IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PASTOR RALPH N. OVADAL, MICHAEL J. FOHT, LINDA L. OVADAL, RICHARD T. BERGUM, JOY E. OVADAL, THOMAS C. OVADAL, EUGENE G. GUNDERSON, ALEX E. DOAK, JANET K. OVADAL, CHRISTINE M. DOAK, CANDYCE L. BERGUM and NICHOLAS R. BERGUM,

OPINION AND ORDER
01-C-379-C

Plaintiffs,

v.

CITY OF MONROE, WISCONSIN, MAYOR WILLIAM M. ROSS, JR., in his official capacity, and POLICE CHIEF FREDERICK KELLEY, in his official capacity,

Defendants.

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In this civil action for declaratory and injunctive relief, plaintiffs challenge two municipal ordinances passed by defendant City of Monroe regulating the distribution of handbills within the city and the placement and display of signs on public property and in public rights-of-way. Plaintiffs argue that certain provisions of these ordinances violate the First and Fourteenth Amendments to the United States Constitution as well as Art. I, § 18

of the Wisconsin Constitution. On August 1, 2001, plaintiffs filed a motion for a preliminary injunction seeking to prevent defendants from enforcing the ordinances on or after September 15, 2001, when plaintiffs plan a protest to coincide with a music festival being held in Monroe.

A hearing was held on plaintiffs' motion on August 22, 2001. From the record and arguments of counsel, I find that as to the handbill ordinance, plaintiffs' challenges are likely to succeed and that the other requirements for injunctive relief are satisfied. Therefore, defendants will be enjoined preliminarily from enforcing the challenged sections of the handbill ordinance. Because I am persuaded that plaintiffs do not have more than a negligible chance of success on their challenges to the sign ordinance, I will deny their request for a preliminary injunction prohibiting defendants from enforcing the sign ordinance.

For the purpose of deciding plaintiffs' motion for a preliminary injunction, I find from the parties' proposed findings of fact that the following are undisputed.

UNDISPUTED FACTS

Plaintiffs are church members who exercise their rights of free expression and assembly in cities throughout Wisconsin, including Monroe. On at least one occasion, Monroe city officials cited plaintiffs Pastor Ralph Ovadal and Michael Foht for allegedly

placing literature critical of Congresswoman Tammy Baldwin on parked cars in downtown Monroe in violation of ordinance no. 9-4-11, titled "Handbills, Advertising Materials." Defendants have since moved to dismiss these citations. Section (C)1.(b) of the handbill ordinance forbids any person to "[d]istribute a handbill in or upon an unattended vehicle within the City which is either parked on a public street or in a parking area open to the general public." Section (C)1.(a) forbids any person to "[d]istribute a handbill in or upon any lands owned or leased by the City in such a manner as to create a litter problem" and further provides that "[d]istribution by means other than handing such handbill to a natural person willing to accept such handbill shall be presumed to be a violation of this subsection."

Another provision, section (C)1.(f), forbids distribution of a handbill "unless any such handbill is folded or otherwise so prepared or placed that it will not be blown by the wind." Section (B) defines "handbill" as "[a]ny handbill, dodger, circular, booklet, card, pamphlet, sheet or other written or printed notice, or any sample product, any of which advertises any commodity, article, merchandise, business, meeting, entertainment, person or thing." The ordinance's "declaration of purpose" sets forth the goal of reducing "unsightly accumulations of litter," among other things.

In addition, at least some of the plaintiffs have been issued citations or warned that they would be issued citations for violating ordinance no. 11-1-11, titled "Signs, Awnings and Encroachments - Public Property." This ordinance establishes a comprehensive

regulatory scheme for the display of signs on public property. Section (B)2. defines "sign" broadly to include "[c]ommercial signs," "[s]igns pertaining to general or special elections," "[s]igns regarding political, sociological, religious, ethical or economic beliefs or opinions" and includes a broad catch-all provision for signs "conveying any other information." Section (B)3. exempts several categories of signs from the ordinance's requirements. Section (B)3.(e) exempts "[s]igns carried by an otherwise lawfully present person; provided however, that a person located upon a public street, sidewalk or walkway may only carry a single sign which does not exceed 3 square feet in area." Section (B)3.(f) exempts "[s]igns posted, displayed, or carried during a special event, by licensed users or lessees of public property, which do not deface, damage or destroy public property and which are maintained only during the duration of the special event, license, or lease."

