IN THE CIRCUIT COURT OF
THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
CHARLOTTE COUNTY, FLORIDA

ANDREW BRYANT SHEETS,
Appellant.

CIVIL ACTION
CASE NO. 21001015CA

VS.

CITY OF PUNTA GORDA, FLORIDA,
Appellee.
_____/

Appeal from Judgement of the Code Enforcement Board
of the City of Punta Gorda, Florida,
Case Nos. 21-79906, 21-79908, 21-79967, & 21-80024

INITIAL BRIEF
FOR THE APPELLANT

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STATEMENT OF THE CASE AND OF THE FACTS

This case comes by appeal from four rulings of the Code Enforcement Board for the City of Punta Gorda, Florida (hereinafter "the Board"). At a hearing held on July 28, 2021, the Board found the Appellant, Andrew Bryant Sheets, to have been in violation of the City's sign ordinance on four separate occasions during June 2021, and thus imposed fines of $1,000 on the first charge and $500 on each of the other three charges, along with costs of $7.41 for each charge, by final Orders entered that day. (App. at 175-76, 194-95, 210-11, 227-28.) Sheets appeals from those Orders, arguing that the City's sign ordinance is unconstitutional.

On June 2, 2021, the City Council of Punta Gorda, Florida adopted a new sign ordinance which bans any sign "containing . . . indecent speech which is legible from any public right-of-way or within any public space, and which can potentially be viewed by children under the age of 17." Punta Gorda, Fla., Code of Ordinances, ch. 26, § 11.5(z) (hereinafter "the Ordinance"); App. at 179. The Ordinance defines "indecent speech" as "language or graphics that depict or describe sexual or excretory activities or organs in a manner that is offensive as measured by contemporary community standards." Punta Gorda, Fla., Code of Ordinances, ch.

26, § 11.4(32); App. at 178. The City's attorney stated to the Board that the Ordinance was created "to protect children under the age of 17 from having to see offensive words" so that the City can "attract families with children" by prohibiting "language that the community finds to be offensive." (App. at 169-70.)

Violations of the Ordinance are subject to a fine of $100 on the first offense, and $200 on the second. Punta Gorda, Fla., Code of Ordinances, ch. 9A, § 9A-13(c)(8). If the violation is found to be "irreparable," the fine may go up to $5,000, subject to the Board's discretion. Code of Ordinances, ch. 9A, § 9A-8(f).

Sheets was issued four citations in June 2021 alleging violations of the Ordinance due to displaying words which police officers considered to be indecent speech. (App. at 190-92, 206-08, 223-25, 240-42.) Police issued the citations to Sheets on June 9, June 12, June 22, and June 26. (Id.) All four cases were set to be heard by the Board on July 28, 2021. (Id.)

Prior to the hearing date, Sheets submitted a memorandum to the Board requesting dismissal of the charges. (App. at 246-60.) The memorandum argued that 1) the Ordinance's prohibition on "indecent" expression is unconstitutional and overbroad on its face under the First Amendment to the United States Constitution; 2)

the Ordinance's prohibition on "indecent" expression is unconstitutional under the First Amendment to the United States Constitution as applied to the conduct of Sheets which was the basis for each of the citations; and 3) Sheets's conduct which was the basis for each of the citations does not fall within the prohibition set forth in the Ordinance. (App. at 249-59.)

In response, the City's attorney then submitted a motion and supporting memorandum to strike Sheets's memorandum and request for dismissal. (App. at 261-66.) The City argued that the Board had no authority or jurisdiction to decide the constitutionality of provisions of the Ordinance, and that an appeal to the circuit court was the proper method for challenging the constitutionality. (App. at 263-66.)

At the hearing on July 28, 2021, the Board passed a motion that arguments concerning the constitutionality of the Ordinance were not within its purview and thus it would not consider Sheets's motion for dismissal, but that the memorandum submitted by Sheets and the response submitted by the City would be made part of the record in all four of Sheets's cases to show that Sheets contested the constitutionality and validity of the Ordinance. (App. at 27-28.)

