CASE NO. 25-3225

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Cozy Inn, Incorporated,
d/b/a The Cozy Inn, *et al*.

Plaintiffs-Appellees,

v.

City of Salina, Kansas

Defendant-Appellant.

On Appeal from the United States District Court for the District of Kansas
The Honorable Judge Toby Crouse
D.C. No. 6:24-cv-01027-TC

APPELLANT CITY OF SALINA, KANSAS' MOTION TO STAY DISTRICT COURT ORDER REGARDING FACIAL CONSTITUTIONALITY PENDING APPEAL

Respectfully submitted,
March 23, 2026

Todd G. Messenger
Amanda C. Jokerst
Lee Katherine Goldstein
Fairfield and Woods, P.C.
1801 California Street, Suite 2600
Denver, Colorado 80202
Tel: (303) 830-2400
Email: tmessenger@fwlaw.com
ajokerst@fwlaw.com
lgoldstein@fwlaw.com
Attorneys for Defendant-Appellant City of Salina, Kansas

Defendant/Appellant, City of Salina ("Salina"), by and through its attorneys of record, pursuant to Fed. R. App. P. 8 and 10th Cir. R. 8, submits this Motion for Stay Pending Appeal, as follows:

STATEMENT OF RELIEF REQUESTED / CONFERRAL.

Salina requests a stay of the District Court's Memorandum and Order dated November 19, 2025 (Ex. 1, Doc. 136) and Judgment in a Civil Case dated January 7, 2026 (Ex. 2, Doc. 148) (collectively, "Order") granting Plaintiffs'/Appellees' ("Appellees") Motion for Summary Judgment, insofar as the Order found Salina's definition of "sign" facially unconstitutional, pending resolution of this appeal.[1]

Salina provided notice of this motion to Appellees. Appellees have authorized the undersigned to represent that the Appellees differ on the substance of the motion, but also that Appellees will not be harmed by a stay.

BACKGROUND AND DISTRICT COURT PROCEEDINGS.

Salina regulates signs to advance substantial interests in aesthetics, traffic and pedestrian safety, and property values. Salina Municipal Code ("SMC") § 42-500. Ex. 3 at 2, (Doc. 107-4). Central to this case is the constitutionality of Salina's Sign

[1] Herein, "Order" refers only to the facial constitutionality determination.

Code—specifically the definition of "sign" upon which the application of the Sign Code turns.[2] SMC § 42-764 provides:

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

This case turns on whether the First Amendment allows Salina to identify a "sign" based on whether it "is used to announce, direct attention to, or advertise." The Order's answer—no—upends controlling precedent and 60 years of application.

Signs tend towards "sign clutter" because they are effective only if their message is delivered and registered, and as such they compete for the viewer's attention. Ex. 4 (Doc. 107-6) at 9, 19-20; Ex. 5 (Doc. 107-12) at 3-5; Ex. 6 at (Doc. 113-12) at 2-3. The Sign Code regulates the size, number, and location of *signs* because applied city-wide, that approach addresses the overall problem of sign

[2] SMC Chapter 42 Article X, related definitions in Article XIV, and SMC § 42-581 are, collectively, "Sign Code." Exhibit 3.

clutter, which advances Salina's substantial interests. Ex. 4 at 19-20; Ex. 5 at 3-5; Ex. 6 at 2-3.

In Salina, the term "sign" includes the displays that, in the aggregate, negatively impact the Salina's substantial interests. However, it does not include displays[3] that are *not* used "used to announce, direct attention to, or advertise" (*e.g.*, statuary and decorative building elements like murals (collectively, "decorative elements")). Unlike signs, decorative elements do not impair the city's interests because they enhance aesthetics and promote property values and traffic and pedestrian safety. Ex. 7 (Doc. 107-19) at 3, 5, 10-11. Since decorative elements are not signs, they are not subject to the Sign Code.[4]

Appellees own and operate the Cozy Inn ("Cozy"). Ex. 8 (Doc. 16) at 4. Without first inquiring about or obtaining a permit, Appellees started painting the Cozy's North wall with ketchup, mustard, pickles, the text "Don't fear the smell! The fun is inside!!", an arrow pointing at the building entrance, and what Appellees describe as "burger-esque flying saucers" (collectively, "Cozy Sign"). Ex. 5 at 6-7, Ex. 8 at 4.

