintiffs argue that we should apply strict scrutiny because the Revised Ordinance discriminates based on content. We need not reach this argument. As discussed below, we ultimately conclude the Revised Ordinance fails even intermediate scrutiny."

[5] *See, e.g.*, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 491 (1981) (explaining that "traffic safety and the appearance of the city . . . are substantial governmental goals"); *Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984) (explaining that "the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property . . . constitutes a significant substantive evil within the City's power to prohibit"); *StreetMediaGroup, LLC v. Stockinger*, 79 F.4th 1243, 1247 (10th Cir. 2023) (holding constitutionally permissible Colorado's signage act, which promotes "roadside safety and aesthetics").

a. Evidence required to show narrow tailoring

The parties dispute how the intermediate scrutiny burden must be satisfied. Salina argues that narrow tailoring is "satisfied by common sense and legislative deference" and that the "collective legislative judgment" of "not less than 34 other local governments [that] use essentially the same [sign code]" should preclude the need for further evidentiary showings. Aplt. Br. at 36, 39. Cozy Inn counters that "Salina must produce evidence that its restrictions advance, and are tailored to, its interests" and that Salina failed to do so. Aplee. Br. at 41, 45-51. We agree with Cozy Inn.

First, Salina's primary reliance on *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) and *Members of City Council of City of L.A. v. Taxpayers for Vincent*, 366 U.S. 789 (1984) is misplaced. *See* Aplt. Br. at 36. In *Metromedia*, the Supreme Court applied the commercial speech doctrine to uphold San Diego's ordinance prohibiting "outdoor advertising display signs" with exceptions for "onsite signs and signs falling within [certain] specified categories." 453 U.S. at 493-94. The Court did not require the city to provide evidence that offsite advertising, as opposed to onsite advertising, heightened traffic safety and aesthetic harms because the city's choice "to value one kind of commercial speech—onsite advertising—more than another kind of commercial speech—offsite advertising"—was reasonable. *Id.* at 512.

We have since narrowly construed *Metromedia* as applying only to commercial speech where there is an "established line of cases to ratify the

legislature's judgment." *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1550 (10th Cir. 1991). Salina has repeatedly denied that this is a commercial speech case. *Cozy Inn*, 2025 WL 3223806, at *15; Aplt. Reply Br. at 21-22. And it identifies no cases in which a city has distinguished signs from murals for safety, aesthetics, or property value purposes. And although *Metromedia* upheld a city's authority to regulate billboards on public land, it said nothing about deferring to legislative judgment when the regulation involves displays on private property. *See Café Erotica of Fla., Inc. v. St. Johns County*, 360 F.3d 1274, 1285 (11th Cir. 2004) ("The regulation of billboards is controlled by *Metromedia*, as 'the law of billboards' is 'a law unto itself.'" (quoting *Metromedia*, 453 U.S. at 501)).

Salina's reliance on *Taxpayers for Vincent* is equally misguided. There, the Court upheld Los Angeles's ordinance prohibiting signs on public property, in part because the record "suggest[ed] that many of the signs posted in violation of the ordinance" "create[d] a potential safety hazard" and "block[ed] views and otherwise cause[d] traffic hazards." *Taxpayers for Vincent*, 466 U.S. at 794, 802. The Court's reliance on the evidentiary record undercuts Salina's argument that this court should rely on "common sense" to ratify the mural-sign distinction. Aplt. Br. at 36.

Second, this court has rejected Salina's argument that we should rely on the "collective legislative judgment" of several local governments with similar sign codes rather than evidence. Aplt. Br. at 39. In *Aptive Environmental*, we explained that examining similar ordinances may be a circular pursuit as those ordinances

"could very well be grounded on the same sort of inadequate common-sense and anecdotal evidence" as the one in question. 959 F.3d at 995.