In addition to the exemptions provided for in section (B), section (D) of the sign ordinance provides that the Board of Public Works "may" issue permits for the display of one sign on public property in front of a business if certain requirements are met. These signs may measure up to 3 feet wide by 5 feet tall, in comparison to the 3 square foot (approximately 1 ½ x 1 ½ feet) limitation imposed by section (B)3.(e) on signs carried by the general public on public thoroughfares such as streets or sidewalks. Finally, section (C)3. of the sign ordinance states, "Notwithstanding any other provision of this section, no sign shall be posted, displayed or carried at a location or in such a manner so as to obstruct or

interfere with, or pose the threat of obstructing or interfering with, vehicular or pedestrian travel, or pose a danger to any person." Plaintiffs have notified defendants of their objections to the two ordinances. Nevertheless, the city intends to enforce the sign ordinance in the future. Whether the city will enforce the handbill ordinance is less clear, although their attorney stated at the hearing that the city plans to rewrite the ordinance.

DISCUSSION

A. Standard for Preliminary Injunction

A preliminary injunction is an extraordinary and drastic remedy that should not be granted unless the movant carries the burden of persuasion by a clear showing. Boucher v. School Board of Greenfield, 134 F.3d 821 (7th Cir. 1998). In order to succeed on a motion for a preliminary injunction, the moving party must show that "it has more than a negligible chance of success on the merits, and no adequate legal remedy. Once this is established, the district court must then consider the balance of hardships between the plaintiffs and the defendants, adjusting the hardships for the probability of success on the merits." Planned Parenthood of Wisconsin v. Doyle, 162 F.3d 463, 473 (7th Cir. 1998). If it is clear that the moving party lacks even a negligible chance of succeeding, the court need not evaluate the remaining elements of the test.

B. Handbill Ordinance

Plaintiffs argue that several provisions of the handbill ordinance are facially invalid under the First Amendment. They allege that they have been forced to "self-censor" their literature distribution out of fear that they will receive further citations. Plts.' Verified Cpt., dkt. # 2, at ¶¶ 27, 93. Relying on Krantz v. City of Fort Smith, 160 F.3d 1214 (8th Cir. 1998), plaintiffs contend first that the ordinance provision prohibiting the placement of handbills on unattended vehicles parked on public property is fatally overbroad. In Krantz, the Court of Appeals for the Eighth Circuit invalidated a similar ordinance prohibiting the placement of handbills on parked cars because the ordinance suppressed "considerably more speech than is necessary to serve the stated governmental purpose of preventing litter." Id. at 1221. In their brief, defendants concede that section (C)1.(b) of Monroe's handbill ordinance would not likely survive First Amendment scrutiny as currently drafted. They have taken steps to dismiss the handbill ordinance citations that were issued to plaintiffs Pastor Ralph N. Ovadal and Michael J. Foht and have stated in their brief that they will no longer issue citations based on section (C)1.(b)'s blanket prohibition on placing handbills on unattended vehicles on public property.

In addition, defendants have declined to defend plaintiffs' challenge to two other provisions of the handbill ordinance: that the ordinance's prohibition on distributing handbills in such a manner as to create a litter problem found in section (C)1.(a) is

overbroad and that section (C)1.(f), which prohibits distribution of handbills unless they are placed or prepared so they will not be "blown by the wind," is unconstitutionally vague. Rather, defendants acknowledged at the August 22 hearing that the handbill ordinance would have to be amended. This is understandable, given the fact that even a cursory review of these two provisions makes clear their vulnerability to the related charges that they are vague and overbroad.

Accordingly, I find that plaintiffs have demonstrated more than a negligible chance of success on the merits of their challenges to provisions (C)1.(a),(b) and (f) of the handbill ordinance. Although defendants have offered general assurances that the handbill ordinance will be amended, in the ordinance's present form, it implicates First Amendment interests, the loss of which "for even minimal periods of time unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1975); National People's Action v. Village of Wilmette, 914 F.2d 1008, 1013 (7th Cir. 1990). As defendants have declined to offer a defense to the provisions of the ordinance challenged by plaintiffs, the balance of harms weighs in favor of granting the preliminary injunction. Defendants will be enjoined preliminarily from enforcing sections (C)1.(a), (b) and (f) of the handbill ordinance, no. 9-4-11.