Sheets entered a plea of not guilty to each of the four charges. (App. at 32, 108, 134, 150.) All four charges involved Sheets protesting (App. at 76, 102, 111, 138, 153) in a public area where police officers claimed the words displayed could potentially be viewed by children under 17 years of age (though there was no evidence that any child was actually present any of these four occasions) (App. at 35, 38-40, 111-14, 139, 153-54).

All four charges were based on a violation of the "indecent speech" provision of the Ordinance, and it was agreed that no charges were based on Sheets's language involving obscenity or fighting words. (App. at 48-49, 66, 128.) One officer noted that Sheets was "one-hundred percent cooperative . . . the entire time" when he received the citation. (App. at 62.) Sheets testified that none of the phrases he was charged for were sexual, but were used to "express [the] depth of [his] anger and frustration with the government" as part of what he felt was "[his] duty as a citizen to confront this attempt to take away our freedom of speech." (App. at 74, 76-77, 87-89, 143-46, 162-63.)

The first charge from June 9, 2021 in Case No. 21-79906 was due to Sheets wearing a t-shirt with the words "Fuck Policing 4 Profit," holding a flag that read "Fuck Trump," and holding a sign

with a photograph of the Punta Gorda City Council on which the words “R Cunts” was written. (App. at 37-41, 76-77. 181-83.)

The second charge from June 12, 2021 in Case No. 21-79908 was due to Sheets wearing a t-shirt with the words “Fuck the Police” and holding a flag that read “Fuck Biden.” (App. at 112-15, 199-200.)

The third charge from June 22, 2021 in Case No. 21-79967 was due to Sheets wearing a t-shirt bearing the words “Fuck the Police.” (App. at 138, 215.)

The fourth charge from June 26, 2021 in Case No. 21-80024 was due to Sheets wearing a t-shirt bearing the words “Fuck Policing For Profit” and holding a flag that read “Fuck Biden.” (App. at 153, 232.)

The Board found Sheets to be in violation on each of the four charges, but none of the Board’s votes were unanimous. (App. at 106-07, 133, 149-50, 173-74.) Throughout the hearing, it was debated how to determine whether Sheets’s words were “offensive as measured by contemporary community standards” to meet the definition of “indecent speech” under the Ordinance. Punta Gorda, Fla., Code of Ordinances, ch. 26, § 11.4(32); App. at 65-66, 132-33. During a preliminary discussion on the motions, a member of the

Board asked counsel how to establish "contemporary community standards" since it is "a very vague concept," to which the Board's counsel replied that there is no definition for "contemporary community standards" and a determination of that would have to be made by the Board. (App. at 12-14.)

That response was later supported by the City's attorney who stated that the Board is tasked with determining those standards "[b]ecause [the Board members] know what is offensive and what is not offensive in our community. It may be less offensive elsewhere." (App. at 97.) The chairman of the Board later stated that the Board is "the community for Punta Gorda. And so . . . it's what offends us." (App. at 104.) However, although the chairman of the Board stated that he "hear[s] a lot of phrases using [the word 'fuck']" when playing golf, and indicated that he might even use the term himself when he "ha[s] a bad swing," he thought that Sheets's use of the word on a sign was different and offensive as measured by contemporary community standards. (App. at 55, 130.)

SUMMARY OF ARGUMENT

The City's Ordinance violates the First Amendment to the U.S. Constitution in numerous ways. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of

speech, or of the press," and its guarantee applies to states and their subordinate governmental entities, such as the City. U.S. Const. amend. I; Stromberg v. California, 283 U.S. 359, 368 (1931).