Third, Supreme Court precedent further undermines Salina's position. For example, in *Ward*, the Supreme Court relied on evidence of constituent complaints to uphold New York City's regulation on sound control at a local amphitheater. 491 U.S. at 800. In *Turner Broad. Sys., Inc. v. FCC.* (*Turner II*), 520 U.S. 180, 201 (1997), the Court relied on evidence that cable systems would have "little incentive to carry, and a significant incentive to drop" broadcast stations to uphold the FCC's "must carry" rules. And in *TikTok Inc.*, the Court reiterated that a content-neutral regulation must be "grounded on reasonable factual findings supported by evidence that is substantial for a legislative determination." 604 U.S. at 78 (quotations omitted).

Fourth, this court has also explained that "to demonstrate [narrow] tailoring, the government 'bears the burden of producing concrete evidence'—in 'some form'—'to show that its proposed restriction will actually achieve its asserted interest without burdening substantially more speech than necessary.'" *Brewer*, 18 F.4th at 1214-15. In *Brewer*, we held that an ordinance restricting pedestrians from congregating within six feet of highway ramps failed intermediate scrutiny because "the evidence that the City relie[d] on to make its narrow tailoring showing d[id] not indicate that the Ordinance alleviate[d] in a direct and material way a real, non-speculative harm." *Id.* at 1221. We pointed to the City's "paltry record evidence" more than once to bolster this conclusion. *Id.* at 1226.

b. Evidence lacking on narrow tailoring

Having established that Salina bore an evidentiary burden under intermediate scrutiny, we now examine three types of evidence Salina offered to show that regulating signs, but not murals, promotes its safety, aesthetic, and property value goals. Salina fails to establish a "close fit between ends and means." *McCullen*, 573 U.S. at 486.

i. Written publications

First, Salina provided a student law review article, a blog post, and an excerpt from a presentation on digital signs and billboards. The article negates Salina's position. It states that regulating commercial and non-commercial murals differently is "impermissible content-based regulation," and it favorably recounts a district court's reasoning that "[m]urals housing commercial content . . . were no more distracting or less aesthetically pleasing than noncommercial murals." Christina Chloe Orlando, *Art or Signage?: The Regulation of Outdoor Murals and the First Amendment*, 35 Cardozo L. Rev. 867, 870, 889 (2013). The blog post reviews a California state district court's holding treating a mural-sign distinction as a commercial speech case. Finally, the presentation on "Regulating Digital Signs and Billboards" contains general statistics on distracted driving but sheds little to no light on Salina's sign definition or its distinct treatment of murals. App., Vol. 7 at 84-89.

ii. Testimony from Salina officials

Second, Salina primarily relied on testimony from Salina City Planner Dustin Herrs. We include two excerpts from his deposition that are instructive. The first excerpt is as follows:

> Q. Is the city aware of any facts that would show that painted wall signs are more detrimental to pedestrian safety than painted murals?
>
> . . .
>
> A. No.
>
> Q. Is the government aware of any facts that would show that painted wall signs are more detrimental to traffic safety than painted murals?
>
> A. I think the fact that signs by their definition attract your eye in a way to announce, direct attention to or advertise does change the character of a sign in relationship to or contrasted to a mural, a painted mural and that that could have impacts on traffic safety.
>
> Q. So you say it could have impacts on traffic safety. Is the city aware of any facts showing that it, in fact, does have impacts on traffic safety?
>
> . . .
>
> A. I didn't research that in preparation.
>
> Q. Okay. And same question there for is the government aware of any facts showing that painted wall signs have a more detrimental affect on property values than paint murals?
>
> A. Yeah, I wasn't aware to research that particular topic, so I haven't prepared for that.

App., Vol. 8 at 249-51 (objections and clarifications omitted).