C. Sign Ordinance

1. Background

Monroe's sign ordinance is a comprehensive scheme for regulating the display of signs on public property and in public rights-of-way. Section (C)1. of the ordinance contains a sweeping prohibition on signs "posted, attached, painted, marked or written on, or otherwise affixed to or placed upon public property or displayed in the public right-of-way." Section (C)3. further forbids any sign from being "posted, displayed or carried at a location or in such a manner so as to obstruct or interfere with, or pose the threat of obstructing or interfering with, vehicular or pedestrian travel, or pose a danger to any person."

Section (B)3. of the ordinance contains several exceptions to these prohibitions. Of particular consequence for plaintiffs, section (B)3.(e) exempts signs "carried by an otherwise lawfully present person; provided however, that a person located upon a public street, sidewalk or walkway may only carry a single sign which does not exceed 3 square feet in area." Examining this provision, two things become apparent. First, signs carried by a person on a street, sidewalk or walkway are exempted from the ordinance's general prohibitions, but such signs may not be larger than 3 square feet in area. Second, signs of any size may be displayed by a person on public property other than a street, sidewalk or walkway, such as a park, but only if the signs are carried.

Section (B)3.(f) further exempts signs "posted, displayed or carried during a special event by licensed users or lessees of public property, which do not deface, damage or destroy

public property and which are maintained only during the duration of the special event, license, or lease." The terms "special event," "license" or "licensed user" are not defined in the sign ordinance and the procedure for obtaining a license is not spelled out or cross referenced in the ordinance.

Finally, section (D) of the ordinance provides that the Board of Public Works "may" issue permits for the display of a single sign on public property in front of a business subject to certain restrictions. These signs may measure up to 3 feet wide by 5 feet tall (a total of 15 square feet), in comparison to the 3 square foot limitation imposed by section (B)3.(e) on signs carried by the general public on streets or sidewalks.

2. Section (B)3.(e)

Public streets, sidewalks and parks are traditional public fora. Frisby v. Schultz, 487 U.S. 474, 480-81 (1988). The level of scrutiny applied by courts evaluating restrictions on speech in a public forum hinges on "whether the statute distinguishes between prohibited and permitted speech on the basis of content." Id. at 481. A content-based regulation is permissible only when it is necessary to achieve a compelling state interest and narrowly tailored to serve that goal. Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983). "With rare exceptions, content discrimination in regulations of the speech . . . in a traditional public forum is presumptively impermissible, and this presumption is a

very strong one." City of Ladue v. Gilleo, 512 U.S. 43, 59 (1993) (O'Connor, J., concurring). At the same time, the state may enforce "regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication." Id.

Plaintiffs challenge section (B)3.(e), which exempts carried signs from the ordinance, but limits picketers to a single sign no greater than 3 square feet in area when carried "upon a public street, sidewalk or walkway." Plaintiffs wish to carry signs larger than 3 square feet on sidewalks and other public thoroughfares and do not want picketers to be limited to a single sign. Section (B)3.(e) is a content-neutral time, place and manner regulation. Application of the exemption found in that section does not require reference to a sign's content. An officer enforcing the ordinance need evaluate only the size of the sign and the location of the person carrying it. Accordingly, it is necessary to determine whether plaintiffs have more than a negligible chance of succeeding on their claim that section (B)3.(e) is not narrowly tailored to serve a significant government interest or fails to leave open ample alternative channels of communication. Perry, 460 U.S. at 45. I conclude that plaintiffs have failed to make this showing.

The Supreme Court has "continually recognized that reasonable 'time, place and manner' regulations of picketing may be necessary to further significant governmental interests." Police Dept. of Chicago v. Mosley, 408 U.S. 92, 98 (1971). The "findings"

section of the Monroe ordinance summarizes the city's goals in regulating the display of signs, including its desire to "facilitate movement and ensure safety in public areas and on public rights-of-way." Insuring traffic safety is a substantial governmental interest. Metromedia, Inc. v. San Diego, 453 U.S. 490, 507-08 (1980); Cox v. Louisiana, 379 U.S. 536, 554-55 (1964). In Foti v. City of Menlo Park, 146 F.3d 629, 636 (9th Cir. 1998), the Court of Appeals for the Ninth Circuit refused to enjoin a nearly identical ordinance provision that limited picketers to a single 3 square foot sign. According to the court, the limit on the number and size of signs carried by picketers was justified by Menlo Park's substantial interest in traffic safety and was narrowly tailored in that the "size and number restrictions [were] 'not substantially broader than necessary to achieve the government's interest.'" Id. at 641 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 800 (1989)). The court noted that larger signs might block drivers' views of traffic signs and conditions, intimidate pedestrians and impede the free circulation of pedestrians on sidewalks and that the 3 square foot restriction represented a reasonable legislative judgment responsive to the city's concern for traffic safety. Id. (Plaintiffs advised the court at the hearing that the Menlo Park sign ordinance was abandoned by the city after remand; this fact does not diminish the precedential value of Foti.)