[3] Herein, "display" refers to the language in the definition of "sign" that begins, "any writing . . .," and ends, ". . . any other figure of similar character."

[4] The District Court called this a "mural-sign distinction," but it is not. Ex. 1 at 7. It is simply a "sign"-"not sign" distinction.

Salina became aware of the Cozy Sign, evaluated it, determined it was a sign that required a permit and that it was too large to qualify for a permit. Ex. 4 at 16; Ex. 5 at 6-7. Staff advised Appellees. Ex. 5 at 7. Appellees responded with this lawsuit, alleging First and Fourteenth Amendment violations. Ex. 8. The District Court decided the case on cross-motions for summary judgment, finding Salina's definition of sign was "unlawful" and unconstitutional on its face. Ex. 1 at 33.

On December 18, 2025, the parties filed a Joint Motion for stay pending appeal ("Joint Motion"). Ex. 9 (Doc. 140). At a status conference on January 6, 2026, the District Court denied the Joint Motion. Ex. 10 (Doc. 145). The District Court reasoned that since no injunction was entered, the Court lacked authority to grant a stay under Fed. R. Civ. P. 62. Ex. 11 (Doc. 149) at 4-5.

The Order requires Salina to regulate signs and murals equally. By operation of the SMC, Salina is using a replacement definition it interprets to include murals. However, the Sign Code's number, size, and location standards are not calibrated for this definition, and even if Salina commits resources to recalibrating its Sign Code, that effort will be undermined by the lack of clarity regarding which other decorative elements must also be regulated as signs.

The definition of "sign" serves to limit the reach of the Sign Code, so compliance with the Order will "burden substantially more speech than is necessary to further [Salina's] legitimate interests." *McCullen v. Coakley*, 573 U.S. 464, 486

(2014). Salina has considered its options and presents this motion because, as discussed in detail on pages 21 to 23, *infra*, the Order causes irreparable harm to Salina and its community. Ex. 12 (Affidavit).

Salina seeks to stay the Order so that it can continue to apply its definition of "sign," to continue to apply its time-tested standards for suitable signage, avoid further litigation, avoid sign clutter, maintain clarity for staff and the public, and support philanthropic and private investment in public art.[5]

ARGUMENT.

I. Basis For Jurisdiction (Provided Pursuant to 10th Cir. R. 8.1(A)).

A. Generally.

On February 19, 2024, Appellees filed suit in the District of Kansas. Ex. 13 (Doc. 1). On April 10, 2024, Appellees filed their First Amended Complaint. Ex. 8. The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343, 2201, and 2202. Ex. 14 (Doc. 101).

On February 7, 2025, the parties filed cross-motions for summary judgment. Ex. 1 at 1. The District Court entered a Memorandum and Order on November 19, 2025, resolving all issues in the case. Ex. 1. No concurrent, separate final judgment

[5] The Sign Code does not require Salina to identify "public art." Herein, "public art" refers to artistic displays in public view (typically sculptures or murals) that are not "used to announce, direct attention to, or advertise."

was entered. Salina filed a Notice of Appeal on December 18, 2025. Ex. 15 (Doc 139). On January 7, 2026, this Court entered an Order Abating Appeal. Ex. 16 (10th Cir. Doc 11). On January 7, 2026, the District Court entered Final Judgment. Ex. 17 (Doc. 148). On January 12, 2026, this Court entered an Order lifting the abatement. Ex. 18 (10th Cir. Doc 14). This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and Fed. R. App. P. 4(a)(1)(A) and 4(a)(2).

B. This Motion to Stay.

Consideration of this Motion is proper under Fed. R. App. P. 8(a)(1) and (8)(2)(A)(ii). Unlike the District Court, which is limited by Fed. R. Civ. P. 62, this Court has inherent authority to grant a stay. *See Nken v. Holder*, 556 U.S. 418, 426 (2009).