The second excerpt is as follows:

> Q. Okay. What facts does the government contend show that regulating signs like The Cozy sign enhances pedestrian safety?
>
> A. So if you have—the idea is that the sign regulations are designed to, again, for each district limit the size of signs, the number of signs, the height of signs, the location of signs in order to reduce clutter. We don't want a lot of sign clutter because that can become distracting. It could impair the visual sight lines for motor vehicles as well as pedestrians. Sign sizes, we want to limit them so they don't become a distraction. We don't want signs that hold the eye longer than they should. We want to make sure that signs are effective. Again, that comes down to clutter where if you have too many signs, it becomes—
>
> Q. I don't want to interrupt you, but is the city aware of any factual data showing its regulating the specific type of signs that The Cozy Inn has enhances pedestrian safety?
>
> A. You're asking if The Cozy Inn enhances traffic safety? Is that what you said?
>
> Q. No. I'm asking is the city aware of any like factual data showing that regulating this type of sign enhances pedestrian safety?
>
> A. I don't know.
>
> Q. Is the city aware of any—let me rephrase. What facts does the city contend support the allegation that regulating signs like The Cozy sign enhances traffic safety?
>
> A. So our regulations, again, are designed to limit the number of signs, the location of signs, the size of signs so that businesses have opportunities or property owners, if they are not even businesses, have opportunities to have signs that give them

> opportunities to display and post those while at the same time limiting the number of signs so that you don't have sign clutter that can become distracting. It doesn't make it hard to read the signs because the more signs you have, the more information there is, sometimes the harder it is to really soak in information that you're trying to and it can become distracting when you're focusing on signs rather than driving or walking. And by limiting the number of signs, you reduce clutter. By limiting the size of signs, you limit signs that might be a distraction.

App., Vol. 3 at 77-78 (objections and clarifications omitted).

Mr. Herr's testimony revealed that he lacked facts or research to show that Salina's regulation of signs in general and the Cozy Inn display in particular advances aesthetics, safety, and property values any more than regulation of murals would do so. *See Aptive Env't*, 959 F.3d at 993 (deeming the town's evidence "woefully insufficient" because it "provided us no studies, no supportive evidence-based findings, and no survey results" and "there [wa]s no evidence that commercial solicitors[, as opposed to noncommercial solicitors,] [were] the source of any public-safety problems").[6]

[6] Salina briefly referenced testimony from Planning and Zoning Administrator Dean Andrew, who described art as "attracting attention" and signs as "directing attention." App., Vol. 8 at 140. He testified that "[a]ttracting attention might briefly pull your eyes off the road or off the sidewalk to see what it is. Directing attention is for something that someone wants you to read or look at for an extended period." *Id.*; Aplt. Br. at 47. We fail to see how Mr. Andrew's attempted differentiation helps Salina meet its burden.

iii. Expert report

Third, Salina offered an expert report from Mark White,[7] who opined that "[n]euroscience studies have demonstrated positive amplitude from persons viewing artwork, as opposed to negative responses from viewing commercial symbols." App., Vol. 15 at 207. He cited a four-paragraph student article from *Penn Today* to assert that "public murals are associated with a decrease in crime," *id.* at 208 (citing Maya Moritz, *Can More Art Equal Less Crime?*, Penn Today (May 23, 2024), https://penntoday.upenn.edu/news/can-more-art-equal-less-crime) [https://perma.cc/GK7W-TMDQ], as they "can replace and deter graffiti," *id*. at 210. But Mr. White provided no evidence or explanation for why an artistic display that references products cannot also replace or deter graffiti or why it may be more harmful to Salina's interests than a mural. And he failed to explain why Cozy Inn's proposed sign threatened Salina's safety, aesthetic, and property value interests more than Salina's many unregulated displays, such as the baseball mural at a baseball training facility or the "Symphony of Sunflowers" mural at the orchestra hall.

Mr. White's deposition testimony provided little or no help. His answers to questions about the sign code's purposes failed to explain why signs but not murals warrant regulation:

> Q. There's no citation in your report for the proposition that public art can't create clutter?

[7] Mr. White, an attorney, has a master's degree in Regional Planning and has practiced as a planner for 34 years.

A. I don't think that there's any documents cited in the report that says that public art could never create clutter.

Q: Are you aware of any evidence that establishes that private art is more dangerous than public art?

A. Well, I don't have a definition of those two, but that said, I'm not aware of a report that gets into the distinctions between those two and their impacts.

Q. Are you aware of any studies that establish private art is more dangerous than public art?

A. Not off the top of my head, no.

. . .

Q. [A]re you aware of any evidence that establishes that commercial content painted on a wall is more dangerous than non-commercial content painted on a wall?

A. I'm not aware of anything that specific.

. . .

Q. Are you aware of any evidence that would establish that a burger-esque UFO mural is more dangerous than a pizza-esque UFO mural?

A. Again, I can't think of anything that specific.

. . .

Q. Do you have any reason to believe that the Mural at the Mill display [depicting children playing Ring Around the Rosie] is dangerous?

A. No.

. . .

Q. . . . Would the mural become dangerous because a business [that pertains to the mural] was operating inside?

A. Not that I know of.

> . . .
>
> Q. . . . Are you aware of any research that says one type of painting on a wall is more aesthetically pleasing than another type of painting on a wall?
>
> A. Not that I can recall.
>
> Q. Are you aware of any evidence that would establish that burger-esque UFO is less aesthetically pleasing than a pizza-esque UFO?
>
> A. Not that I can recall.
>
> . . .
>
> Q. Do you believe that the Mural at the Mill . . . is aesthetically pleasing?
>
> A. To me personally, it is.
>
> Q. Does that mural become less aesthetically pleasing if a daycare business were being operated inside the mill?
>
> A. I don't have a basis for saying that it would.

App., Vol. 11 at 89-96 (objections and clarifications omitted).

Mr. White's expert report and deposition testimony fail to support the purposes behind Salina's differential treatment of signs and murals. *See Turner Broad. Sys., Inc. v. FCC* (*Turner I*), 512 U.S. 622, 664 (1994).

* * * *

Salina's evidence failed to justify the distinction between regulated signs and unregulated murals. It did not show that signs pose greater danger to Salina's interest

in safety, aesthetic, and property values. Because the means-ends evidence is lacking, the sign code fails intermediate scrutiny.[8]

B. *Prior Restraint Claim*

Salina placed Mr. Howard's permit application on indefinite hold instead of issuing a decision within 10 days as the sign code required. The district court declared this was a prior restraint.

1. Legal Background

"A prior restraint on speech is a law, regulation or judicial order that suppresses speech . . . on the basis of the speech's content and in advance of its actual expression." *Utah Pol. Watch, Inc. v. Musselman*, 179 F.4th 1241, 1260 (10th Cir. 2026) (quoting *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 42 (10th Cir. 2013)). Although not all prior restraints are per se unconstitutional, "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

An administrative licensing scheme, which requires a speaker to obtain permission before engaging in speech, is one type of prior restraint. For example, in *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 130, 137 (1992), the Supreme Court held that a local ordinance requiring citizens to obtain a permit before

[8] Because the sign code fails at narrow tailoring, we decline to analyze whether it "leave[s] open ample alternative channels for communication." *McCraw*, 973 F.3d at 1070 (quotations omitted).

holding a parade or assembly on public property was an unconstitutional prior restraint.

"[A] prior restraint that fails to place limits on the time within which the decisionmaker must issue the license is impermissible." *Am. Target Advert., Inc. v. Giani*, 199 F.3d 1241, 1250 (10th Cir. 2000). "Time limits upon a prior restraint allay 'the risk of indefinitely suppressing permissible speech,'" *id*. at 1253, and "prevent[] . . . [city] officials from encouraging some views and discouraging others," *Forsyth County*, 505 U.S. at 133. A restraint before judicial review can be imposed only for a specified brief period during which the status quo must be maintained. *See Freedman v. Maryland,* 380 U.S. 51, 58-60 (1965).

2. Analysis

As noted, the sign code provides that a permit, must be "issued or refused . . . within ten (10) days after the receipt of an application . . . or within such further period as may be agreed to by the applicant," Salina Code § 42-502, which on its face is constitutional. *See Am. Target Advert.*, 199 F.3d at 1253 (holding constitutional a ten-day administrative processing period because it is "both clearly specified and brief").

