IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

David Kliss,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	Civil Action No. _____
	:	
East Hanover Township and	:	**JURY TRIAL DEMANDED**
Light-Heigel & Associates, Inc.,	:	
	:	
Defendants.	:	ELECTRONICALLY FILED

PLAINTIFF'S BRIEF IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. PROCEDURAL HISTORY OF THE CASE 1

II. STATEMENT OF FACTS 1

III. STATEMENT OF QUESTIONS INVOLVED 4

IV. ARGUMENT 5

A. PLAINTIFF HAS STANDING 5

B. THE EAST HANOVER TOWNSHIP SIGN ORDINANCE IS UNCONSTITUTIONALLY OVERBROAD UNDER THE FIRST AMENDMENT 6

C. THE "VULGAR/INDECENT/OBSCENE" PROVISION OF THE SIGN ORDINANCE IS UNCONSTITUTIONALLY VAGUE UNDER THE FOURTEENTH AMENDMENT 10

D. A PRELIMINARY INJUNCTION MUST ISSUE TO PREVENT UNCONSTITUTIONAL ABRIDGMENT OF PLAINTIFF'S FIRST AMENDMENT RIGHTS PENDING DETERMINATION OF PLAINTIFF'S CLAIMS 13

1. LIKELIHOOD OF SUCCESS ON THE MERITS 13

2. UNCONSTITUTIONAL RESTRICTIONS ON SPEECH "UNQUESTIONABLY" CONSTITUTE IRREPARABLE HARM 14

3. GRANTING A PRELIMINARY INJUNCTION WILL NOT RESULT IN GREATER HARM TO THE NON-MOVING PARTY 15

4. THE PUBLIC INTEREST FAVORS GRANTING A PRELIMINARY INJUNCTION 15

V. CONCLUSION 17

CERTIFICATION OF WORD COUNT 18

TABLE OF AUTHORITIES

CASES

Abu-Jamal v. Price, 154 F.3d 128 (3d Cir. 1998) 15

ACLU v. Ashcroft, 322 F.3d 240 (3d Cir. 2003) 14

ACLU v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007) 5

Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153 (3d Cir. 1999) 13

Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979) 5

Bantam Books v. Sullivan, 372 U.S. 58 (1963) 13

Boos v. Barry, 485 U.S. 312 (1988) 8

Brown v. City of Pittsburgh, 543 F. Supp. 2d 448 (W.D. Pa. 2008) 14

Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968) 13

City of Ladue v. Gilleo, 512 U.S. 43 (1994) 7

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 5

Connally v. General Constr. Co., 269 U.S. 385 (1926) 11

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 16

Elrod v. Burns, 427 U.S. 347 (1976) 15, 16

Freedman v. Maryland, 380 U.S. 51 (1965) 13, 14

Grayned v. City of Rockford, 408 U.S. 104 (1972) 10, 11

Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489 (1982) 11

Holder v. Humanitarian Law Project, ___ U.S. ___, 130 S.Ct. 2705 (2010) 11

Kolender v. Lawson, 461 U.S. 352 (1983) 10

Kos Pharms., Inc. v. Andrx Corp., 369 F.3d 700 (3d Cir. 2004) 13

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 11

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) 16

Miller v. California, 413 U.S. 15 (1973) 7, 12, 15

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 10

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) 11

Payton v. New York, 445 U.S. 573 (1980) 7

Smith v. Daily Mail, 443 U.S. 97 (1979) 14

Spence v. Washington, 418 U.S. 405 (1974) 7

Startzell v. City of Philadelphia, 533 F.3d 183 (3d Cir. 2008) 8

Stern v. United States Gypsum, Inc., 547 F.2d 1329 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1977) 16

Swartzwelder v. McNeilly, 297 F.3d 228 (2002) 14

Thomas v. Collins, 323 U.S. 516 (1945) 16

Trojan Techs. v. Pennsylvania, 916 F.2d 903 (3d Cir. 1990) 10

United Mine Workers of America, District 12 v. Illinois State Bar Association, 389 U.S. 217 (1967) 16