The Ordinance is unconstitutional on its face as it essentially enacts a much broader variation on the existing obscenity standard set forth in Miller v. California. 413 U.S. 15, 24 (1973). The Ordinance is also unconstitutional as applied to Sheets because it is viewpoint discriminatory and constitutes a content-based speech regulation subject to a standard of strict scrutiny, which the City fails to meet. Further, the Ordinance is impermissibly vague so as to render it void because its subjective and uncertain standard for indecent speech fails to provide fair notice, creates a high probability of selective enforcement and varying interpretations, and likely causes people to self-censor their speech due to fear of being fined thousands of dollars for violating the Ordinance. The City's Ordinance's indecent speech provisions thus violate both the First and Fourteenth Amendments of the U.S. Constitution.

Additionally, Sheets did not violate the Ordinance as written. The phrases Sheets displayed while protesting did not constitute descriptions of sexual activity or organs, either as contemplated by

the provision under which he was cited or as specified in existing First Amendment jurisprudence.

ARGUMENT

I. The Ordinance's indecent speech provision is unconstitutional, and the City thus erred in adopting and enforcing the Ordinance through its police department and Code Enforcement Board.

Determining the constitutionality of a statute is a pure question of law, subject to *de novo* review. Caribbean Conservation Corp. v. Fla. Fish & Wildlife Conservation Comm'n, 838 So. 2d 492, 500 (Fla. 2003); Montgomery v. State, 69 So. 3d 1023, 1026 (Fla. 5th DCA 2011).

> Statutes and ordinances are presumed to be constitutional, and all reasonable doubts regarding the statute or ordinance must be resolved in favor of constitutionality. . . . However, an exception to the general constitutional presumption enjoyed by statutes and ordinances exists respecting regulations affecting First Amendment rights. "Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat, the constitution demands that content-based restrictions on free speech be presumed invalid, . . . and that the Government bear the burden of showing their constitutionality."

State v. Hanna, 901 So. 2d 201, 204 (Fla. 5th DCA 2005) (quoting Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 660 (2004)).

a. The Ordinance's indecent speech provision is unconstitutional because it bans protected speech and its definition of indecent speech extends well beyond what is permitted for the proscription of obscenity.

The indecent speech provision is unconstitutional because the definition greenlights the proscription of speech beyond what the U.S. Supreme Court has permitted, either on its face or as applied to Sheets based on his display of the word "fuck" and one-time use of the word "cunts." In Cohen v. California, 403 U.S. 15 (1971), the Court struck down a conviction for disturbing the peace based on the defendant's display of "Fuck the Draft" on a jacket he was wearing in a courthouse. The Court summarized the issue before it as whether the government "can excise, as 'offensive conduct,' one particular scurrilous epithet from the public discourse, either upon the theory of the court below that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary." Cohen, 403 U.S. at 22-23. The Court held the government may not do so, writing as follows:

> Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable

> general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Cohen, 403 U.S. at 25; see also Wood v. Eubanks, 25 F.4th 414, 428 (6th Cir. 2022) (holding that "a 'Fuck the Police' shirt was clearly protected speech").

In Miller v. California, the Court permitted states to prohibit obscenity if it met the following definition: (1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. 413 U.S. at 24.

The City's Ordinance bans obscene signage using a similar definition: "language or graphics that depict or describe sexual or excretory activities or organs in a manner that is offensive as measured by contemporary community standards." Code of Ordinances, ch. 26, §11.4(32). This definition employs language

from, and thus could be confused for, an obscenity standard. For example, it requires that the language be offensive "as measured by contemporary community standards." However, the City's definition, as distinct from the Miller standard, does not require that speech appeal to the "prurient interest" to be punishable, allowing the City to sweep more broadly. See 413 U.S. at 24. Moreover, whereas the Court determined that even otherwise obscene speech has enough merit to bar its proscription where it has "serious literary, artistic, political or scientific value," the City's indecent speech ban targets even speech which, like Sheets's, has obvious social value. See id. Finally, also as distinct from the Miller standard, the City's definition does not require that the sexual or excretory activities described be "specifically defined by the applicable state law," meaning the City may arbitrarily decide what constitutes a sexual or excretory activity. See id. Sheets's punishment under this law, for what were in context clearly not sexual references, is evidence of the danger for how such a loose, untethered standard can be used to punish speech.