II. Standard of Review: Fed. R. App. P. 8. Requires a Four-Pronged, Case-by-Case "Balancing Test."

A stay of "the judgment or order of a district court pending appeal" may be entered in consideration of: "(1) the likelihood of success on appeal; (2) the threat of irreparable harm if the stay . . . is not granted; (3) the absence of harm to opposing parties if the stay . . . is granted; and (4) any risk of harm to the public interest." *F.T.C. v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 852 (10th Cir. 2003); Fed. R. App. P. 8; 10th Cir. R. 8.1; 10th Cir. R. 18.1. "'No one element controls the result.'" *Standard Havens Prod., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 513 (Fed. Cir. 1990) (quotations omitted). "'The probability of success that must be demonstrated

is inversely proportional to the amount of irreparable injury' that the movant will suffer absent a stay." *First Savings Bank, F.S.B. v. First Bank Sys., Inc.*, 163 F.R.D. 612, 615 (D. Kan. 1995) (quoting *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)).

III. The Factors Favor the Requested Stay.

A. Salina Has a Substantial Likelihood of Success on Appeal.

On *de novo* review,[6] Salina has a substantial likelihood of success on the merits of its appeal of the Order for five independent reasons: (1) the District Court erred in finding that Salina's content-neutral code was not "narrowly-tailored"; (2) the District Court misapplied intermediate scrutiny and imposed a heightened burden on Salina; (3) the District Court misapplied intermediate scrutiny by considering hypotheticals while disregarding evidence about aggregate effects; (4) Salina carried even a heightened evidentiary burden; and (5) the District Court adjudicated facts from conflicting testimony on summary judgment.

[6] This Court reviews the Order *de novo*. *See Valdez v. Macdonald*, 66 F.4th 796, 813-14 (10th Cir. 2023); *McIntosh v. Scottsdale Ins. Co.*, 992 F.2d 251, 253 (10th Cir. 1993). On its *de novo* review, this Court is "obliged to make a fresh examination of crucial facts." *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 567 (1995).

1. Salina's Sign Code, Including Its Definition of "Sign," Is Content-Neutral and Passes Intermediate Scrutiny.

a. Salina's Definition of "Sign" Is Content-Neutral.

The Order assumes without deciding that Salina's Sign Code is content-neutral. Facial content-neutrality is a question of law. *See Pahls v. Thomas*, 718 F.3d 1210, 1234 (10th Cir. 2013). A regulation is facially content-neutral if: (1) it "does not draw content-based distinctions on its face," and (2) it was not adopted because of the government's disagreement with a message. *Evans v. Sandy City*, 944 F.3d 847, 854 (10th Cir. 2019).

Step one involves only the regulation's text. *See City of Austin v. Reagan Nat'l Adv. of Austin, LLC*, 596 U.S. 61, 64, 76 (2022); *Harmon v. City of Norman*, 981 F.3d 1141, 1148 (10th Cir. 2020). The challenged regulations are content-neutral. They are "agnostic as to content." *Austin*, 596 U.S. at 69. There is no reference to topics, ideas, messages, or viewpoints regarding what is announced, the external objects or locations to which attention may be directed, or the subject matter of any advertisement. *cf. Austin*, 596 U.S. at 71. There is no interpretation that would "hand the 'government the choice of permissible subjects for public debate.'" *Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, 64 F.4th 287, 296 (5th Cir. 2023) ("*Austin II*") (quoting *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 515 (1981)). In Salina, the term "sign" identifies displays based on "function or purpose" in a way

that does not (and cannot) serve as a proxy for an "obvious subject-matter distinction." *Austin*, 596 U.S. at 74-75.

Salina's definition of "sign" reflects common understandings about what signs are, common-sense legislative judgment, and decades of local and national experience.[7] Salina's definition of "sign" is much like the definition at issue in *Austin*—Salina's definition includes displays that are "used to announce, direct attention to, or advertise," while Austin's definition uses the language "advertis[e]" or "direct[] persons to." *Austin*, 596 U.S. at 66.

Salina's stated purposes do not implicate content. Ex. 3 at 2. There is no evidence that 60 years ago Salina adopted its definition out of disagreement with any particular messages. Ex. 3 at 10; Ex. 19 (Doc 105) at 2-25; *cf. Harmon v. City of Norman*, 61 F.4th 779, 790 (10th Cir. 2023) ("*Harmon II*"). As a matter of law, the challenged regulations are facially content-neutral.

b. Salina's Definition of "Sign" Satisfies Intermediate Scrutiny.