In Foti, the court found that the regulation left open ample alternative channels of communication, including leafleting and sidewalk speeches. Id. Similarly, section (B)3.(e)

of the Monroe ordinance does not limit the ability of picketers to simultaneously leaflet or make sidewalk speeches. Even though section (B)3.(e) does limit the size and number of signs that can be carried by a picketer, it places no restrictions on the number of picketers who may be present at any given time and does not restrict the times at which picketers may protest. "So long as the amount of speech left open is ample, it is not fatal that the regulation diminishes the total quantity of speech." City of Watseka v. Illinois Public Action Council, 796 F.2d 1547, 1553 (7th Cir. 1986). "An adequate alternative [channel of communication] does not have to be the speaker's first or best choice, or one that provides the same audience or impact for the speech." Gresham v. Peterson, 225 F.3d 899, 906 (7th Cir. 2000). Although I recognize that a 3 square foot size limitation is a significant restriction, I am persuaded that the reasoning in Foti should be applied in this case. Accordingly, I conclude that the number and size limitations contained in section (B)3.(e) are constitutionally permissible time, place and manner regulations.

4. Section (B)3.(e) in conjunction with section (D)

Plaintiffs do not simply challenge the facial constitutionality of section (B)3.(e) as a free-standing provision. They argue that when read in conjunction with the business permit provision contained in subsection (D), the ordinance affords commercial speech a greater degree of protection than noncommercial speech. A picketer on a public street, sidewalk or

walkway is limited to a single 3 square foot sign but section (D) allows a business permit holder to place a larger, 3 foot by 5 foot sign on public property in front of a business, subject to certain restrictions. Relying on Metromedia, Inc., 453 U.S. 490, plaintiffs contend that the sign ordinance impermissibly exalts commercial speech over noncommercial speech. A "city may not conclude that the communication of commercial information concerning goods and services connected with a particular site is of greater value than the communication of noncommercial messages." Id. at 513. On this score, defendants reply that section (D) does not require signs for which a permit is sought to contain commercial, as opposed to noncommercial, information. In other words, a business owner could obtain a permit and erect a sign containing either a noncommercial or a commercial message.[1]

Despite plaintiffs' assertion to the contrary, the Monroe ordinance is distinguishable from the one at issue in Metromedia. In that case, the Supreme Court reviewed a San Diego ordinance containing a broad ban on outdoor advertising signs. One exception to this ban allowed for on-site commercial advertising (a sign advertising goods or services available at the sign's location) while forbidding off-site commercial advertising or the advertising of

[1]Section (D) authorizes the grant of a permit only for signs placed on public property "in front of [a] business" and only upon "obtaining consent from the lawful occupant of the business." Presumably, the effect of these requirements will result in the appearance of primarily commercial speech on signs authorized pursuant to a section (D) permit. Nevertheless, plaintiffs have not challenged section (D) as creating an essentially commercial content based regulation, and I do not address that possibility here.

noncommercial messages. The Court upheld the ban on off-site billboards but it rejected the ordinance's general ban on billboards carrying noncommercial messages. The Court reasoned that by protecting on-site commercial advertising while generally prohibiting noncommercial messages, San Diego had inverted the constitutional norm that affords noncommercial speech greater protection than commercial speech. Id. However, as defendants point out, the Monroe ordinance does not prohibit permit holders from displaying noncommercial messages. Unlike the San Diego ordinance, section (D) contains no restrictions on the content of signs displayed pursuant to a permit.