Notably, the Court has never laid out a definition for the prohibition of "indecent" or "offensive" speech. Quite to the contrary, the Court has said that indecent speech is "protected by

the First Amendment." Sable Communications v. F.C.C., 492 U.S. 115, 126 (1989). The City, in banning speech seen as "offensive" per "contemporary community standards," has outlawed what is functionally a very soft version of obscenity. Put another way, the City is attempting to ban speech, including Sheets's, which may be offensive, but which does not come close to meeting the Miller standard. Indeed, it the City and Board agreed that none of Sheets's four charges were based on obscenity. (App. at 48-49, 66, 128.)

Even with regard to public schools, which have a "special interest" in regulating student speech, the Court held recently in Mahanoy Area Sch. Dist. v. B. L. that a public high school violated the First Amendment when it took disciplinary action against a 14-year-old student for using crude and vulgar language in posting an image to her friends with her middle fingers raised and a caption displaying the words "Fuck school fuck softball fuck cheer fuck everything" to express her frustration about not making the varsity cheer squad, even though her comments caused some students to be visibly upset. 141 S. Ct. 2038, 2043 (2021).

If the First Amendment prohibits a school from punishing a child for using the word "fuck" in an angry rant about not making the cheer squad, then it must certainly give even greater protection

from punishment to an adult using the same word in political speech when protesting the government. The City's prohibition is thus more stringent than would be allowed even by a school, which is specifically exempted from certain First Amendment constraints on its students. Although the City might try to argue that the Ordinance has a specific focus on protecting children under 17 years of age from offensive speech (App. at 169-70), that does not justify violating the Constitution, and the Court made clear in Mahanoy that such children have a constitutional right to use offensive language themselves in communicating with other children. Therefore, any attempt by the City to justify and salvage its Ordinance on such a ground must also fail.

Since the indecent speech provision of the Ordinance bans speech which the Court has said is protected, and since the City's definition for proscribing that speech extends well beyond the definitions provided by the Court for the proscription of obscene speech, the provision unconstitutionally infringes on protected speech and cannot be enforced.

b. The Ordinance as applied to Sheets is unconstitutional because it is viewpoint discriminatory in violation of the First Amendment.

The Ordinance also should not be enforced against Sheets because it is viewpoint discriminatory in contravention of the First Amendment. As a general proposition, "the Government may not discriminate against speech based on the ideas or opinions it conveys." Iancu v. Brunetti, 139 S.Ct. 2294, 2299 (2019). The test for viewpoint discrimination is whether "the government has singled out a subset of messages for disfavor based on the views being expressed." Matal v. Tam, 137 S.Ct. 1744, 1750 (2017). Further, "giving offense is a viewpoint." Id. at 1749. See also Street v. New York, 394 U.S. 576, 592 (1969) ("the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers").

In Iancu, the plaintiff attempted to register his trademark, "FUCT," with the U.S. Patent and Trademark Office (PTO). 139 S.Ct. at 2297. Since FUCT is read phonetically as "fucked," a PTO examining attorney and the PTO Appeal Board found the mark to be "a total vulgar[ity]" and thus "unregistrable" under a provision proscribing the registration of "immoral or scandalous" trademarks. Id. at 2298. The Court, however, held the provision to be facially viewpoint discriminatory because it permits approval of some marks – those "aligned with conventional moral standards" – while

rejecting other marks – "those hostile to [conventional moral standards]" – on the same topics. Id. at 2300. That is, the only difference between the approved and disapproved marks was their substantive content. Id. Therefore, the law disfavored "ideas that offend," making it viewpoint discriminatory in contravention of the First Amendment. Id. at 2301.

As with Iancu's "immoral or scandalous" provision, the City's prohibition on signs containing indecent speech is facially viewpoint discriminatory. Just as in Iancu, the Ordinance treats signs with differing views on the same topic differently. Sheets, for example, whose signs are hostile to some opinions of decency, is being penalized while the City would not punish one whose sign aligned with those standards on the same topic (e.g., the City would not punish an "I Love Biden!" sign). As in Iancu, the only difference between these two signs is their substantive content, with "ideas that offend" being disfavored by the City. This represents the City singling out a subset of messages (those that are seen as offensive) for disfavor. Therefore, the "indecent speech" provision is viewpoint discriminatory in violation of the First Amendment. See also Matal, 137 S.Ct. at 1766 (Kennedy, J., concurring) (holding as "the essence of viewpoint discrimination" the Government's attempt within

certain trademark categories to disallow "derogatory" trademarks but permit positive or benign marks).

c. The law is a content-based speech regulation which fails to survive strict scrutiny.

A restriction is content-based if "on its face" it draws distinctions based on the "communicative content" of what a speaker says, or if it "require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." McCullen v. Coakley, 573 U.S. 464, 479 (2014) (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984)). The same is true if a law "applies to particular speech because of the topic discussed or the idea or message expressed." Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015); see also Cohen, 403 U.S. at 24 (finding restriction to be content-based where it imposed restrictions on words because of their vulgarity).

The Ordinance is thus clearly content-based. On its face, it draws a distinction based on communicative content, as content is the only thing that could distinguish indecent speech from that which is decent. The Ordinance, moreover, requires enforcement authorities to examine the content of the message to determine if a

violation has occurred, as one cannot know whether something is indecent without first viewing and analyzing it – i.e., examining it. Therefore, the Ordinance constitutes a content-based restriction on speech.

When a restriction is content-based, it is presumptively unconstitutional and can only be justified if it passes strict scrutiny – i.e., if it is narrowly tailored to serve a compelling governmental interest. R.A.V. v. City of St. Paul, 505 U.S. 377, 395 (1992). Put differently, the Ordinance is unconstitutional unless the City can show that the law: (1) was enacted pursuant to a compelling interest, (2) materially advances this interest, (3) is not overinclusive, (4) is the least restrictive alternative, and (5) is not underinclusive.

The City's interest is that it "wants to be able to attract families with children, and . . . protect the children from having to be faced with indecent language that the community finds to be offensive." (App. at 170.) When there are far greater dangers to children than mere words on a sign which they might not even see or be able to read, and which the children or their parents might themselves say to each other or read or hear in a variety of other places such as the television or internet, the City's interest cannot

possibly be sufficiently compelling to override First and Fourteenth Amendment protections by those protesting government actions, especially in light of Mahanoy which affirms children's right to use such language themselves. 141 S. Ct. at 2043.

Further, the City's means of achieving its interest is both highly overinclusive and underinclusive. The City's Ordinance is overinclusive because it not only penalizes "indecent speech" which is seen by children, but also that which is never even seen by children, as appeared to be the case here. The Ordinance penalizes indecent speech "which can *potentially* be viewed by children under the age of 17" (emphasis added) and this is all that was proven by the City. (App. at 35, 38-40, 111-14, 139, 153-54.) The effect is to have such a widespread restriction that there is no possible time or place within the City where such language can be used and not *potentially* be viewed by children.

The City's Ordinance is underinclusive as it does not prohibit people from saying those same words which it prohibits from being written on a sign or from children seeing such signs in non-public areas. Indeed, one might worry that the City will likewise expand its prohibition to begin fining parents or people playing golf (see App. at 55, 130) thousands of dollars for saying curse-words which

children might overhear. And many families with children might not be attracted to such a city which imposes unconstitutional restrictions on speech.

Therefore, the City's Ordinance fails to meet the strict scrutiny standard, which is the City's burden to prove, and is thus unconstitutional. See Hanna, 901 So. 2d at 204.

d. The Ordinance is impermissibly vague because it does not provide fair notice, encourages arbitrary enforcement, and is overbroad.

There are three ways in which a statute can be impermissibly vague: (1) failure to provide fair notice of prohibited conduct, (2) encouragement of arbitrary and discriminatory enforcement, and (3) overbreadth that leads to impingement on First Amendment freedoms. Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972). The Ordinance is vague in each of the three aforementioned ways.

1. The Ordinance does not provide fair notice because its definition of indecent speech is subjective and thus uncertain.

As the Supreme Court has repeatedly recognized, "it is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." Id. at 108. Clarity of law is

foundational because "we assume that man is free to steer between lawful and unlawful conduct," which requires that laws be sufficiently clear to give "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Id. A vague statute, with uncertain definitions and ambiguous words susceptible of multiple reasonable interpretations, "may trap the innocent by not providing fair warning." Id.

The Ordinance's indecent speech provision fails to provide fair notice because it does not give people a reasonable opportunity to know what is prohibited. The proscription on indecent signage is more specifically a ban on descriptions of sexual or excretory activities that are "offensive as measured by contemporary community standards." Code of Ordinances, ch. 26, §11.4(32).

It is uncertain which words could be considered to describe a sexual or excretory activity or organ. In Miller, the Court, in formulating a definition for proscribable obscenity, required that an obscenity describe "sexual conduct *specifically defined by the applicable state law*" (emphasis added) in order to be banned. 413 U.S. at 24. Their rationale was avoiding the very problem that endures here: no one can know how the City will define a sexual or

excretory activity. The case at bar aptly demonstrates this, as "Fuck [a person at whom one is mad]" would not be interpreted by most in the sexual manner which the City has chosen to interpret it. And Sheets's "Fuck Policing 4 Profit" t-shirt, which formed part of the basis for two of his four charges, cannot possibly be interpreted to have a sexual meaning since policing for profit is an activity and not a person or an object.

Moreover, it is not at all clear that "offensive as measured by contemporary community standards" provides a commonly or consistently understood standard of conduct. It is difficult to pin down precisely which standards prevail in a community. On one side, some believe that they have a right to be free from indecency; on the other, some believe that the right to sharply and unpleasantly criticize elected officials is what makes America worth defending. Even the Board itself was not unanimous in its decisions to find Sheets in violation of the Ordinance. (App. at 106-07, 133, 149-50, 173-74.)

Punta Gorda is thus divided between at least two camps whose views on this issue are irreconcilable; one or the other must prevail in the Ordinance's application. Given this, residents are only likely to have notice toward which standard the law will be applied

if they can correctly guess the moral or political proclivities of the responding police officer and the current members of the Board which can change over time.

The City claims that the members of the Board represent the community standards. (App. at 97, 104.) But even here, some of the Board members expressed that they could not determine the contemporary community standards, which one member characterized as "a very vague concept." (App. at 12-14, 65-66, 132-33.) And another Board member seemed to admittedly apply different standards to his personal life when golfing from the standard he imposed on Sheets. (App. at 55, 130.)

But it is not just residents of the City who are subject to being penalized for violating the Ordinance. The City acknowledged this discrepancy when it stated that "[the Board members] know what is offensive and what is not offensive in our community. It may be less offensive elsewhere." (App. at 97.) If it might be less offensive elsewhere, then travelers and visitors to the City cannot possibly have fair notice of what "is offensive as measured by contemporary community standards," which the City claims is represented by the Board's nonunanimous majority decision.

Thus, the Ordinance does not provide fair notice. The uncertainty inherent in measuring an offense according to contemporary community standards, along with the greater-yet uncertainty in how sexual or excretory activities and organs will be defined and applied, deprives people of fair notice in the operation of the Ordinance's indecent speech provision. The Ordinance thus violates due process and cannot be enforced.

2. The Ordinance's indecent language provision is impermissibly vague because its undefined terms create a high probability of inconsistent enforcement.

One historical ideal of the United States has been the prevention of "arbitrary and discriminatory enforcement" of the law. Grayned, 408 U.S. at 108. To ensure this, "laws must provide explicit standards for those who apply them." Id. A vague law violates equal-application ideals (and thus fails to provide due process) because it "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis" – a form of resolution carrying "attendant dangers of arbitrary and discriminatory application." Id. at 108-09.

The Ordinance provides those who apply it with at best ambiguous standards. As already mentioned, owing to an improper

lack of definition, it is unknown to the public how the City plans to define sexual or excretory activities or organs and apply those terms for purposes of enforcing the Ordinance. Because there is no definition of these terms, arbitrary enforcement is assured: each officer will have no choice but to implement their own sense of what constitutes a sexual or excretory activity or organ. Some officers, therefore, might try to argue that Sheets's displayed language describes sexual activity; while others, who apply the colloquial use of the terms, would not view it as a sexual allusion. The same problem inheres in officers deciding what is offensive on the basis of community standards.

This type of broad vagueness has been held unconstitutional, both by the U.S. Supreme Court and by the Florida Supreme Court, which wrote in a 1976 decision that, "[c]onsistently with the United States Supreme Court's decisions, nobody can be punished under a statute purporting to outlaw spoken words, if the statute would be unconstitutional as applied to anybody." Spears v. State, 337 So. 2d 977, 980 (Fla. 1976). Whether the words are spoken or written makes no difference to one's First Amendment right to freedom of speech. Because the lack of definition creates a high probability of

inconsistent enforcement, the Ordinance's provision is impermissibly vague.

3. The provision is overbroad because its uncertain meanings will cause some residents to preemptively self-censor their constitutionally protected speech.

Vague statutes are overbroad when they cause the preemptive self-silencing of speakers whose messages would be entitled to constitutional protection. Reno v. ACLU, 521 U.S. 844, 874 (1997). This is especially worrisome where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," since it will thus operate "to inhibit the exercise of [First Amendment] freedoms." Grayned, 408 U.S. at 109 (first alteration in original) (quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (internal citations omitted)). Where meanings are uncertain, citizens will invariably "'steer far wider of the unlawful zone' … than if the boundaries of the forbidden areas were clearly marked." Id. (quoting Baggett, 377 U.S. at 372). A law which is overbroad in this way is impermissibly vague.

In Reno v. ACLU, Congress passed a statute making one criminally liable for sending to minors "any communication that, in context, depicts or describes, in terms patently offensive as

measured by contemporary community standards, sexual or excretory activities or organs." 521 U.S. at 860. The Court found that, "given the vague contours of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection." Id. at 874. That is, because those subject to it were unsure how its vague language would be applied, they erred on the side of safety and silenced their own speech – speech which is protected under the Constitution, but which could be subject to penalty depending on how the statute is interpreted for application. Id. at 871. The statute was vague and thus functionally overbroad, making its provisions unconstitutional. Id. at 864. Importantly, the Court also held that such vagueness was made even more troublesome because the statute was a "content-based regulation" on speech. Id. at 871.

The provision at bar is nearly identical to that in Reno and as such is also impermissibly vague. Like that statute, it bans descriptions of sexual or excretory activities in a manner "offensive as measured by contemporary community standards." Code of Ordinances, ch. 26, §11.4(32). The Ordinance is actually more vague, because it, unlike the Reno statute, is not tempered by the

requirement that the determination be made "in context." Reno, 521 U.S. at 860.

More to the point, however, it is unclear in both cases how sexual and excretory activities and organs are defined; it is also unclear in both cases how one is to interpret "offensive as measured by contemporary community standards." This lack of clarity creates uncertainty, and people will likely err on the side of personal safety, i.e., they will refrain from communicating their protected expression. As in Reno then, the Ordinance's indecent speech provision is impermissibly vague. This argument is made stronger because, as discussed above in this brief, the Ordinance is a content-based regulation of speech, which Reno held makes a statute's vagueness even more concerning. Id. at 871-872.

Additionally, the Supreme Court of Florida had held that a state statute criminalizing a person who would "publicly use or utter any indecent or obscene language" was unconstitutional on its face because it was overbroad. Spears, 337 So. 2d at 978, 980. The Florida Court stated that "'indecent or obscene' does not meet constitutional requirements, because it does not succeed in articulating a boundary between expression which is protected and

expression which is not." Id. at 980-81. The Court explained and warned that

> Overbroad statutes create the danger that a citizen will be punished as a criminal for exercising his right of free speech. . . . [T]he mere existence of statutes and ordinances purporting to criminalize protected expression operates as a deterrent to the exercise of the rights of free expression, and deters most effectively the prudent, the cautious and the circumspect, the very persons whose advice we seem generally to be most in need of.

Id. at 980.

II. The phrases Sheets displayed did not constitute descriptions of sexual activity or organs in the manner contemplated by the Ordinance, and thus the Code Enforcement Board violated the First and Fourteenth Amendments to the U.S. Constitution in applying the Ordinance to Sheets when it found him in violation.

There is no dispute as to Sheets's actions or the language he displayed. So, whether Sheets actually violated the Ordinance depends on an interpretation and application of the terms in the Ordinance. "When the facts are not in dispute, the application of law to those facts is reviewed de novo. To the extent resolution of an issue requires statutory interpretation, review is de novo. In construing a statute, courts must first look to its plain language." Fortune v. Gulf Coast Tree Care, Inc., 148 So. 3d 827, 828 (Fla. 1st DCA 2014) (internal citations omitted).

Sheets was penalized for displaying language stating, "Fuck Biden," "Fuck Trump," that the City Council members are "cunts," "Fuck the Police," and "Fuck Policing 4 Profit," which the City argues are descriptions of "sexual or excretory activities or organs in a manner that is offensive as measured by contemporary community standards." This is an improper application of the Ordinance, as Sheets's language was clearly not sexual references and, in context, would not reasonably be interpreted as such.

Indeed, the "four-letter expletive[s]" chosen by Sheets are often used in a manner completely detached from the meaning which the City attributes to them (except when used on the golf course). As the Supreme Court pointed out in Cohen, 403 U.S. at 20, use of the word "fuck" in such a context cannot plausibly be considered sexual or erotic. When someone feels very strongly about an issue, as Sheets clearly does here, words such as fuck "are often chosen as much for their emotive as their cognitive force." Id. at 26. The word garners attention and can be used as a catchall word to convey "not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well." Id. The same is true for the use of the word "cunt" as an insult. A strong, difficult-to-verbalize dislike of Trump, Biden, and the City's

decisions and police activity, rather than some completely irrelevant sexual allusion, is what Sheets meant and conveyed with his language.

Because Sheets's language does not constitute descriptions of sexual activity, applying the Ordinance's provision to Sheets violates his constitutional rights. See Baker v. Glover, 776 F. Supp. 1511 (M.D. Ala. 1991) (finding that a bumper sticker reading "1-800-EAT-SHIT" had political value and was not reasonably interpreted as a sexual allusion); Cohen, 403 U.S. at 26 (noting that California's attempt to banish the word "fuck" from the public square raises concerns about "governments . . . seiz[ing] upon the censorship of particular words as a convenient guise for banning the expression of unpopular views"); Spears, 337 So. 2d at 981 (stressing that vulgar language "aptly characterized as 'indecent'" often lacks sexual undertones and fails to appeal to the "prurient interest"); Wood, 25 F.4th at 428 (confirming that a shirt bearing the words "Fuck the Police" is inarguably protected by the First Amendment).

CONCLUSION

For these reasons, Sheets asks this Court to find the City's Ordinance facially unconstitutional as it is in violation of the First

and Fourteenth Amendments to the U.S. Constitution, or unconstitutional as applied to him, reverse the judgment of the Board, and vacate the four Orders finding Sheets in violation of the Ordinance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Initial Brief has been provided this 24th day of March 2022 to the E-File Portal For Filing and Distribution, and to David M. Levin, attorney for Appellee by email at: dlevin@icardmerrill.com.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Initial Brief complies with the applicable font and word count limit requirements set by the Florida Rules of Appellate Procedure, and that it contains 6,273 words according to the word count feature of MS Word, this 24th day of March 2022.

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