The district court declared that Salina imposed an impermissible prior restraint on Cozy Inn because it held Mr. Howard's permit application indefinitely. Salina argues that Mr. Howard likely consented to having his application placed on indefinite hold, and because consent is an exception to the sign code's requirement that a decision be issued within 10 days, the hold was constitutional. *See* Aplt. Br.

at 52. But as the district court noted, the record fails to support this argument. *Cozy Inn*, 2025 WL 3223806, at *18. At his deposition, City Planning and Zoning Administrator Dean Andrew testified:

> Q. Did Mr. Howard agree to having his permit being placed on hold?
>
> A. Yes.
>
> . . .
>
> Mr. Howard was informed on Monday the 6th that we were unable to issue a sign permit, and he was informed that we were going to continue to work with him on coming up with a code-compliant solution that might allow the sign to ultimately be installed.
>
> Q. And at any point after that, did Mr. Howard consent to his application being place[d] on hold?
>
> A. Mr. Howard had knowledge that we were not able to approve his sign permit application.
>
> . . .
>
> What is your definition of consent? Mr. Herrs talked to Mr. Howard face-to-face, handed him information face-to-face and told him face-to-face that we are unable to issue a sign permit for the sign as currently proposed under the current sign code. How is that not communication.

App., Vol. 7 at 167-68 (objections and clarifications omitted).

Although Mr. Andrew's testimony showed that Salina informed Mr. Howard of the hold, it did not show that Mr. Howard consented to a hold. Even if it did, nothing in the record shows that Salina informed him of an indefinite hold, let alone that he consented to one. Given that Mr. Howard's application has aged for three

years without his consent, Salina imposed a prior restraint on his speech. *See Riley v. Nat'l Fed'n of the Blind of N.C.,* 487 U.S. 781, 802 (1988) (licensing scheme that allows "delay without limit" is impermissible); *Vance v. Universal Amusement Co.,* 445 U.S. 308, 315-17 (1980) (indefinite-duration prior restraint is impermissible).

Salina next argues there was no impermissible prior restraint because Mr. Howard submitted an application knowing it would be denied because the Cozy Inn display exceeded size restrictions and thus the hold did not "risk . . . indefinitely suppressing *permissible speech*." Aplt. Br. at 52-54 (quotations omitted).

Although Salina did not raise this specific argument in district court and has not argued plain error on appeal, *see Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127-28 (10th Cir. 2011),[9] the argument is also unpersuasive.

Once Salina officials told him to submit a permit application, Mr. Howard could reasonably expect it would at least be considered and not summarily denied. Salina's February 2024 letter to Mr. Howard, sent three months after he submitted his permit application, confirms this expectation. It said, "[T]he City is engaging in a comprehensive review of the City's sign regulations" and that, as a result, "our office will be placing your . . . application on-hold until our review . . . is complete." App., Vol. 9 at 232. At that point, "Staff will then be able to . . . review your sign permit

[9] In district court, Salina said it informed Mr. Howard that the Cozy Inn display was too large to qualify for a permit, but then it told him to submit an application without saying it would be summarily denied.

application." *Id.* The letter hardly suggests Mr. Howard's application would be automatically denied.

The application has now been pending for three years. "[E]ach day of delay in acting on the application was a day in which [Mr. Howard] was forced to be silent." *Utah Animal Rts. Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1259 (10th Cir. 2004). Although content-neutral licensing restrictions are not subjected to the most rigorous prior restraint scrutiny, *Taylor*, 713 F.3d at 42-43, we conclude the district court did not err in declaring that Salina imposed an impermissible prior restraint on Cozy Inn.

III. CONCLUSION

We affirm the district court's judgment.

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RE: 25-3225, Cozy Inn, Incorporated, et al v. City of Salina, Kansas
Dist/Ag docket: 6:24-CV-01027-TC

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(d)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rule 40 and 10th Cir. R. 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Riley Grace Borden
Trevor Caldwell Burrus
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John Michael Connolly
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