In addition, it is not at all clear that the ordinance genuinely affords permit holders a greater opportunity to be heard than that provided to picketers under section (B)3.(e). Section (D)1. authorizes a single sign per business. Section (D)3. requires the sign to be situated within 4 feet of the building housing the business and limits display of the sign to those hours in which the business is open to the public. When the business closes each day, the sign must come in. Although section (D) signs may be larger than the signs carried by picketers on public thoroughfares, picketers are not restricted to a four foot area in front of a particular building. Rather, they may circulate freely on the sidewalk in order to enhance their visibility. And unlike section (D) signs, picketers' activities are not restricted to certain hours of the day. Further, picketers may engage in other expressive activities such as sidewalk speaking and leafleting simultaneously. Plaintiffs have offered no evidence that the

scheme established by section (D) is superior to that established by section (B)3.(e) as it affects their ability to communicate their chosen message. Accordingly, I conclude that plaintiffs have failed to demonstrate that they have more than a negligible chance of succeeding on the merits of their claim that on its face the sign ordinance unconstitutionally favors commercial speech over noncommercial speech.

5. Section (B)3.(f)

Plaintiffs devote less than a page in their brief to their assertion that section (B)3.(f) establishes a licensing scheme that lacks definite standards to guide the licensing authority. That section exempts from the sign ordinance's prohibitions "[s]igns posted, displayed, or carried during a special event, by licensed users or lessees of public property, which do not deface, damage or destroy public property and which are maintained only during the duration of the special event, license, or lease." Plaintiffs object to the fact that the sign ordinance does not define "special event," lay out the procedure for obtaining a license or refer to any other ordinance where this information can be found. In turn, defendants note that the sign ordinance itself does not govern the issuance of licenses for special events. Rather, it states merely that the sign ordinance does not apply to persons who have obtained a license to conduct a special event. Defendants also point out that plaintiffs have not alleged that they have ever applied for a license to conduct a special event.

As an initial matter, "when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 755-56 (1987). A licensing scheme with a close nexus to expressive activity will be suspect under the First Amendment if it grants unbridled discretion to the licensing authority. Id. at 759. However, plaintiffs have failed to allege the existence of any deficiencies in the city's licensing ordinance or the absence of any ordinance altogether. Apparently, plaintiffs want the court to enjoin enforcement of the sign ordinance because it contains an exemption for license holders but no cross-reference to the city's licensing ordinance. I decline to do so. The city's licensing ordinance may or may not vest unbridled discretion in city officials to grant or deny licenses and the exemption to the sign ordinance that goes with them. If it does, plaintiffs' concerns are legitimate. But plaintiffs have not developed that argument or raised the possibility that the licensing exemption accords incidental speech greater protection than purposeful speech in violation of the Constitution. See Foti, 146 F.3d at 639. Having failed to do anything more than note the absence of a cross-reference, plaintiffs have not demonstrated even a negligible chance of success on the merits of this claim.

6. The sign ordinance as a violation of the Wisconsin Constitution

Although their argument is difficult to follow, plaintiffs seem to be contending that Art. I, § 18 of the Wisconsin Constitution requires the city to demonstrate that the sign ordinance is the least restrictive means for advancing a compelling government interest. Plaintiffs begin this argument by citing the Supreme Court of Wisconsin's decision in State v. Miller, 202 Wis. 2d 56, 549 N.W.2d 235 (1996). In that case, the court reviewed the validity under the state constitution of a traffic safety statute as applied to eight members of the Old Order Amish faith. In this case, plaintiffs ask the court to determine whether "the *application* of the Sign Ord. in a manner limiting Plaintiffs' religious expression constitutes a burden on their sincerely held religious beliefs." Plts.' Br. in Supp. of Mot. for Prelim. Inj., dkt. #6, at 29-30 (emphasis added). If it does, plaintiffs argue, the city must show the ordinance is supported by a compelling state interest and is the least restrictive alternative available to satisfy that interest. As plaintiffs concede in their brief, however, their motion for a preliminary injunction is limited to a facial challenge to the sign ordinance's constitutionality. Plaintiffs' "'as applied' concerns . . . are not argued in this motion." Id. at 7. Therefore, it would be premature to say whether the application of the sign ordinance to plaintiffs' picketing activities violates the Wisconsin Constitution.

At this point in their brief, plaintiffs reassert their argument that the ordinance exalts noncommercial religious speech over commercial speech. It is not clear whether plaintiffs are arguing that this purported disparity constitutes a separate violation of Wis. Const. Art.