United States v. Cruikshank, 92 U.S. (2 Otto.) 542 (1875) 16

United States v. Lanier, 520 U.S. 259 (1997) 11

United States v. Williams, 553 U.S. 285 (2008) 11

Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383 (1988) 5

Whitney v. California, 275 U.S. 357 (1927) (Brandeis, J., concurring) 16

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I .....*passim*

U.S. Const. amend. V 12

U.S. Const. amend. XIV 12

OTHER AUTHORITIES

East Hanover Township Zoning Ordinance .....*passim*

OTHER NON-AUTHORITATIVE WORKS

Seinfeld, Episode 18 ("The Old Man") (first aired 2/18/1993) 8, 9

I. PROCEDURAL HISTORY OF THE CASE

This is a newly-filed case instituted by way of complaint challenging the constitutionality of a provision of the East Hanover Township Zoning Ordinances that regulates the contents of signage. A motion for preliminary injunction is filed contemporaneously with the complaint.

II. STATEMENT OF FACTS

Movant David Kliss is an adult individual who at all times relevant hereto maintained a principal residence at 436 Pheasant Road, Hummelstown (East Hanover Township), Dauphin County, Pennsylvania 17036. Kliss Declaration ¶ 1. Defendant East Hanover Township ("Township"), a political subdivision of the Commonwealth of Pennsylvania, is located in Dauphin County, Pennsylvania. Kliss Declaration ¶ 2. Defendant Light-Heigel & Associates, Inc. ("Light-Heigel") is a corporation that maintains a regular place of business at 805 Estelle Drive, Suite 111, Lancaster, Lancaster County, Pennsylvania 17601. Kliss Declaration ¶ 3. Light-Heigel at all times relevant hereto served as the authorized zoning officer for Defendant Township. *Id.*

On or about July 14, 2010, Kliss put up a sign on his property ("Sign") at 436 Pheasant Road, East Hanover Township, Dauphin County, Pennsylvania. Kliss Declaration ¶ 5. The Sign stated "$10,000 TO TAKE A CRAP[.]" A true and correct picture of the Sign is attached to the complaint as Exhibit "A". Kliss

Declaration ¶ 6.

Kliss erected such sign to protest a proposed mandatory sewer tie-in for his property which was then pending before the Township's board of supervisors, the cost of which would be several thousand dollars to movant. Kliss Declaration ¶ 7.

On or about July 22, 2010, the Township through its authorized code enforcement officer, Light-Heigel, issued an "ENFORCEMENT NOTICE" to Kliss ("Enforcement Notice"). A true and correct copy of such Enforcement Notice, bearing certain non-original scribbled markings, is attached as Exhibit "B" to the complaint. Kliss Declaration ¶ 8.

The Enforcement Notice stated that Kliss' Sign was in violation of the East Hanover Township Zoning Ordinance ("Zoning Ordinance") for, *inter alia*, violating Section 314.2.13 thereof, which states,

> No Loud, Vulgar, Indecent, or Obscene Advertising matter shall be displayed in any manner, including, but not limited to:
>
> **A.** Any graphic illustration pertaining to specified sexual activities and/or specified anatomical areas; and
>
> **B.** Scenes wherein artificial devices are employed to depict, or drawings are employed to portray any of the prohibited signs, photographs or graphic representations described above[.]

Zoning Ordinance, § 314.2 (hereafter referred to as "Vulgar/Indecent/ Obscene" provision), attached as Exhibit "C" to the complaint. Kliss Declaration ¶ 9.

The Terms "Loud," "Vulgar," "Indecent" and "Obscene" are nowhere defined in the Ordinance. Kliss Declaration ¶ 10. The Sign contained no "graphic illustration pertaining to specified sexual activities and/or specified anatomical areas[.]" Kliss Declaration ¶ 11. The Sign further contained no "[s]cenes wherein artificial devices are employed to depict, or drawings are employed to portray any of the prohibited signs, photographs or graphic representations described[]" in the Ordinance. Kliss Declaration ¶ 12.

Defendants Township and Light-Heigel, under color of law, prohibited Kliss from speaking out, protesting in writing and petitioning government against the proposed mandatory sewer tie-in that was then pending before the East Hanover Board of Supervisors, under threat of civil prosecution with fines of five hundred dollars ($500) per day. Kliss Declaration ¶ 13.

Kliss attempted to avoid legal prosecution for violation of the Vulgar/Indecent/Obscene provision by painting a white stripe over the word "crap" and re-posting the Sign in a manner that did not transgress any other provisions of the Sign Ordinance invoked by defendants in the Enforcement Notice. Kliss Declaration ¶ 14. Kliss wishes to again put out a sign with its original language, but fears to do so because of the threat of government retaliation and civil prosecution. Kliss Declaration ¶ 18.

III. STATEMENT OF QUESTIONS INVOLVED

1. IS THE EAST HANOVER TOWNSHIP SIGN ORDINANCE UNCONSTITUTIONALLY OVERBROAD UNDER THE FIRST AMENDMENT?

   Suggested Answer: Yes.

2. IS THE EAST HANOVER TOWNSHIP SIGN ORDINANCE UNCONSTITUTIONALLY VAGUE UNDER THE FOURTEENTH AMENDMENT?

   Suggested Answer: Yes.

3. SHOULD THIS COURT PRELIMINARILY ENJOIN ENFORCEMENT OF THE "VULGAR/INDECENT/OBSCENE" PORTION OF THE EAST HANOVER SIGN ORDINANCE PENDING TRIAL OF THIS MATTER?

   Suggested Answer: Yes.

IV. ARGUMENT

A. PLAINTIFF HAS STANDING

To have standing, a plaintiff must show, *inter alia*, that he has sustained or is immediately in danger of sustaining some direct injury that is not abstract, conjectural or hypothetical. *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 807-808 (E.D. Pa. 2007) (citing *City of Los Angeles v. Lyons,* 461 U.S. 95, 102, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)). In a pre-enforcement challenge to a statute carrying criminal penalties, standing exists when "the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution." *Id.* (quoting *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979) and citing *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988)).

In the present case, movant/plaintiff was actually threatened with enforcement action under a township ordinance and accordingly has standing to challenge such ordinance. See Declaration ¶¶ 8, 9 and 13.

B. THE EAST HANOVER TOWNSHIP SIGN ORDINANCE IS UNCONSTITUTIONALLY OVERBROAD UNDER THE FIRST AMENDMENT

Section 314.2.13 of the East Hanover Township Zoning Ordinance states,

> No Loud, Vulgar, Indecent, or Obscene Advertising matter shall be displayed in any manner, including, but not limited to:
>
> **A.** Any graphic illustration pertaining to specified sexual activities and/or specified anatomical areas; and
>
> **B.** Scenes wherein artificial devices are employed to depict, or drawings are employed to portray any of the prohibited signs, photographs or graphic representations described above[.]

See Exhibit "C" to complaint. (Section 314 of the Zoning Ordinance will be referred to hereafter collectively as the "Sign Ordinance" and the specifically quoted provision will be referred to hereafter as the "Vulgar/Indecent/Obscene" provision.)

Defendant East Hanover Township has enforced the Sign Ordinance against plaintiff in a way that violates his First Amendments rights to freedom of speech, press and petition. In particular, Defendant East Hanover Township through its code enforcement officer, Defendant Light-Heigel & Associates, Inc., issued a notice to plaintiff on or about July 15, 2010 that the language on a sign he posted on his front yard stating "$10,000 TO TAKE A CRAP" violated the Vulgar/Indecent/Obscene provisions of the Sign Ordinance. Declaration ¶ 9. See also Exhibit "B" (Enforcement Notice).

The Supreme Court has held that "in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression . . . an area in which there are few eternal verities." *Miller v. California*, 413 U.S. 15, 22-23 (1973). Further, an ordinance may no more regulate signs than speech, for "signs are a form of expression protected by the Free Speech Clause[.]" *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994).