The challenged regulations are content-neutral, so "intermediate scrutiny" applies. *Ward v. Rock Against Racism,* 491 U.S. 781, 797 (1989). The test has three prongs: (1) the governmental interests must be substantial; (2) the regulations must

[7] Dozens of other jurisdictions use essentially the same definition. Ex. 24 (Doc 113-11).

advance those interests in a manner that "would be achieved less effectively absent the regulation"; and (3) the regulations must leave open "ample alternative channels for communication . . . ." *Id.* at 799 (quotation omitted).

i. Salina's Interests Are "Substantial."

The Order assumes without deciding that Salina's interests in community aesthetics, traffic and pedestrian safety, and property values are "substantial." Ex. 1 at 24; Ex. 3 at 2. These interests are "substantial" as a matter of law. *StreetMediaGroup, LLC v. Stockinger*, 79 F.4th 1243, 1251 (10th Cir. 2023); *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 795, 807-08 (1984) ("*Vincent*").

ii. Salina's Regulations Are Narrowly-Tailored.

The narrowly-tailored requirement is satisfied if the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799. The test does not require "the least restrictive or least intrusive means." *Id*. at 797-98 (content-neutral "restrictions . . . are not invalid simply because there is some imaginable alternative that might be less burdensome on speech." (quotations omitted)). To meet its burden, Salina need only show that the Sign Code promotes at least one substantial interest.

The Supreme Court has maintained, "a city might reasonably view the general regulation of signs as necessary because signs 'take up space and may obstruct

views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation.'" *Reed v. Town of Gilbert*, 576 U.S. 155, 173 (2015) (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994)). The Fifth Circuit recently observed, "[i]n the context of [content-neutral] sign regulations, the Court has generally accorded municipalities significant leeway." *Austin II*, 64 F.4th at 293. Deference to "common-sense judgments of local lawmakers" to determine such things as the traffic safety hazards presented by signs is appropriate. *Metromedia*, 453 U.S. at 508-09. Even "underinclusiveness" is allowed if it is not an "attempt to give one side of a debatable public question an advantage in expressing its views to the people." *Ladue*, 512 U.S. at 51.

Precedent and experience teach that time, place, and manner restrictions advance substantial interests regarding the "distinct safety and esthetic challenges" posed by signs in a manner that would be "achieved less effectively absent the regulation." *Austin*, 596 U.S. at 64, 71, 75; *see also Vincent*, 466 U.S. at 810-11; *Austin II*, 64 F.4th at 296-97 ("In the context of sign codes . . . the Court has not required a great quantum of empirical support."); *StreetMediaGroup, LLC v. Stockinger*, 1:20-CV-03602-RBJ, 2021 WL 5770231, at *5 (D. Colo. Dec. 6, 2021) (unpublished), *aff'd*, 79 F.4th 1243 (The "interest in promoting safe driving alone satisfies the narrow-tailoring requirement," and the government does not have to wait for crashes to "establish[] a prophylactic permitting scheme.").

Yet even if deference, precedent, and common-sense are not enough, Salina presented evidence that applied in the aggregate, its Sign Code serves to reduce sign clutter—and that the text of its content-neutral definition of "sign" described and detailed signs in a way that identified the types of displays that contributed most to the problems Salina was trying to address. *See* Section III.A.4, *infra*, at 18-20.

iii. Appellees Have Ample Alternative Channels of Communication.

"[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). An alternative channel of communication is constitutionally adequate if the speaker's ability to "communicate effectively" is not "threatened." *Vincent*, 466 U.S. at 812.

The Sign Code does not threaten the ability to communicate effectively. It regulates signs but does not prohibit them. *Cf. Wag More Dogs, Ltd. Liab. Corp. v. Cozart*, 680 F.3d 359, 369 (4th Cir. 2012). Appellees have—and use—ample alternative channels for communication by way of signs and other media. See. Ex. 4 at 16-18, Ex. 5 at 8-13; Ex. 20 (Doc. 113-8); Ex. 21 (Doc. 103-2) at 17; Ex. 22 (Doc 107-10) at 2-11; Ex. 23 (Doc. 108) at 10 (¶ 32), 18 (¶¶ 58-59).