I, § 18. Without more in the way of argument, plaintiffs cannot show they have any chance of success on this point. See Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999) ("Arguments that are not developed in any meaningful way are waived.") ; see also Finance Investment Co. (Bermuda) Ltd. v. Geberit AG, 165 F.3d 526, 528 (7th Cir. 1998); Colburn v. Trustees of Indiana University, 973 F.2d 581, 593 (7th Cir. 1992) ("[plaintiffs] cannot leave it to this court to scour the record in search of factual or legal support for this claim); Freeman United Coal Mining Co. v. Office of Workers' Compensation Programs, Benefits Review Board, 957 F.2d 302, 305 (7th Cir. 1992) (court has "no obligation to consider an issue that is merely raised, but not developed, in a party's brief").

7. Section (C)3.

Section (C)3. of the sign ordinance states, "[n]otwithstanding any other provision of this section, no sign shall be posted, displayed or carried at a location or in such a manner so as to obstruct or interfere with, or pose the threat of obstructing or interfering with, vehicular or pedestrian travel, or pose a danger to any person." Plaintiffs argue that this language is unconstitutionally vague because it fails to put citizens on notice as to what actions will subject them to sanctions and because it provides no standards to limit the discretion of police officers charged with enforcing the provision. In particular, plaintiffs

object to the language that prohibits activities that merely "pose the threat" of interfering with travel. Defendants contend that plaintiffs' concerns are misplaced because they are based on a misinterpretation of the ordinance. Defendants assert that section (B)3.(e) exempts unequivocally picketers carrying signs no larger than 3 square feet from section (C)3.'s prohibitions. However, section (C)3. can be plausibly read to apply to picketers carrying signs no larger than 3 square feet if, for instance, the term "lawfully present person" is read to mean someone who is not carrying a sign in such a manner as to obstruct traffic. Therefore, I will address plaintiffs' vagueness challenge.

The void-for-vagueness doctrine seeks to encourage precision in the law. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." Grayned v. City of Rockford, 408 U.S. 104, 108 (1971). Clear definitions provide those subject to a law with fair warning as to prohibited conduct. They also limit arbitrary and discriminatory enforcement by channeling the discretion of enforcing authorities. Id. at 108-09. In the context of the First Amendment, the doctrine facilitates robust expression by relieving speakers of the need to "hedge and trim" in an effort to comply with uncertain standards. Buckley v. Valeo, 424 U.S. 1, 43 (1975) (quoting Thomas v. Collins, 323 U.S. 516, 535 (1945)).

The provision that prohibits the display of a sign "at a location or in such a manner so as to obstruct or interfere with . . . vehicular or pedestrian travel" is not unconstitutionally

vague. In Cameron v. Johnson, 390 U.S. 611 (1967), the Supreme Court upheld an ordinance that prohibited "picketing . . . in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any public premises" in the face of a vagueness challenge Id. at 612 n.1. The Court concluded that "[t]he terms 'obstruct' and 'unreasonably interfere' plainly require no 'guess[ing] at [their] meaning'" and held that the statute "clearly and precisely delineates its reach in words of common understanding." Id. at 616. Similarly, the Monroe sign ordinance's prohibition on displaying signs that "obstruct or interfere with . . . vehicular or pedestrian travel" gives sufficient guidance to picketers of ordinary intelligence that they may "steer between lawful and unlawful conduct." Grayned, 408 U.S. at 108. The requirement that vehicular or pedestrian travel be obstructed or interfered with in fact provides suitable standards by which to measure police conduct in implementing the ordinance so as to avoid arbitrary or discriminatory enforcement. The fact that enforcement of the ordinance "requires the exercise of some degree of police judgment" is not fatal. Id. at 114. "Condemned to the use of words, we can never expect mathematical certainty from our language." Id. at 110.

Plaintiffs' raise more serious concerns in their argument relating to the ordinance's provision preventing display of a sign "in such a manner so as to . . . pose the threat of obstructing or interfering with, vehicular or pedestrian travel." Plaintiffs concede that a picketer knows how to conduct herself so as not to obstruct a sidewalk, but they reasonably

question how picketers are supposed to behave so as to ensure they will not be deemed to pose a threat of obstructing a sidewalk. Plts.' Br. in Supp. of Mot. for Prelim. Inj., dkt. #6, at 32. In Grayned, the Court considered an anti-noise ordinance providing that no person "while on public or private grounds adjacent to any building in which a school . . . is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or *tends to disturb* the peace or good order of such school session." 408 U.S. at 107-08 (emphasis added). Although the Court upheld the ordinance, it expressed reservations about the "imprecision" of the phrase "tends to disturb." Id. at 111. The Court's concerns were allayed by its belief that previous rulings from Illinois state courts interpreting similar language would lead Illinois courts either to interpret the "tends to disturb" language to prohibit only actual or imminent disturbances, or to read the language out of the ordinance altogether. Id. at 111-12 & n.20.