A special respect for individual liberty in the home "has long been part of our culture and our law[.]" *City of Ladue*, *supra*, at 58 (1994) (citing *Payton v. New York*, 445 U.S. 573, 596-597, 63 L. Ed. 2d 639, 100 S. Ct. 1371, and nn. 44-45 (1980)). This respect is one that has "special resonance" as applied to the home when the government seeks "to constrain a person's ability to speak there." *Id.* (citing *Spence v. Washington*, 418 U.S. 405, 406, 409, 411 (1974) (per curiam)).

In the case of *Miller v. California*, 413 U.S. 15 (1973), the Supreme Court held that a regulation of putatively "obscene" speech was constitutionally permissible only as applied to statements "which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 24. East Hanover Township has failed to establish any element of this tri-partite, conjunctive test.

First, use of the words "$10,000. to take a crap" can hardly be said to "appeal to the prurient interest in sex[.]" As the Supreme Court has stated, "[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Startzell v. City of Philadelphia*, 533 F.3d 183, 200 (3d Cir. 2008) (quoting *Boos v. Barry*, 485 U.S. 312, 322, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988) (citations and internal quotation marks omitted)). "Crap" is hardly a word that appeals to the prurient interest in sex—especially when understood in the context in which plaintiff's protest was made: criticism of a mandatory sewer tie-in fee. See Kliss Declaration, ¶7.

Secondly, there is nothing about the sign that "portrays sexual conduct in a patently offensive way[.]" This point, we assume, even defendant will concede, in light of the casual use of the word "crap" on broadcast television.[1]

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[1] *See, e.g.*, the following dialogue from a top-rated 1990's situation comedy first aired by NBC and re-run in syndication thousands of times since:

> Kramer: *(in Newman's ear)* This guy's nothin' but a piece of crap.
> Newman: You are nothing but a piece of crap.
> Ron: Pardon me?
> Kramer: *(in Newman's ear)* A piece of crap.
> Newman: A piece of crap.
> Kramer: *(in Newman's ear)* I find you extremely ugly.
> Newman: I find you extremely ugly.
> Ron: *Do* you?
> Kramer: *(in Newman's ear)*: You emit a foul and unpleasant odor.
> Newman: You emit a foul and unpleasant odor.

Finally, there is a serious political reason for plaintiff's use of the language in his yard sign. Use of the words "take a crap" is intended to illustrate the high cost of bathroom use arising from the mandatory sewer tie-in. Discussion of septic issues may be considered inherently distasteful to the average person. But at least equally as distasteful is contemplation of a mandatory ten thousand dollar sewer tie-in fee that is forced upon unwilling homeowners. Plaintiff's yard sign contained quintessential political speech: Mr. Kliss did not like what the supervisors proposed to do with sewage disposal in his township, and he opposed it through his exercise of his First Amendment right to proclaim to the world the high cost that would be attached to such endeavor.

The Sign Ordinance hopelessly fails the *Miller* test for regulation of obscene speech and is consequently unconstitutionally overbroad under the First Amendment.

> Ron: Oh, is that right?
> Kramer: *(in Newman's ear)* I *loathe* you.
> Newman: I *loathe* you.

Seinfeld, Episode 18 ("The Old Man") (first aired 2/18/1993).

C. THE "VULGAR/INDECENT/OBSCENE" PROVISION OF THE SIGN ORDINANCEIS UNCONSTITUTIONALLY VAGUE UNDER THE FOURTEENTH AMENDMENT

In the case of *Grayned v. City of Rockford*, 408 U.S. 104, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972), the Supreme Court explained that "vague" laws offend several important values. As stated by the Court,

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

Id. at 108-09. See also *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 44 (1991) ("Due process requires that a State provide meaningful standards to guide the application of its laws."); *Trojan Techs. v. Pennsylvania*, 916 F.2d 903, 914 (3d Cir. 1990) ("[A] statute should be struck as vague if (1) it fails to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, or (2) it fails to provide explicit standards to the enforcing officer").

Vagueness and overbreadth are "traditionally viewed . . . as logically related and similar doctrines." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (citations omitted). Whereas overbreadth forbids a law that outlaws a swath of conduct so wide that otherwise constitutionally protected activity is criminalized, the

vagueness doctrine bars enforcement of a statute which either "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Lanier*, 520 U.S. 259, 266 (1997) (citing *Connally v. General Constr. Co.,* 269 U.S. 385, 391 (1926); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).

If a legislative enactment fails to provide to a person of ordinary intelligence "fair notice" of what is prohibited, or is so standardless that it encourages discriminatory enforcement, no penalty for violation thereof will lie. *Holder v. Humanitarian Law Project*, ___ U.S. ___, ___, 130 S. Ct. 2705, 2719 (2010) (citing *United States v. Williams*, 553 U.S. 285, 304 (2008)). A "more stringent vagueness test" applies when an enactment interferes with the First Amendment right to free speech. *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982) (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165, 166 (1972); *Grayned, supra*, 408 U.S., at 109).

The East Hanover Township Zoning Ordinance purports to regulate speech that is "loud, vulgar, indecent, or obscene[.]" See Sign Ordinance § 314.2(13), *supra*. But within the Ordinance, the words "loud," "vulgar," "indecent" and "obscene" are nowhere defined.[2] The Supreme Court has expressly condemned

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[2] It might be argued by the Township that the provision of the Zoning

such legislation and held that a putative prohibition on the use of such words without definition is unconstitutional *per se*. There is no authoritative construction to which defendant can point to limit the overbreadth of the ordinance's undefined reach.

The Sign Ordinance is standardless and consequently defectively vague under the Fifth and Fourteenth Amendment guarantees to due process of law. The Supreme Court has expressly condemned such legislation and held that a putative prohibition on the use of such words without definition is unconstitutional *per se*.

> [W]e now confine the permissible scope of such regulation [of "obscene" publication] to works which depict or describe sexual conduct. **That conduct must be specifically defined by the applicable state law, as written or authoritatively construed.**

Miller v. California, 413 U.S. 15, 24 (1973) (footnote omitted) (emphasis added).

There is no written definition or authoritative construction to which defendant can point to limit the Sign Ordinance's vague and undefined reach. It is consequently void for vagueness.

Ordinance dealing with signs is self-defining, that is, that vulgarity, indecency and obscenity are to be construed by the stated examples of "[a]ny graphic illustration pertaining to specified sexual activities and/or specified anatomical areas" and "[s]cenes wherein artificial devices are employed to depict, or drawings are employed to portray any of the prohibited signs, photographs or graphic representations described above[.]" Sign Ordinance at § 314.2(13). If this be the case, however, it is difficult to understand how the word "crap" meets either such definition. Further, the ordinance expressly states that the provision's prohibition is "not limited to" such examples. *Id.*

D. A PRELIMINARY INJUNCTION MUST ISSUE TO PREVENT UNCONSTITUTIONAL ABRIDGMENT OF PLAINTIFF'S FIRST AMENDMENT RIGHTS PENDING DETERMINATION OF PLAINTIFF'S CLAIMS

"A party seeking a preliminary injunction must show: (1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (quoting *Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir. 1999)).

The case *sub judice* concerns a restriction on the exercise of the rights of speech, press and petition under the First Amendment. Decisions of the United States Supreme Court make clear that the equities weigh heavily in favor of the entry of a preliminary injunction to enjoin such official suppression of speech pending final resolution of movant's underlying prayer for permanent injunction.

1. LIKELIHOOD OF SUCCESS ON THE MERITS

The present case presents a high likelihood of success on the merits. The Supreme Court has stated that "[a] system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Carroll v. President & Com, 'rs of Princess Anne*, 393 U.S. 175, 180-181 (1968) (quoting *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963), and citing *Freedman v.*

Maryland, 380 U.S. 51, 57 (1965)).[3] "And even where this presumption might otherwise be overcome, the Court has insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit." *Id.*

For the reasons more fully explicated in Section IV(B)(1) and (2), *supra*, defendants cannot rebut the "heavy presumption" of the challenged ordinance's unconstitutionality.

2. UNCONSTITUTIONAL RESTRICTIONS ON SPEECH "UNQUESTIONABLY" CONSTIUTE IRREPARABLE INJURY

"When evaluating a request for injunctive relief based on a First Amendment challenge, it is apparent that the first prong is the most important and the most dispositive, that is whether the [challenged regulation] violates the First Amendment." *Brown v. City of Pittsburgh*, 543 F. Supp. 2d 448, 484 (W.D. Pa. 2008) (quoting *ACLU v. Ashcroft*, 322 F.3d 240, 250-51 (3d Cir. 2003)).

Nevertheless, it is also clear that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Swartzwelder v. McNeilly,* 297 F.3d 228, 241 (2002) (quoting *Elrod v. Burns*, 427

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[3] The civil enforcement mechanism of the Zoning Ordinance might be considered a "subsequent penal" sanction as opposed to a prior restraint on speech. Irrespective of the classification of the challenged provisions, the analysis to be applied to either kind of restriction on speech is the same. See *Smith v. Daily Mail Publishing Co.,* 443 U.S. 97, 101-02 (1979).

U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976); citing *Abu-Jamal v. Price*, 154 F.3d 128, 136 (3d Cir. 1998)).

3. GRANTING A PRLEIMINARY INJUNCTION WILL NOT RESULT IN GREATER HARM TO THE NON-MOVING PARTY

Respondents cannot credibly claim that there will be greater harm arising to them from the granting of a preliminary injunction. There is no compelling governmental interest that requires that the word "crap"—a word used casually on network television for years—be expunged from political discourse. And this is especially so in the context of movant's protestation of proposed government action, to wit, a criticism of a proposed sewer line. Under *Miller*, *supra*, 413 U.S. 15, serious political expression is protected from government regulation under the guise of obscenity regulation.

There is absolutely no harm that will come to the defendants if the injunction be granted. *A fortiori*, defendants cannot establish that "greater harm" will result to either respondent if a preliminary injunction be granted than if it not be so granted.

4. THE PUBLIC INTEREST FAVORS GRANTING A PRELIMINARY INJUNCTION

The public interest unquestionably favors granting a preliminary injunction. "The people's right to petition the government for a redress of grievances is 'among the most precious of the liberties safeguarded by the Bill of Rights.'"

United Mine Workers of America, District 12 v. Illinois State Bar Association, 389 U.S. 217, 222 (1967). It is "implicit in and fundamental to the very idea of a republican form of governance." *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1342 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1977) (citing *United States v. Cruikshank*, 92 U.S. (2 Otto.) 542, 552 (1875)). The government acts on behalf of the people and, "to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). Sharing the "preferred place" accorded the First Amendment freedoms in our system of government, the people's right to petition "has a sanctity and a sanction not permitting dubious intrusions." *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

First Amendment rights are further deemed "fundamental rights[.]" *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336 (1995) ("The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights.") (quoting *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring)).

There thus can be no dispute that the public interest favors the entry of an injunction against an unconstitutional infringement upon such rights.

V. CONCLUSION

WHEREFORE, Plaintiff prays this Honorable Court to PRELIMINARILY ENJOIN enforcement of the "VULGAR/INDECENT/OBSCENE" provision of the Borough of East Hanover sign ordinance pending trial of this matter.

Respectfully submitted,

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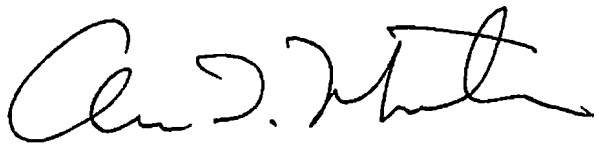
Date: September 16, 2010.

CERTIFICATION OF WORD COUNT

I certify that the word count of the foregoing brief is 4,164. This count was performed by the word processing program (Word 2007) on which this document was prepared.



Date: September 16, 2010.

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