2. The District Court Misapplied the Law Regarding the "Narrowly-Tailored" Prong of Intermediate Scrutiny And Imposed a Heightened Evidentiary Burden.

The District Court misapplied the law regarding the narrowly-tailored prong

of intermediate scrutiny by imposing a higher burden on Salina than controlling precedent establishes. Narrow-tailoring is present if the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799. The government has never been required to "demonstrate, not merely by appeal to common sense, but also with empirical data, that its ordinance will successfully" advance its stated purpose. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 439 (2002); *see also Austin II*, 64 F.4th at 296-97.

In cases involving content-neutral sign regulations, the government's burden is quite low because the "'esthetic harm'" caused by signs is "not speculative." *Metromedia, 453 U.S.* at 510; *Vincent*, 466 U.S. at 807, 816-17. Likewise, the potential for signs to distract motorists is self-evident. *See StreetMediaGroup*, 2021 WL 5770231, at *5 (unpublished). In this context, in determining whether a sign regulation "directly advances" a substantial interest, courts defer to the "accumulated, common-sense judgments of local lawmakers" and "the many reviewing courts." *Metromedia*, 453 U.S. at 509.

The District Court applied a different standard. It found that "regardless of what type of speech restriction is at issue," intermediate scrutiny "requires the government to show that its 'recited harms are real' or that its regulations 'will in fact alleviate these harms in a direct and material way.'" Ex. 1 at 24-25 (quoting

McCraw v. City of Okla. City, 973 F.3d 1057, 1070-71 (10th Cir. 2020)). Based on that language, the Order augmented the burden on Salina in a way never before applied to a content-neutral sign regulation in this circuit or in the Supreme Court.

According to the Order, "[t]o determine whether a municipality has produced sufficient evidence to meet this burden, it is necessary to 'evaluate that evidence 'in light of cases where those categories of evidence have previously been invoked.'"" Ex. 1 at 25 (citing *McCraw*, 973 F.3d at 1073 and quoting *Aptive Envt'l LLC v. Town of Castle Rock*, 959 F.3d 961, 989 (10th Cir. 2020)). The Order continued, "evidence like expert testimony, research studies, and the experiences of other cities may suffice so long as the evidence that 'the city relies upon is reasonably believed to be relevant to the problem that the city addresses.'" Ex. 1 at 25 (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986)).

The District Court rejected Salina's reliance on *Metromedia* and other sign cases, and disregarded Salina's argument that narrow-tailoring is satisfied by experience, common sense, and deference, even though controlling cases say that. Ex. 1 at 25-26; *See Vincent*, 466 U.S. at 806-08; *Metromedia*, 453 U.S. at 509; *Austin II*, 64 F.4th at 297. Instead, turning *Adolph Coors Co. v. Brady* upside down, the Order concluded *Metromedia* did not apply because "[t]he Tenth Circuit has clarified that the situation in *Metromedia* is a narrow one applicable to commercial speech cases 'where [a court] can defer to the legislature on the basis of precedent

which already has established that the legislature's chosen means directly advances the asserted ends.'" Ex. 1 at 25 (citing *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1550 (10th Cir. 1991)).

Adolph Coors says the opposite. It supports Salina's case. Applying the *Central Hudson* commercial speech test to a novel regulation prohibiting alcohol content disclosures on beverage labels, the *Adolph Coors* Court observed that the "link" between means and ends in that case was "not self-evident." *Id*. at 1550. The Court then named *Metromedia* as a case where the link *was* self-evident—where a court could defer "on the basis of precedent which already has established that the legislature's chosen means directly advances the asserted ends." *Id*.

Nothing in *Adolph Coors* suggests that *Metromedia's* evidentiary standard regarding narrow tailoring only applies to commercial-speech sign cases. *Id*. Moreover, this Court and the Supreme Court have cited *Metromedia* as intermediate scrutiny precedent in sign cases where the challenged regulations were content-neutral. *See Vincent*, 466 U.S. at 804, 806-07; *Austin*, 596 U.S. at 73 (Opinion), 81-82 (Breyer, J. concurring); *Faustin v. City and Cty. of Denver*, 423 F.3d 1192, 1200-01 (10th Cir. 2005); *cf. StreetMediaGroup*, 79 F.4th at 1255. Moreover, the "commercial speech test" is historically stricter than the "intermediate scrutiny" test that is applicable here.

The *McCraw* and *Aptive* cases cited in the Order are similarly not germane.

The identified "harm" and the connections between means (a ban on pedestrians in medians—a public forum, and a curfew on certain door-to-door solicitations, respectively) and ends (public safety) in those cases were not self-evident. *McCraw*, 973 F.3d at 1071, 73; *Aptive*, 959 F.3d at 993, 995-97, 998-99. Unlike *McCraw* and *Aptive*, Supreme Court precedent clearly establishes that Salina's ends (interests) are "not speculative," and that its means advance those ends.

3. The District Court Misapplied the Law by Considering Individual Cases and Hypotheticals and Disregarding Evidence About the Aggregate Application of the Sign Code.

The Order rests on immaterial individual cases and hypotheticals. The "validity of [a] regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interests in an individual case." *Ward* 491 U.S. at 801. Individual cases and hypotheticals are "beside the point." *Id*. Since there is no allegation that the Sign Code burdens substantially more speech than is necessary, hypothetical approaches to regulation are also not germane. *Verlo v. Martinez*, 820 F. 3d 1113, 1135 (10th Cir. 2016).

The Order has no footing in the relationship between the Sign Code and "the overall problem" that Salina "seeks to correct." Instead, the Order sets out a handful of hypothetical cases, including:

> [i]t would seem illogical to argue that a hamburger-based display on a building housing a hamburger restaurant implicates interests requiring

> prohibition whereas that same display across the street on a building housing another business, perhaps a pizza restaurant, implicates none of those concerns.

Ex. 1 at 28 and 26 (finding Salina Planner Dustin Herrs ("Herrs") did not "address or explain why displays that (allegedly) do not pertain to the services or goods a business sells—for example, a commercial baseball training facility promoting engagement in baseball, or a music store promoting the engagement in playing music—would have any different impact on those interests than signs like Cozy's hamburger scheme might.") The District Court's reasoning closely resembles Justice Thomas' recent dissent in *Austin* (which was rejected by the majority):

> Take . . . a sign outside a Catholic bookstore. If the sign says, "Visit the Holy Land," it is likely an off-premises sign . . . . But if the sign instead says, "Buy More Books," it is likely a permissible on-premises sign. * * *

Austin, 596 U.S. at 91 (Thomas, J., dissenting). Like Justice Thomas' hypotheticals, the Order's hypotheticals may be uncomfortable, but they do not signal constitutional infirmity.

4. The District Court Erred in Granting Summary Judgment in Favor of Appellees Because Salina Satisfied Even the Erroneously High Evidentiary Burden.

Salina presented undisputed evidence that satisfied even the erroneously high burden the Order imposes. Herrs is a certified planner who has taken courses in sign regulation. Ex. 25 (Doc. 109-25). His reasoning was sound, not "circular." Ex. 1 at 26. Herrs' testimony established that the Sign Code regulates the number, size, and

location of signs, in the aggregate, which reduces clutter, reduces distractions for drivers and pedestrians, reduces safety hazards, and promotes community aesthetics. Ex. 5 at 4; Ex. 26 (Doc. 109-16) at 4, 15. Herrs explained, "signs by their definition attract your eye in a way to announce, direct attention to or advertise [which] does change the character of a sign in relationship to or contrasted to a mural . . . that could have impacts on traffic safety." Ex. 27 (Doc. 108-5) at 8. His testimony established signs pull or attract the eye and "[t]hey wouldn't function if they didn't". Ex. 26 at 4, 15.

Additionally, Salina produced industry-specific publications that (contrary to the Order's finding), did provide insight into the difference between murals and signs. Ex. 1 at 26. (referring to Ex. 28 (Doc. 107-2 at 7)). One of the publications addressed *ArchitectureArt, LLC v. City of San Diego*, 231 F. Supp. 3d 828 (S.D. Cal. 2017), *aff'd*, 745 F. App'x 37 (9th Cir. 2018). It explained how differentiating between murals and painted wall signs that include advertising copy (or as the District Court put it, "signs that pertain to the goods and services sold on-site") was narrowly-tailored. Ex. 1 at 28; Ex. 28 at 9-10.

The Order found that planning and zoning expert Mark White's expert testimony "recognizes the needed connection." Ex. 1 at 27. White testified, "the sign code 'stops where it needs to, by not sweeping decorative building elements such as murals that display public art into the same regulatory system that applies to signs.'"

Id. The District Court misapplied the law by disregarding White's opinion as unacceptable evidence. *Id*.

Salina presented the "expert testimony" and "the experiences of other cities" that is "relevant to the problem that the city addresses" that the Order stated "may suffice." Ex. 1 at 25. Salina's uncontroverted evidence was more than sufficient to establish narrow-tailoring. The District Court's misapplication of the law caused it to overlook the material evidence and rely on the immaterial.

5. The District Court Erred in Granting Summary Judgment in Favor of Appellees Because the Facts the District Court Relied Upon Were Disputed.

Consideration of individual cases and hypotheticals in this facial challenge is "beside the point." Yet even if it were not, the District Court weighed conflicting testimony and adjudicated facts about individual cases. Ex. 1 at 26-27. Summary judgment in favor of Appellees was precluded as a matter of law. *Cruz v. Farmers Ins. Exch.*, 42 F. 4th 1205, 1217 (10th Cir. 2022); *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1165 (10th Cir. 1998).

Salina disputed that the baseball training facility display was a sign because it was located inside of a building (as defined at SMC § 42-637). Ex. 8 at 13; Ex. 19 (Doc. 105) at 18 (¶¶ 144-45); Ex. 29 (Doc. 105-6 at 7, 17); Ex. 30 (Doc. 109) at 15 (¶¶ 144-45); Ex. 31 (Doc. 109-5) at 18-22, 32-24; Ex. 3 at 9. Salina disputed that the Symphony of Sunflowers display is on a building that houses a "music store" or a

"music-related business," and the building's use was not conclusively established. Ex. 19 at 18 (¶ 149); Ex. 30 at 16 (¶ 149); Ex. 32 (Doc. 105-7) at 10-12. Because summary judgment in favor of Appellees was precluded by these disputes, Salina has demonstrated a substantial likelihood of success on appeal.

B. Threat of Irreparable Harm in the Absence of a Stay.

Salina and its residents, businesses, property owners, philanthropists, and arts community face irreparable harm in the absence of a stay. "[I]rreparable harm is often suffered when the injury can[not] be adequately atoned for in money . . . or when the district court cannot remedy [the injury] following a final determination on the merits." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (quotations omitted).

To comply with the Order, Salina must completely deregulate signs or regulate signs and murals (and likely other decorative elements) in the same way. Both lead to irreparable harm. Completely deregulating signs will accelerate sign clutter and the resulting problems that the Sign Code holds at bay. Regulating signs and decorative elements in the same way will impose a greater burden on speech than is necessary to accomplish the city's objectives, require costly study and recalibration of the Sign Code, potentially subject the city to further litigation, and impose a deeply chilling effect on public art and related philanthropy.

Salina needs clarity about what signs are, and about which decorative elements are excluded from sign regulation. Its definition of "sign" provided that clarity. Substitute definitions that comply with the Order do not, which creates significant administrative challenges.

Tensions are high, so expanding the number and types of displays that are regulated is likely to trigger new disputes and more litigation. Assuming the Order is precedent, its use of hypotheticals and individual cases and its rejection of Salina's reliance on history, tradition, common-sense, precedent, the expertise of staff, industry-specific publications, and the analysis of a recognized expert will make it inordinately difficult for Salina to defend any regulatory approach.

Finally, while the Sign Code does not create a "mural-sign" distinction, the Order inflicts significant collateral damage on planned private and philanthropic investments in public art. That is harmful because public art enhances aesthetics, public safety, and property values. Ex. 12; Ex. 7 at 2-3, 6-9, 11-12. The record and a "long history, a substantial consensus, and simple common sense" supports promoting—not limiting—public art. *Cf. Burson v. Freeman*, 504 U.S. 191, 211 (1992); 35 No. 5 ZPLR 1 "Percent-For-Art Programs at Public Art's Frontier," (May 2012).

Salina is empowered to advocate for its "citizens' First Amendment interests." *Community Commc'ns Co., Inc. v. City of Boulder, Colo.*, 660 F.2d 1370, 1376 (10th

Cir. 1981). This year marks Boom! Festival's fifth edition. Ex. 12. The planning for the 2026 festival is underway, and the organizers report that the Order is having chilling impacts. *Id*. The cultural impacts of the Order on the Salina community are far reaching and cannot be adequately remedied by money or by a court following a final determination after appeal.

C. No Harm to Opposing Parties

Appellees will not be harmed by the stay. *See* p. 2, *supra*. The parties agreed Appellees may complete the Cozy Sign and maintain it during the pendency of this appeal, and if Salina prevails, Appellees will bring the Cozy Sign into compliance within 180 days. The motion to stay in the District Court was a joint motion.

D. No Risk of Harm to the Public Interest

The requested stay serves the public interest. *See* Section B, *supra*. There is no risk of harm to the public. To implement the Order, Salina must regulate more speech than it previously regulated, so a stay would result in more speech, not less. Additionally, the Boom! Festival is closely associated with downtown reinvestment, which brings significant economic benefits, supports property values, and enhances community pride. Ex. 12.

CONCLUSION

For the foregoing reasons, Salina requests a stay of the Order pending resolution of this appeal.

Respectfully submitted this 23rd day of March, 2026.

Todd Messenger
Name of Counsel

s/ Todd Messenger
Signature of Counsel

1801 California St., Ste 2600
Denver, CO 80202
(303) 830-2400
Mailing Address and Telephone Number

tmessenger@fwlaw.com
Email Address

Amanda Jokerst
Name of Counsel

s/ Amanda Jokerst
Signature of Counsel

1801 California St., Ste 2600
Denver, CO 80202
(303) 830-2400
Mailing Address and Telephone Number

ajokerst@fwlaw.com
E-Mail Address

Lee Katherine Goldstein
Name of Counsel

s/ Lee Katherine Goldstein
Signature of Counsel

1801 California St., Ste 2600
Denver, CO 80202
(303) 830-2400
Mailing Address and Telephone Number

lgoldstein@fwlaw.com
Email Address

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Fairfield and Woods, P.C.

s/ Todd Messenger
Todd G. Messenger
Amanda C. Jokerst
Lee Katherine Goldstein
1801 California Street, Suite 2600
Denver, Colorado 80202
Tel: (303) 830-2400
Email: tmessenger@fwlaw.com
ajokerst@fwlaw.com
lgoldstein@fwlaw.com

Attorneys for Defendant-Appellant
City of Salina, Kansas

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2026, I electronically filed the foregoing **APPELLANT CITY OF SALINA, KANSAS' MOTION TO STAY DISTRICT COURT ORDER REGARDING FACIAL CONSTITUTIONALITY PENDING APPEAL,** with the Clerk of the Tenth Circuit Court of Appeals using the CM/ECF system and was served on the following counsel of record for the parties in this case:

Samuel G. MacRoberts
Jeffrey Shaw
Sam@KansasJusticeInstitute.org
Jeff@KansasJusticeInstitute.org

Fairfield and Woods, P.C.

s/ Todd Messenger
Todd G. Messenger
Amanda C. Jokerst
Lee Katherine Goldstein
1801 California Street, Suite 2600
Denver, Colorado 80202
Tel: (303) 830-2400
Email: tmessenger@fwlaw.com
ajokerst@fwlaw.com
lgoldstein@fwlaw.com

Attorneys for Defendant-Appellant City of Salina, Kansas

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Fairfield and Woods, P.C.

s/ Todd Messenger
Todd G. Messenger
Amanda C. Jokerst
Lee Katherine Goldstein
1801 California Street, Suite 2600
Denver, Colorado 80202
Tel: (303) 830-2400
Email: tmessenger@fwlaw.com
ajokerst@fwlaw.com
lgoldstein@fwlaw.com

Attorneys for Defendant-Appellant
City of Salina, Kansas