Like the "tends to disturb" language at issue in Grayned, the language is imprecise in the Monroe sign ordinance regulating the display of signs that merely "pose the threat" of obstructing traffic. Defendants admit that "[n]o state court has yet had an opportunity to interpret" section (C)3. of the sign ordinance. Dfts.' Br. in Resp. to Mot. for Prelim. Inj., dkt. # 13, at 14. Further, defendants do not identify any other Wisconsin court rulings that have applied a limiting interpretation to similar language. Instead, defendants argue that any troublesome language in section (C)3. could be narrowed readily by a future state court

ruling to avoid any constitutional deficiencies by, for instance, interpreting it to prohibit only affirmative acts that obstruct or intend to obstruct traffic. "In assessing the constitutionality of an allegedly vague state law or ordinance, 'a federal court must, of course, consider any limiting constructions that a state court or enforcement agency has proffered.'" Gresham, 225 F.3d at 907-08 (quoting Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.5 (1982)). Even when no state court has had the opportunity to interpret the terms of the ordinance in question, "the rule that federal courts should defer to state court interpretations of state laws also discourages federal courts from enjoining statutes that could be easily narrowed by a state court to avoid constitutional problems." Id. at 908 (citations omitted).

The current language of section (C)3. appears to be amenable to a narrowing construction by a state court that would limit its application to signs displayed so as to obstruct or interfere with pedestrian or vehicular travel or signs intended to obstruct or interfere with such travel. Alternatively, a state court might opt simply to read the troublesome "pose the threat of" language out of the ordinance altogether. A federal court should "not hold a vague statute unconstitutional if a reasonable interpretation by a state court could render it constitutional in some application." Id. Accordingly, plaintiffs have not demonstrated more than a negligible chance of succeeding on the merits of this claim. I will not enjoin enforcement of section (C)3.

Because plaintiffs have failed to show more than a negligible chance of succeeding on the merits of their challenges to the sign ordinance, their motion for a preliminary injunction enjoining enforcement of the sign ordinance will be denied. Nevertheless, I note that significant portions of the sign ordinance raise constitutional concerns. For instance, sections (B)3.(c) exempts "safety, traffic or other public information" signs erected by a public officer in the performance of a public duty. Such "safety, traffic, and public informational signs are content based because a law enforcement officer must read a sign's message to determine if the sign is exempted from the ordinance." Foti, 146 F.3d at 636. It is unclear whether a broad exemption for all "public informational" signs is narrowly tailored and justified by a compelling interest. In addition, section (D) allows a "business" to obtain a permit to display a sign on public property in front of the business, but the ordinance fails to define the term "business." This raises the question whether a non-profit, charitable or social welfare organization such as a political party could obtain such a permit. Similarly, the plain language of section (D) provides that the Board of Public Works "may" grant a permit if certain conditions are satisfied. This language seems to give the Board the unfettered discretion to reject even an applicant who met all of section (D)'s objective requirements. Finally, when the broad prohibition in section (C)1. is read in conjunction with the exemptions in section (B)3., it would appear that a person speaking or gathering signatures in a public park would be prohibited from setting a sign on the ground next to her

soapbox or petition table. Such a significant limitation on speech raises overbreadth concerns. However, because none of these issues were raised by the parties, I have not considered them at this stage of the litigation.

ORDER

IT IS ORDERED that the motion of plaintiffs Pastor Ralph N. Ovadal, Michael J. Foht, Linda L. Ovadal, Richard T. Bergum, Joy E. Ovadal, Thomas C. Ovadal, Eugene G. Gunderson, Alex E. Doak, Janet K. Ovadal, Christine M. Doak, Candyce L. Bergum and Nicholas R. Bergum for a preliminary injunction is GRANTED with respect to sections (C)1.(a), (b) and (f) of the handbill ordinance, no. 9-4-11; it is DENIED with respect to the sign ordinance, no. 11-1-11, because plaintiffs have failed to show that they have more than a negligible chance of succeeding on the merits of the challenges they have raised to that ordinance.

Entered this 19th day of September, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge