17-274

No.

In the Supreme Court of the United States

MUSLIM AMERICAN SOCIETY FREEDOM FOUNDATION,
Petitioner,

v.

DISTRICT OF COLUMBIA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the void for vagueness doctrine, a law must supply "minimal guidelines to govern law enforcement," so that the law does not "permit a standardless sweep" allowing "'policemen, prosecutors, and juries to pursue their personal predilections.'" *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983).

The District of Columbia sign ordinance imposes special restrictions on non-commercial signs that are "related to" an event. D.C. Mun. Regs. tit. 24 § 108.6. The regulation provides that these restrictions apply if an event is "referenced on the poster itself *or* reasonably determined from all circumstances by the inspector." *Id.* § 108.13 (emphasis added). The District offers no objective criteria governing when a poster that does not itself reference an event is nonetheless "related to" it.

The D.C. Circuit held that this regulation is not vague. Although there are no objective criteria to guide the "related to" analysis, the court focused on the obligation that an inspector must act "reasonably." Other circuits, however, hold that laws may not delegate standardless enforcement discretion to officials, even if the officers are obligated to exercise that discretion reasonably.

The question presented is:

Whether the District's event-related sign ordinance, which lacks any objective criteria defining what renders a sign "related to" an event, is unconstitutionally vague.

RULE 14.1(B) STATEMENT

Petitioner is the Muslim American Society Freedom Foundation. Respondent is the District of Columbia. The Act Now To Stop War And End Racism Coalition was a party below, but it is not a party to this petition.

RULE 29.6 STATEMENT

The Muslim American Society Freedom Foundation has no parent company nor publicly held stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Muslim American Society Freedom Foundation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 846 F.3d 391. The opinion of the district court is published at 905 F. Supp. 2d 317.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2017. The court denied a timely petition for rehearing on March 24, 2017. On June 22, 2017, Chief Justice Roberts extended the time for the filing of this petition until August 21, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

REGULATIONS INVOLVED

D.C. Municipal Regulation, Title 24, Section 108 provides in relevant part:

> 108.1 No person shall affix a sign, advertisement, or poster to any public lamppost or appurtenances of a lamppost, except as provided in accordance with this section. * * *
>
> 108.5 A sign, advertisement, or poster shall be affixed for no more than one hundred eighty (180) days.
>
> 108.6 A sign, advertisement, or poster related to a specific event shall be removed no later than thirty (30) days following the event to which it is related. This subsection does not

> extend the time limit in subsection 108.5.
> * * *
>
> 108.13 For purposes of this section, the term "event" refers to an occurrence, happening, activity or series of activities, specific to an identifiable time and place, if referenced on the poster itself or reasonably determined from all circumstances by the inspector.

STATEMENT

The Due Process Clauses of the Fifth and Fourteenth Amendments "require the invalidation of laws that are impermissibly vague." *F.C.C.* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972).

Vague laws that restrict speech are scrutinized especially closely; "[t]he general test of vagueness applies with particular force in review of laws dealing with speech." *Hynes* v. *Mayor & Council of Oradell*, 425 U.S. 610, 620 (1976). To survive this review, a law must prescribe a governing "standard of conduct" (*Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971)) or provide some "objective criteria" for its application (*Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 526 (1994)).

At issue here is the District of Columbia's sign ordinance. The District generally allows citizens to post non-commercial signs on public lampposts; most signs may remain affixed to lampposts for 180 days. But, if the sign is "related to a specific event," it must

be removed no later than 30 days following the event. D.C. Mun. Regs. tit. 24 § 108.6. This restriction applies if the event is "referenced on the poster itself *or* reasonably determined from all circumstances by the inspector." *Id.* § 108.13 (emphasis added).

Because the regulation uses the disjunctive "or," some signs that do not "reference" an event "on the poster itself" are nonetheless "related to a specific event." See App., *infra*, 105a-107a.

The District has never articulated objective criteria that guide the determination whether a sign, which does not itself reference an event, is event-related. The District "admits that there exist no additional policies, rules, staff instructions, guidance or any documents or communications which * * * define what characteristics render a sign to be 'related to a specific event.'" App., *infra*, 104a-105a. Indeed, the District acknowledges that it has delegated this lawmaking authority to an inspector's ad hoc "reasoning and discretion." *Id.* at 108a.

Myriad interpretative questions result from this murky regulation. Take, for example, a sign that says simply, "Scientists agree: Global warming is real." Does that sign "relate to" a previously-announced rally addressing climate change? Does it "relate to" a rally held by climate change skeptics? What if the event is announced *after* the sign was posted? Is the sign "related to" a rally held in Baltimore? Or in Paris? Does it "relate to" a screening of *An Inconvenient Sequel* or a book-signing of *An Appeal to Reason*?

Or, take a sign, posted during election season, that says nothing other than "GRAHAM!" If one of

the candidates for office was Jim Graham, would that sign have been "related to" an event?

The district court, Judge Lamberth, held that this regulation is unconstitutionally vague because it fails to provide any objective criteria to cabin what it means for a sign to be "related to" an event. As the district court saw it, delegating this question of legal interpretation to enforcement officials is precisely "the kind of administrative discretion that the Due Process Clause and First Amendment abhor." App., *infra*, 103a.

The court of appeals, however, held that the regulation's requirement that an officer act "reasonably" was sufficient to save it from invalidation. The court of appeals concluded, in other words, that a municipality *may* delegate ad hoc discretion to individual enforcement officers—so long as those officers are obligated to act reasonably.

The results of this holding are deeply troubling. Inspectors may establish ad hoc standards for declaring posters "related to" an event—thereby exercising their individual discretion to decide which posters to tear down early and who to fine. Because the fines reach $2,000 *per poster*, the net effect is the chill of self-censorship.

The decision below warrants review. It turns vagueness law on its head; it is irreconcilable with decisions of other circuits; and it is certain to chill speech rights in just the manner that this Court's precedents are meant to avoid.

A. Legal background.

"A fundamental principle in our legal system is that laws which regulate persons or entities must

give fair notice of conduct that is forbidden or required." *Fox*, 567 U.S. at 253. This "void for vagueness doctrine addresses" twin "due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Ibid.*

These concerns are magnified in the context of speech. "When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Fox*, 567 U.S. at 253-254. Accordingly, "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Vill. of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). If a "law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Ibid.* This is because vague laws regulating speech "operate to inhibit the exercise of those freedoms;" these laws "inevitably lead citizens to steer far wider of the unlawful zone." *Grayned*, 408 U.S. at 109 (quotations and alterations omitted).

In addressing vagueness, the Court has been careful to distinguish complex factual determinations from unclear legal standards. "[A] regulation is not vague because it may at times be difficult to prove an incriminating fact" (*Fox*, 567 U.S. at 253) or because "it requires a person to conform his conduct to an imprecise but comprehensible normative standard" (*Coates*, 402 U.S. at 614). But it is unconstitutionally vague if the regulation "is unclear as to what fact must be proved" (*Fox*, 567 U.S. at 253) or if "no

standard of conduct is specified at all" (*Coates*, 402 U.S. at 614).

At bottom, a law must provide "minimal guidelines to govern law enforcement," lest it "permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983).

B. The event-related sign regulation.

The District regulates the posting of signs to public lampposts. See D.C. Mun. Regs. tit. 24 § 108. Relevant here, the District generally permits individuals and entities to affix non-commercial signs to public lampposts for a period of 180 days. *Id.* § 108.5. But "[a] sign, advertisement, or poster related to a specific event shall be removed no later than thirty (30) days following the event to which it is related." *Id.* § 108.6. The regulation provides further that "the term 'event' refers to an occurrence, happening, activity or series of activities, specific to an identifiable time and place, if referenced on the poster itself or reasonably determined from all circumstances by the inspector." *Id.* § 108.13.[1]

The District acknowledges that "there exist no additional policies, rules, staff instructions, guidance or any documents or communications which further * * * define what characteristics render a sign to be 'related to a specific event.'" App., *infra*, 104a-105a. In sum, "'[t]here are no limiting or interpretive materials beyond what appears * * * on the face of the regulation itself.'" *Id.* at 105a.

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[1] The District has frequently amended these regulations; during the pendency of this litigation alone, the District amended the governing rules four separate times. See App., *infra*, 4a-8a.

The District's solid waste inspectors administer this statute. App., *infra,* 97a. Violations of this provision trigger graduated fines. *Ibid.* The fines reach $2,000 for the fourth and each subsequent violation, assessed on a per-sign basis, within a 60-day period. D.C. Mun. Regs. tit. 24 § 1380.3.

C. Proceedings below.

Petitioner Muslim American Society Freedom Foundation (MASF) is a nonprofit advocacy organization that posts signs with political messages. App., *infra,* 1a, 5a, 7a. Petitioner contends that the event-related sign regulation "delegates an impermissible degree of enforcement discretion to the District's inspectors in violation of due process." *Id.* at 2a.[2] Petitioner thus asserts that it is facially unconstitutional. *Id.* at 7a.

1. The district court, Chief Judge Lamberth, granted summary judgment in favor of petitioner, holding that the event-related sign regulation is unconstitutionally vague. See App., *infra*, 96a-111a.[3]

During discovery, petitioner took the deposition of four solid waste inspectors. The inspectors repeatedly asserted that the regulation left the task of substantive interpretation to their discretion,[4] they ad-

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[2] MASF and its co-plaintiff, Act Now To Stop War And End Racism Coalition, asserted additional claims not at issue here.

[3] The district court originally dismissed for lack of standing, but the court of appeals reversed. App., *infra*, 6a.

[4] See, *e.g.*, App., *infra*, 100a-101a n.10 ("Q. Where in the regulations does it suggest that you are constrained in any way? A. It doesn't constrain me in the regulations. It says I can use my judgment."); *ibid.* ("Q. And as you apply the regulations as an enforcement officer, what's the removal date appropriate for this sign? A. It would actually be—it would be my discretion be-

mitted that different inspectors may reach different conclusions about the same sign,[5] and they in fact disagreed about whether a sign that stated "GRAHAM!"—the name of a political candidate—would be related to an election. See App., *infra*, 35a. The district court recognized that this evidence "suggests problems with the guidance the law provides to enforcement officers." *Id.* at 100a-101a.

Turning to the text of the regulation (App., *infra*, 103a), the district court trained on the regulation's direction that a sign is related to an "event" if an event is "referenced on the poster itself or *reasonably determined from all circumstances by the inspector*." D.C. Mun. Regs. tit. 24 § 108.13 (emphasis added).

The court held that the latter clause "is a clear example of the kind of administrative discretion that the Due Process Clause and First Amendment abhor." App., *infra*, 103a. Indeed, "[t]elling an officer to act 'reasonably' does not provide objective criteria cabining his discretion" because "[r]easonable people frequently come to different conclusions." *Id.* at 103a-104a. This problem is compounded by the fact that the District has no policy or guidance that "define[s] what characteristics render a sign to be 'related to a specific event.'" *Id.* at 104a-105a. Rather, the District has acknowledged that enforcement decisions are delegated to the inspectors' "reasoning and discre-

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tween 108.5 and 108.6. * * * Q. And the rules leave it up to you because of the nature of the sign, as to which one you might reasonably apply; correct? A. Yes.").

[5] See, *e.g.*, App., *infra*, 100a n.10 ("Q. Someone else's exercise of discretion and judgment might lead them to another reasonable conclusion, that is, it's related to the general election; correct? A. Correct.").

tion." *Id.* at 108a. The district court therefore held that the regulation was vague.

The district court next concluded that there was no alternative construction of the regulation that would save its constitutionality. App., *infra*, 105a-107a. In particular, the court explained that the regulation necessarily authorizes inspectors to deem posters "related to" an "event" "even if that poster does not clearly list the time and place of the event." *Id.* at 107a.

The court concluded that "[a] legislature cannot explicitly delegate ambiguous cases to the rudderless 'reasonable' judgment of individual enforcement officers." App., *infra*, 70a. But that is precisely the effect of the event-related sign regulation: "By delegating some cases to the 'reasonable determination' of individual inspectors, the District fails to assure potential speakers that it will enforce the sign regulations in an objective, predictable manner." *Id.* at 96a.

2. The court of appeals reversed. See App., *infra*, 29a-35a.

To begin with, the court agreed that petitioner had properly framed its claim as "a facial vagueness challenge." App., *infra*, 30a. Because of the danger of "[s]elf-censorship," "only a facial challenge can effectively test the statute." *Id.* at 31a (quotations omitted).

Regarding the merits of the vagueness challenge, the court of appeals concluded that "the fact targeted by the 'event-related' limitation is clear." App., *infra*, 33a. In particular, "[t]o relate to an 'event,' a sign must relate to 'an occurrence, happening, activity or series of activities, specific to an identifiable time and place.'" *Ibid.* Focusing on the meaning of the

term "event," which is defined by the regulation, the court reasoned that this "is not a vague standard." *Ibid.*

The court recognized that "[i]nspectors confirmed that they had some leeway to assess event-relatedness." App., *infra*, 35a. Inspectors could not agree, for example, "whether a 2012 poster stating simply 'GRAHAM!' pertained to the reelection campaign of City Council member Jim Graham and was event-related." *Ibid.* The court took this evidence to show that the regulation "might be misapplied in certain cases," not that it "lacks criteria to cabin enforcement discretion." *Ibid.* The court did not, however, explain whether a "GRAHAM!" poster is properly considered event-related or not, according to the standards it held to be "clear."

In holding that the regulation is clear and not vague, the court rested its analysis principally on the regulation's requirement that inspectors act reasonably. "To the extent enforcement agents draw on surrounding circumstances to *un*reasonably infer that a sign is event related in accordance with the District's rule, the event-relatedness restriction would not apply." App., *infra*, 34a-35a. But, "[s]o long as their inferences are reasonable, * * * the rule's open-endedness about the evidence that may be used to meet that standard does not convert its otherwise clear limitation into an impermissibly vague one." *Id.* at 34a. On that basis, the court of appeals reversed the district court's grant of summary judgment. *Id.* at 35a.

REASONS FOR GRANTING THE PETITION

The District's special restrictions on non-commercial, event-related signs apply not only to signs that expressly "reference[]" an event on the "poster itself," but also to those signs that, despite *not* expressly referencing an event, are "reasonably determined from all circumstances by the inspector" to be related to one. D.C. Mun. Regs. tit. 24 § 108.13.

No objective standard guides the determination whether a sign that does not directly reference an event is nonetheless "related to" it. *Id.* § 108.6. The court of appeals did not actually identify any criteria that "cabin enforcement discretion." App., *infra*, 35a. To the contrary, the court acknowledged that the regulation provides inspectors "some leeway to assess event-relatedness." *Ibid.* Because that holding conflicts with decisions of other courts of appeals and turns this Court's First Amendment vagueness precedents upside down, further review is warranted.

First, the fundamental touchstone of due process requires objective criteria that limit official discretion. That is especially so where, as here, the law regulates speech. Here, however, there is no objective standard whatsoever; rather, whether a sign "relates to" an event is delegated to the discretion of individual inspectors. In materially similar circumstances, the Ninth Circuit has invalidated a law that delegates essentially standardless discretion to enforcement officials.

Second, in an attempt to work around the lack of any objective standard, the court of appeals focused on the regulation's requirement that inspectors must "reasonably determine" whether a sign is event-related. This was enough, the court held, to save the

statute from vagueness. That holding is incompatible with this Court's longstanding vagueness doctrine. Officials are *always* obligated to act reasonably; that is no basis to delegate to them lawmaking authority. It also creates a conflict with the Sixth Circuit, which has expressly rejected a law that delegates legal interpretation to an official's reasonable determination.

Third, review is imperative because the decision below will chill free speech rights. It lets stand an unconstitutionally vague law and, in so doing, encourages municipalities to enact similar, standardless ordinances. And this law is particularly troublesome. It licenses an inspector to develop an idiosyncratic, ad hoc standard to determine whether he or she believes a poster is "related to" an event—and then use that individualized judgment to tear down signs prematurely and assess substantial fines. Self-censorship is the inevitable result.

A. The event-related sign ordinance is unconstitutionally vague because it lacks objective standards.

1. For a law to comply with due process requirements, it must supply *objective* standards that govern its enforcement.

The Court has observed that "perhaps the most meaningful aspect of the vagueness doctrine" is "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974). A law with "standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.* at 575. But "[l]egislatures may not so abdicate their responsibilities for setting the standards of the crimi-

nal law." *Ibid.*[6] See also *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 170 (1972) (When "there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law.").

A law must therefore specify the governing "standard of conduct." *Coates*, 402 U.S. at 614. There must be some "objective criteria" for applying the statute. *Posters 'N' Things, Ltd.*, 511 U.S. at 526. This requirement guards "against entrusting lawmaking 'to the moment-to-moment judgment of the policeman on his beat.'" *Goguen*, 415 U.S. at 575.

This review is heightened when the law touches on First Amendment freedoms; "[t]he general test of vagueness applies with particular force in review of laws dealing with speech." *Hynes*, 425 US. at 620. Indeed, the Court has acknowledged that "perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Vill. of Hoffman Estates*, 455 U.S. at 499. If a "law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *Ibid.* Accordingly, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433 (1963). See also *id.* at 432 ("[S]tandards of permissible statutory vagueness are strict in the area of free expression.").

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[6] The District of Columbia's sign regulations constitute a penal statute. App., *infra,* 97a n.9 (citing *Washington* v. *D.C. Department of Public Works*, 954 A.2d 945, 948 (D.C. 2008)).

At the same time, the Court has explained, "a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved." *Fox*, 567 U.S. at 253.

Consistent with this framework, a law is unconstitutional if it requires "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings"—for example, whether conduct is "annoying" or "indecent." *United States* v. *Williams*, 553 U.S. 285, 306 (2008). Likewise vague is a law that regulates individuals with "no apparent purpose," a standard that is "inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene." *City of Chicago* v. *Morales*, 527 U.S. 41, 62 (1999).

2. The District's event-related sign ordinance flunks this essential test. It lacks any objective standard as to what makes a sign "related to a specific event," even when it says nothing on its face about an event. D.C. Mun. Regs. tit. 24 § 108.6.

Standing alone, the prepositional phrase "related to a specific event" (*ibid.*) provides no objective criteria. In a context where the term "relate to" governed the scope of a preemption statute, the Court observed that, "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for really, universally, relations stop nowhere." *N.Y. State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (quotation and alteration omitted). When faced with such terms of relationship, courts must identify a "limiting principle consistent with the structure of the

statute and its other provisions." *Maracich* v. *Spears*, 133 S. Ct. 2191, 2200 (2013).

Here, "[t]he District admits that 'there exist no additional policies, rules, staff instructions, guidance or any documents or communications which further * * * define what characteristics render a sign to be 'related to a specific event.'" App., *infra*, 104a-105a. And, according to the District, "'[t]here are no limiting or interpretive materials beyond what appears * * * on the face of the regulation itself.'" *Id.* at 105a.

There are, accordingly, no "objective criteria" for determining whether a sign that does not reference an event nonetheless *relates to* it. *Posters 'N' Things, Ltd.*, 511 U.S. at 526. The interpretative questions that arise are easy to see.

Take, for example, the sign that says solely "Scientists agree: Global warming is real." Would such a sign relate to an environmental rally taking place the week after it was first posted? What about a rally for climate change skeptics? What if the rally is announced *after* the signs go up? And is the sign event-related if the rally is held in Baltimore? If it is held in Paris? Does it relate to a book signing or a movie screening about climate change?

Or consider a sign that says nothing other than "GRAHAM!" Is that sign related to an election if Jim Graham was running? If so, is it related to the primary election, the general election, or both?

These examples all turn on what "related to a specific event" means in this context. To answer these questions, one must know the breadth of relationship that "related to" permits within the legal meaning of the regulation. But the District has never attempted to supply any objective criteria or stand-

ard of any sort that guides what "related to" means here.

The District's own solid waste inspectors are of the view—correctly so—that no objective criteria guides their decision-making. App., *infra*, 100a n.10. As one inspector said, "[i]t doesn't constrain me in the regulations. It says I can use my judgment." *Ibid.* And, when faced with a sign like "GRAHAM!", an inspector testified that "it would be my discretion between 108.5 and 108.6." *Ibid.*

For its part, the court of appeals identified no objective criteria governing what it means for a sign to be "related to a specific event." It acknowledged that inspectors have "some leeway to assess event-relatedness." App., *infra*, 35a. And, when evaluating the "GRAHAM!" example, the court never determined whether such a sign *is* event-related or how one would even go about making that determination. *Ibid.*

The District's event-related sign ordinance does precisely what due process prohibits—it "abdicate[s] * * * responsibilities for setting the standards of the criminal law" from the legislature to the enforcement officer (*Goguen*, 415 U.S. at 575), rendering enforcement discretion "ad hoc and subjective" (*Grayned*, 408 U.S. at 109). As the district court rightly held, "[t]his is a clear example of the kind of administrative discretion that the Due Process Clause and First Amendment abhor." App., *infra*, 103a.

3. The Ninth Circuit has rejected a materially similar ordinance as unconstitutionally vague. This case would have been decided differently under that circuit's precedent.

In *Hunt* v. *City of Los Angeles*, 638 F.3d 703 (9th Cir. 2011), the court considered a law allowing permit holders to sell only "merchandise constituting, carrying or making a religious, political, philosophical or ideological message or statement which is inextricably intertwined with the merchandise" on a city boardwalk. *Id.* at 707 (quoting L.A. Mun. Code § 42.15(C) (2004)) (quotation omitted).

The court held that the statute "fails to explain when merchandise has a message that is 'inextricably intertwined' with it." *Hunt*, 638 F.3d at 711. Indeed, the law "leav[es] unanswered whether the product itself must carry and display the message, or whether it is sufficient for the vendor to explain the product's message." *Ibid.* The phrase "inextricably intertwined" (similar in kind to "related to") could be read either way. *Ibid.*

Given the lack of "clear guidance" from the statute, "such determinations would necessarily be left to the subjective judgment of the officer." *Hunt*, 638 F.3d at 712. The effect is a significant risk of chilling: "this lack of clarity may operate to inhibit the exercise of freedom of expression because individuals will not know whether the ordinance allows their conduct, and may choose not to exercise their rights for fear of being criminally punished." *Id.* at 713.

The court ultimately held that the law "clearly fail[ed] to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited," and, moreover, "given that the line between allowable and prohibited sales of merchandise is so murky, enforcement of the ordinance poses a danger of arbitrary and discriminatory application." *Hunt*, 638 F.3d at 712.

The phrase "related to" is of the same basic character as the phrase "inextricably intertwined." Both concern the relatedness of speech with some other object or event. And neither phrase, standing alone, provides the clarity that due process and the First Amendment demand.[7]

B. The "reasonably determined" requirement does not cure the vagueness defect.

1. To work around the lack of any standard for what "related to" means in this context, the court of appeals turned to the regulation's requirement that officials make *reasonable* determinations. As the

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[7] The courts of appeals broadly acknowledge that laws lacking objective criteria to cabin enforcement are unconstitutionally vague. See, *e.g.*, *Wollschlaeger* v. *Governor, Florida*, 848 F.3d 1293, 1322 (11th Cir. 2017) (holding that the statutory phrase "unnecessary harassment" was constitutionally vague; "a definition" of what conduct qualifies as "unnecessary harassment" is "markedly absent from the pages of the Florida Statutes"); *McCormack* v. *Herzog*, 788 F.3d 1017, 1030-1033 (9th Cir. 2015) (holding unconstitutionally vague a statute that required "properly staffed" medical offices and "satisfactory" arrangements with hospitals because the "terms 'properly' and 'satisfactory' are * * * subjective and open to multiple interpretations"); *Bell* v. *Keating*, 697 F.3d 445, 462-463 (7th Cir. 2012) (holding that "serious inconvenience" and "annoyance" permit "unbridled discretion at odds with the Fourteenth Amendment," "impermissibly delegat[ing] to law enforcement the authority to arrest and prosecute on 'an ad hoc and subjective basis'"); *Tucson Woman's Clinic* v. *Eden,* 379 F.3d 531, 554-555 (9th Cir. 2004) (invalidating a statute requiring physicians to treat patients "with consideration, respect, and full recognition of the patient's dignity and individuality" as void for vagueness because it "subjected physicians to sanctions based not on their own objective behavior, but on the subjective viewpoint of others"). The same kind of defect is implicated here.

court put it, "[t]o the extent enforcement agents draw on surrounding circumstances to *un*reasonably infer that a sign is event related in accordance with the District's rule, the event-relatedness restriction would not apply." App., *infra*, 34a.

But, as the district court observed, "[t]elling an officer to act 'reasonably' does not provide objective criteria cabining his discretion" beyond what is required under any and every law. App., *infra*, 103a. Under this regulation, if the public "posts signs throughout the District, several different Solid Waste Inspectors will see the signs," and, "[a]s the depositions indicate, different Inspectors may come to different conclusions about the same signs." *Id.* at 119a. The point of reasonableness is that "[r]easonable people frequently come to different conclusions." *Id.* at 103a. Put another way, a reasonableness standard, without more, does not furnish the regulated public with the clarity needed to determine ex ante what is lawful under the regulation.

For just that reason, this Court routinely rejects delegating interpretative discretion to officers, even though they are obligated to act reasonably. That was the nub of the statutory defect in *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81 (1921). There, a statute rendered it unlawful to "make any unjust or unreasonable rate or charge" in certain contexts. *Id.* at 86. To determine whether a rate is "unreasonable" or not, an enforcement official had to make a "reasonable" judgment. But that was not sufficient basis to save the statute from constitutional infirmity. Instead, it failed to establish an "ascertainable standard of guilt." *Id.* at 89. This conclusion so "clearly results" so "as to render elaboration on the subject wholly unnecessary." *Ibid.*

So too in *Morales*, where the statute defined loitering as "to remain in any one place with no apparent purpose." 527 U.S. at 61. That failed to provide "minimal guidelines to govern law enforcement." *Id.* at 60. According to the court of appeals' reasoning in this case, the statute would have been saved if it had said, instead, "to remain in any one place with no apparent purpose *as reasonably determined by an officer*." But that makes no sense. Because all officers must act reasonably, it would have been the very same statute; spelling out the reasonableness requirement does nothing to provide the objective criteria necessary to cabin enforcement discretion or to give notice to the public of what is and isn't lawful. See *id.* at 60-64.

The requirement of reasonableness is no different than a pledge that the government will act responsibly. In a related context, the Court has explained that "the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *United States* v. *Stevens*, 559 U.S. 460, 480 (2010). The Court "would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Ibid.* No matter how reasonable an inspector may promise his lawmaking will be, the delegation of ad hoc authority is unconstitutional all the same.

To be sure, reasonableness is often an integral component of an *objective* legal standard. An officer with "reasonable suspicion," for example, can stop and detain an individual. *Terry* v. *Ohio*, 392 U.S. 1 (1968). A law may turn on the exercise of "reasonable medical judgment." *Karlin* v. *Foust*, 188 F.3d 446, 464 (7th Cir. 1999). But this uses reasonableness as an objective tool for making a factual determina-

tion—such as a reasonable person standard. This does not authorize officers to decide what facts govern—that is, to make subjectively reasonable *legal* judgments, establishing ad hoc standards for themselves. See *Fox*, 567 U.S. at 253 ("[A] regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved.").

2. Contrary to the result reached below, the Sixth Circuit has held that a facially standardless law remains unconstitutionally vague, even when it restricts an official to *reasonable* determinations. This case would have been decided differently in that circuit, too.

In *Belle Maer Harbor* v. *Charter Township of Harrison*, 170 F.3d 553 (6th Cir. 1999), the court addressed an ordinance establishing safety requirements for "bubbling devices" that protect boats and other structures from ice. 170 F.3d at 555. The ordinance authorized an operator to maintain an area of open water around a protected structure "not to exceed five (5) feet, or as determined by the inspecting officer to be a reasonable radius." *Id.* at 555 n.4. The court sought to "discern whether the reasonableness standard in the Ordinance bounds the inspection officer's enforcement decisions sufficiently to prevent ad hoc, discriminatory enforcement of the open water restriction." *Id.* at 558.

As in this case, what it means to be "reasonable" was neither defined in the ordinance nor had a commonly accepted meaning that "would provide an inspection officer with guidance in interpreting the Ordinance and in executing his or her enforcement duties with any uniformity." 170 F.3d at 558. While recognizing that "many" ordinances "requir[e] use of

an officer's discretionary judgment in their enforcement," the court concluded that the ordinance was vague, observing that "neither the enforcement officer nor the bubbler operator can ascertain by examining the language of the Ordinance alone whether criminal sanctions will result from one foot or ten feet of open water." 170 F.3d at 559. There was, in other words, no legal standard to guide an officer as to what factual findings actually needed to be made or, in turn, to notify the public of what is and is not permitted under the law. *Ibid.*

The court rejected the municipality's contention that the otherwise standardless regulation was permissible because "decisions to prosecute would be constrained by the reasonableness standard in relation to the stated purpose of the Ordinance." 170 F.3d at 559. The lack of any standard, apart from the requirement to act reasonably, created a "level of imprecision" that "cannot withstand a due process challenge on vagueness grounds." *Ibid.*

The analogous requirement in this regulation—that an inspector must "reasonably determine[]" that a sign is related to an event (D.C. Mun. Regs. tit. 24 § 108.13)—similarly does not cure the due process defect.

C. Because the decision below chills protected speech, review is imperative.

While the lack of objective standards renders any law vague, that is especially so here, where the law at issue regulates speech.

Laws restricting speech "operate to inhibit the exercise of those freedoms," which "inevitably lead[s] citizens to steer far wider of the unlawful zone." *Grayned*, 408 U.S. at 109 (quotations and alterations

omitted). Thus, "[w]hen speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Fox*, 567 U.S. at 253-254.

The Court entertains facial challenges to vague statutes precisely because vagueness creates the risk of "[s]elf-censorship." *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 757-758 (1988) ("Self-censorship is immune to an 'as applied' challenge, for it derives from the individual's own actions, not an abuse of government power."). Thus, "[o]nly standards limiting the [official]'s discretion will eliminate this danger by adding an element of certainty fatal to self-censorship." *Ibid.* See also *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 36 (1963) ("[I]n cases arising under the First Amendment * * * we are concerned with the vagueness of the statute 'on its face' because such vagueness may in itself deter constitutionally protected and socially desirable conduct.").

Unless this Court intervenes, free speech will be chilled in the District. Because the standards an official may use to judge whether a sign is event-related are ad hoc and entirely unknowable, the public is very likely to engage in self-censorship to avoid the draconian $2,000 *per poster* fines.

The event-related sign regulation at issue here has unique implications given that the District is the Nation's seat of government. Events of all stripes occur on a daily basis in the District, and rallies emerge with little warning or planning. Meanwhile, individuals and groups from across the country hang their posters in the District, often addressing issues of pressing political concern. Postering—a core exercise of democratic free speech—is woven deep into

the District's fabric. Yet the decision below authorizes District officials to apply idiosyncratic interpretations of what makes a sign "related to" an event—and then impose punishment on those who unwittingly violate that ad hoc standard.

The holding below also authorizes the District to enact other laws that confer wide-ranging discretion on enforcement officers, so long as the law spells out the obligation to act "reasonably." Review by this Court is imperative to clarify for the citizens of the District—and of the Nation—whether a law may delegate legal interpretation to enforcement officers, so long as the officers are constrained to exercise their lawmaking authority "reasonably."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLOMBIA CIRCUIT

Argued March 24, 2016 Decided January 24, 2017

No. 12-7139

ACT NOW TO STOP AND END RACISM COALITION AND MUSLIM AMERICAN SOCIETY FREEDOM FOUNDATION, APPELLEES

V.

DISTRICT OF COLUMBIA, APPELLANT

Consolidated with 12-7140

Appeals from the United States District Court
for the District of Colombia
(No. 1:07-cv-01495)

Carl J. Schifferle, Assistant Attorney General, Office of the Attorney General for the District of Columbia, argued the cause for appellant/cross-appellee. With him on the briefs were *Karl A. Racine*, Attorney General, *Todd S. Kim*, Solicitor General, and *Loren L. AliKhan*, Deputy Solicitor General.

Mara E. Verheyden-Hilliard argued the cause for appellees/cross-appellants. With her on the briefs were *Carl L. Messineo* and *Andrea Costello*.

Before: ROGERS and PILLARD, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

PILLARD, *Circuit Judge*: Like many municipalities around the country, the District of Columbia regulates the manner in which members of the public may post signs on the District's lampposts. District of Columbia law allows a posted sign to remain on a public lamppost for up to 180 days. But a sign relating to an event must be removed within 30 days after the event, whether the 180-day period has expired or not. Thus, the District's rule may in some cases give less favorable treatment to signs that relate to an event than to signs that do not.

Two nonprofit organizations, the Act Now to Stop War and End Racism Coalition (ANSWER) and the Muslim American Society Freedom Foundation (MASF) (together, the organizations), challenge the District's sign-posting rule. MASF brings a pre-enforcement challenge to the rule as unconstitutional on its face in violation of the First Amendment and due process. MASF first argues that the distinction between event-related and other signs is content based yet cannot meet strict First Amendment scrutiny and that, even if the rule is not content based, it fails the intermediate scrutiny applicable to content-neutral time, place, and manner restrictions. Second, MASF contends that the regulation delegates an impermissible degree of enforcement discretion to the District's inspectors in violation of due process. It further challenges what it contends is strict liability on the originators of posters for any violation of the sign-posting rule, which MASF argues also contravenes its speech and due process rights. ANSWER, unlike MASF, was cited by the District for violations of the regulation. ANSWER seeks damages under

section 1983, contending that it did not in fact violate the regulation and that citations were unconstitutional retaliation against it for its postering.

The district court granted summary judgment to MASF, invalidating the regulation's treatment of event-related posters on both First Amendment and due process grounds, but rejecting MASF's strict-liability objection. The court also sanctioned the District for seeking discovery in the face of an order granting limited discovery to plaintiffs. The district court granted summary judgment to the District on ANSWER's section 1983 damages claim for lack of a showing of a policy, custom, or practice of retaliatory enforcement, as required by *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978). The District and the organizations cross-appealed.

We conclude that the regulation does not impose a content-based distinction because it regulates how long people may maintain event-related signs on public lampposts, not the content of the signs' messages. The "event-related" category is not itself content based. Under the intermediate First Amendment scrutiny that is therefore applicable, the rule is a reasonable time, place, and manner restriction. It is narrowly tailored to further a well-established, admittedly significant governmental interest in avoiding visual clutter. The regulation's definition of event-based signs also guides officials' enforcement discretion sufficiently to avoid facial invalidation on due process grounds. Accordingly, we reverse the grant of summary judgment in MASF's favor and remand for the district court to enter summary judgment for the District.

On the organizations' cross-appeal, we affirm the district court's dismissal of ANSWER's section 1983

damages claim that the District retaliated against it in violation of the First Amendment, and MASF's claim that the District's regulation imposes a system of strict liability the First Amendment does not allow. Finally, because discovery is presumptively available to all parties pursuant to the Federal Rules of Civil Procedure in the absence of a court order to the contrary, we vacate the district court's imposition of discovery sanctions against the District for seeking discovery without leave of court.

I. Background

The District of Columbia began its regulation of signs on public lampposts with an outright prohibition in 1902. D.C. Police Regulations, Art. XII, § 2 (1902). The District partially relaxed that ban in 1958 to allow for the posting of signs on lampposts only with the permission of the District's Commissioners. D.C. Police Regulations, Art. 20 § 2 (1958). After the District's Corporation Counsel advised that the regulation might be constitutionally infirm for lack of clearly articulated standards, *see* Letter from Louis P. Robbins, Acting Corporation Counsel, to James W. Hill, Director, Dep't of Licenses, Investigations, and Inspections (October 12, 1978) (Gov't Add. 13) [hereinafter Robbins Letter], the District revised the regulation to add specific criteria to limit enforcing officers' discretion, *see* Street Sign Regulation Amendment Act of 1979, D.C. Law 3-50, 26 D.C. Reg. 2733 (1979); *see also* Crime Prevention Sign Posting Act of 1980, D.C. Law 3-148, 27 D.C. Reg. 4884. Following the revisions, signs "not relate[d] to the sale of goods" could be affixed to lampposts for up to 60 days; election signs for District of Columbia candidates for public office were exempt from that overall limit but had to be taken down within 30 days after

the election; and signs intended to aid neighborhood crime prevention were exempted from the time limits. *See* D.C. MUN. REGS. tit. 24 § 108.4-108.6 (1980). Commercial signs could not be affixed to public lampposts at all. *See id.* § 108.4. The revised rule also articulated specific requirements for the manner in which signs could be posted on a lamppost "or appurtenances of a lamppost" to "minimiz[e] the need to repair lamp posts defaced by signs attached by adhesives or other permanent methods and the need to remove abandoned or improperly secured signs from lamp posts, the sidewalks and the streets." Robbins Letter at 2; *see* D.C. MUN. REGS. tit. 24, § 108.8-108.9 (1980). During the pendency of this case, the District twice further amended its lamppost rules, as described below.

In the meantime, ANSWER, a "grassroots civil rights organization" that works to end war and oppose racism, Affidavit of Brian Becker ¶ 2 (Mar. 14, 2008), J.A. at 32, had posted signs advertising rallies in the District, including events in September 2007 and March 2010. MASF, an unincorporated nonprofit association that conducts "civil and human rights advocacy with a focus on empowering the Muslim American community," Affidavit of Imam Mahdi Bray (Oct. 26, 2013) ¶ 6, Organizations' Add. 2, has in the past and intends in the future to post signs that combine general messages of advocacy and references to specific events, *see id.* at 6-8. MASF "has sought to engage in postering to the same extent as is afforded others, including those favored within the District of Columbia municipal regulation system." *Id.* at 9. The District of Columbia has not cited MASF, but in 2007 the District issued multiple citations against ANSWER under the then-current lamppost rule.

ANSWER and MASF sued the District, seeking a declaratory judgment that the District of Columbia's lamppost rule violates their First Amendment and due process rights, and an injunction barring its enforcement. First Amended Complaint, *Act Now To Stop War & End Racism Coal. v. District of Columbia* (*ANSWER I*), 570 F. Supp. 2d 72 (D.D.C. 2008) (No. 07-1495). The district court dismissed both ANSWER's and MASF's claims for lack of standing, and in abstention from pending local administrative enforcement proceedings. *ANSWER I*, 570 F. Supp. 2d at 75-78. The organizations appealed.

This court reversed in part and remanded. *Act Now to Stop War & End Racism Coal. v. District of Columbia* (*ANSWER II*), 589 F.3d 433, 434 (D.C. Cir. 2009). The court held that MASF had standing based on "a credible statement of intent to engage in violative conduct," and had shown sufficient likelihood of enforcement against it because its allegations raised "somewhat more than the 'conventional background expectation that the government will enforce the law.'" *Id.* at 435 (quoting *Seegars v. Gonzales*, 396 F.3d 1248, 1253 (D.C. Cir. 2005)). At the motion to dismiss stage, the court reasoned, an affidavit from MASF's director stating an intention to violate the regulation sufficed to establish standing. *Id.* at 436. As to ANSWER, the court found that the district court had correctly abstained under *Younger v. Harris*, 401 U.S. 37 (1971), to the extent that charges against ANSWER for violations of the challenged regulation remained pending in the District of Columbia's administrative process. *ANSWER II*, 589 F.3d at 436.

While MASF and ANSWER's appeal was pending before this court, the District of Columbia De-

partment of Transportation amended the lamppost regulation. The 2010 final rule made one distinction relevant to the plaintiffs' claims: Signs "not related to a specific event" could be posted for up to 60 days while signs "related to a specific event" could be posted at any time beforehand, but had to be removed within 30 days after the event. 57 D.C. Reg. 528 (January 8, 2010) (amending D.C. MUN. REGS. tit. 24, §§ 108.5 & 108.6). Thus, in theory, event-related signs could be posted for months or years before the event they announced and for an additional 30 days thereafter, while signs that were not event related could be posted for a maximum of 60 days.

On remand, ANSWER voluntarily dismissed its claims for prospective relief. *See* Stipulation of Dismissal, *Act Now To Stop War & End Racism Coal. v. District of Columbia* (*ANSWER III*), 798 F. Supp. 2d 134 (D.D.C. 2011) (No. 07-1495). MASF, the only party still challenging the constitutionality of the District's regulation going forward, amended its complaint in light of the revised rule, adding an as-applied challenge to the "event-related" distinction as content based. *See* Supplemental Pleading ¶¶ 16-17, *ANSWER III*, 798 F. Supp. 2d 134 (No. 07-1495). Because neither the earlier nor the revised regulation had been enforced against MASF, the district court dismissed MASF's as-applied challenge, leaving only its facial challenges under the First Amendment and the Due Process Clause. *ANSWER III*, 798 F. Supp. 2d at 143. Those claims, the court held, could proceed to discovery. *Id.* at 150-51.

Meanwhile, in its supplemental pleading after remand, ANSWER alleged that the District had "attacked" it with ninety-nine enforcement actions in March and April 2010 in retaliation for the content of

its postering activity. The court dismissed that claim, holding that ANSWER had failed adequately to allege that the claimed retaliation resulted from a municipal custom or practice. *ANSWER III*, 798 F. Supp. 2d at 154-55. The court also dismissed MASF's claim that the regulation imposes a system of "strict liability" in violation of the First Amendment. *Id.* at 153.

In 2012, the District revised the regulation once more, yielding the version now before us. *See* 59 D.C. Reg. 273 (Jan. 20, 2012). Section 108 currently provides that any sign—including those announcing events—may be affixed to a publicly owned lamppost for a maximum of 180 days, but that signs relating to specific events must be removed within 30 days after the event. D.C. MUN. REGS. tit. 24, §§ 108.5, 108.6. The regulation also continues to restrict the method of affixing signs on public lampposts: All signs must be "affixed securely to avoid being torn or disengaged by normal weather conditions," *id.* § 108.8, but cannot "be affixed by adhesives that prevent their complete removal from the fixture, or that do damage to the fixture," *id.* § 108.9. Signs may not be posted on "any tree in public space," *id.* § 108.2, and no more than three copies of any sign may be posted on either side of the street on a given block, *id.* § 108.10. The 2012 revision also added subsection 108.13, which defines an "event" as "an occurrence, happening, activity or series of activities, specific to an identifiable time and place, if referenced on the poster itself or reasonably determined from all circumstances by the inspector." *See* 59 D.C. Reg. 273 (codified at D.C. MUN. REGS. tit. 24, § 108.13).

After discovery—which we discuss in Part II.E., *infra*, in connection with the sanctions order—the

District and MASF cross-moved for summary judgment. The court granted summary judgment to MASF, reasoning that even if the regulation does not distinguish on the basis of content, subsections 108.5 and 108.6 nevertheless fail intermediate scrutiny under the First Amendment for want of admissible evidence showing how the regulation advances the city's content-neutral purposes. *Act Now to Stop War & End Racism Coal. v. District of Columbia* (*ANSWER IV*), 905 F. Supp. 2d 317, 340-41 (D.D.C. 2012). It also held that subsection 108.13 was an impermissible delegation of enforcement discretion in violation of the Due Process Clause. *Id.* at 332. The court sanctioned the District for seeking discovery in violation of the court's scheduling order. *Act Now to Stop War & End Racism Coal. v. District of Columbia*, 286 F.R.D. 117 (D.D.C. 2012). The District and the organizations cross-appealed.

We held these appeals in abeyance pending the Supreme Court's resolution of *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), *see* Order, *Act Now to Stop War & End Racism Coal. v. District of Columbia*, No. 12-7139 (D.C. Cir. August 20, 2014), and, once *Reed* was decided, requested supplemental briefing addressing its applicability here.

II. Analysis

We begin by addressing the District's contention that MASF lacks standing to sue. Finding standing, we proceed to MASF's First Amendment and due process facial challenges. As to both, we find MASF's challenges fall short, and accordingly reverse the district court's grant of summary judgment in its favor. We affirm the court's dismissal of ANSWER's section 1983 claim for damages and MASF's claim that the District's rule imposes strict liability in violation of

the First Amendment. Finally, we vacate the discovery sanctions again the District.

A. MASF Has Standing to Challenge the District's Lamppost Regulation

The District argues that MASF ceased operating in 2011, so has "lost standing" during the pendency of its suit. Gov't Br. at 19. Even if MASF exists, the District asserts, it has failed to establish that the regulation causes it to suffer injury in fact. We disagree: An affidavit from MASF's Imam Bray attests that MASF continues to exist as an unincorporated nonprofit association, and the District's submissions raise no real question on that point.

1. ***Evidence Shows MASF Exists.*** For a federal court to exercise jurisdiction, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733 (2008); see also *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (plaintiff must support standing "with the manner and degree of evidence required at the successive stages of the litigation"). Thus, "[e]ven where litigation poses a live controversy when filed, we must dismiss a case as moot if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." *Chamber of Commerce of U.S. v. E.P.A.*, 642 F.3d 192, 199 (D.C. Cir. 2011) (alteration in original) (internal quotation marks omitted). The District contends that this case has become moot because MASF no longer exists, thus eliminating it as a party whose rights could be affected.

MASF, as the party invoking our jurisdiction, "bears the burden of establishing" its standing, *Lujan*, 504 U.S. at 561, a burden that is "correlative to the burden" to establish the substantive elements of its claims, *Sierra Club v. E.P.A.*, 292 F.3d 895, 900 (D.C. Cir. 2002). Even though the District did not challenge MASF's existence when it moved for summary judgment because it learned of the evidence that it believes calls MASF's existence into question only after noticing its appeal, we consider MASF's standing *de novo*, as we would had it been challenged at the procedural stage to which the case had progressed in the district court. *Scenic America, Inc. v. Anthony Foxx*, 836 F.3d 42, 49-50 (D.C. Cir. 2016). Accordingly, on appeal from denial of summary judgment in MASF's favor, there must be no material dispute about the facts that support its standing. We view the evidence and inferences therefrom in the light most favorable to the District as the non-moving party on MASF's cross-motion for summary judgment. *See Dunaway v. Int'l Bhd. of Teamsters*, 310 F.3d 758, 761 (D.C. Cir. 2002).

Imam Bray's affidavit suffices as an authoritative statement of MASF's continued existence as an unincorporated nonprofit association under District of Columbia law. An "unincorporated nonprofit association" is "an unincorporated organization, consisting of 2 or more members joined under an agreement that is oral, in a record, or implied from conduct, for one or more common, nonprofit purposes." D.C. Code § 29-1102(5) (2016). Such a nonprofit is "a legal entity distinct from its members and managers" and has "perpetual duration" unless otherwise provided. *Id.* § 29-1105(a), (b). To operate as an unincorporated nonprofit association an organization need not be registered with the District, *see id.* § 29-1102(5), and

it has the capacity on a member or manager's initiative to sue in its own name, *id.* § 29-1109.

In his affidavit, Imam Bray attested that, "[t]hroughout the period of litigation, there have always been two or more persons (*i.e.* 'members' as that term is used in the District's Uniform Unincorporated Nonprofit Association Act) who have participated in the management of the affairs of MASF or in the development of the policies and activities of MASF." Bray Affidavit ¶ 4, Organizations' Add. 2. The District has no evidence that the organization in fact lacks "2 or more members," D.C. Code § 29-1102(5), who have joined together for a "common, nonprofit purpose," *id.*, namely "to engage in civil and human rights advocacy with a focus on empowering the Muslim American community," Bray Affidavit ¶ 6, Organizations' Add. 2.

The District challenges MASF's existence based on an online newspaper report and a record from the District of Columbia Department of Consumer and Regulatory Affairs. While this appeal was pending, the District learned of an online *Muslim Link* article reporting that MASF "announced its closure on June 17, 2011." Gov't Add. 40. The *Link* cited a statement from someone identifying himself as a MASF member that the organization did not have "the resources that would allow [continuing] advocacy and organizing work." *Id.* (alterations in original). In the online "comments" section of the document as printed and filed by the District, however, a member of the Muslim American Society's Board of Trustees, Mazan Mokhtar, explained that the "reports of MAS Freedom's closing are greatly exaggerated." Gov't Add. 42. Imam Bray's declarations attest to MASF's continued existence. Bray Affidavit ¶¶ 10-29, Organiza-

tions' Add. 3-9. The conclusory and ambiguous *Link* document, unaccompanied by a declaration of the quoted individual or anyone else attesting to personal knowledge of the putative closing, fails to call into question MASF's continued existence.

The District also points to a record from the District of Columbia Department of Consumer and Regulatory Affairs (DCRA) stating that an entity referred to as "MASF, Inc.," had its incorporation status "revoked." *See* Gov't Br. Add. 44. MASF, however, avers that it is not the organization described in that DCRA record. MASF's complaint does not refer to the organization as "MASF, Inc.," *see* First Amended Complaint at 5, *ANSWER I*, 570 F. Supp. 2d 72 (No. 07-1495), nor is it so described in the corporate disclosure statement to this court, *see* Corporate Disclosure Statement, Docketed February 28, 2013. For further confirmation, MASF points to Imam Bray's sworn affidavit attesting that MASF has never been incorporated. *See* Bray Affidavit, Organizations' Add. 2-3. Imam Bray explains that he "was involved with the formation and abandonment of that short-lived separate corporation. Those papers were filed with the intent to create a 501(c)(4) corporation that would engage in activities coinciding with the 2008 Presidential election. However, the project was abandoned. The incorporation papers were, essentially, a false start." *Id.* at 3. Thus, the District has not raised a material factual dispute as to whether the organization whose incorporation is listed as "revoked" is the party before us.

Neither of the District's submissions suffices to call into question MASF's continued existence.

2. ***MASF Has Established its Injury.*** The District also contends that, even if MASF exists, the lamppost regulation causes it no injury.

MASF brings a pre-enforcement challenge to the regulation before it has faced any punishment. As we explained when this case was previously before us, "standing to challenge laws burdening expressive rights" may require "only 'a credible statement by the plaintiff of intent to commit violative acts and a conventional background expectation that the government will enforce the law.'" *ANSWER II*, 589 F.3d at 435 (quoting *Seegars v. Gonzales,* 396 F.3d 1248, 1253 (D.C. Cir. 2005)). Here, MASF encounters "somewhat more than the 'conventional background expectation that the government will enforce the law.'" *Id.* (quoting *Seegars*, 396 F.3d at 1253). Given the District's energetic issuance of multiple citations against ANSWER, the threat of enforcement against MASF is not "imagined or wholly speculative," *Seegars*, 396 F.3d at 1252, nor is there reason to think "the challenged law is rarely if ever enforced," *id.*

The District now argues that the 2012 amendment of the lamppost regulation during the pendency of this case has eliminated the risk of harm that MASF identified. The District says that MASF has "never asserted an intent to poster in violation of the regulations invalidated on summary judgment"—*i.e.*, the current rule, as promulgated in 2012. Gov't Br. at 27. MASF's only claimed injury, the District contends, stems from the disfavored status afforded to signs *not* related to an event under the superseded 2010 Regulation—a disadvantage the current regulation eliminates.

The 2010 rule favored signs related to an event but, in eliminating that leeway, the 2012 version could be viewed to have swung too far in the other direction so as to disfavor event-related signs. *See* 59 D.C. Reg. 273 (2012). Under the 2010 rule, signs "not related to a specific event" could be posted for up to 60 days; the rule did not specify how far in advance signs "related to a specific event" might be posted, so long as they were removed within 30 days of the event. 57 D.C. Reg. 528 (Jan. 8, 2010). Thus, the 2010 rule on its face allowed event-related signs to remain on lampposts for months or years leading up to an event, while it restricted total posting time for signs not related to an event. Under the current rule as amended in 2012, however, no sign—whether or not related to an event—may remain affixed to a public lamppost for more than 180 days. D.C. MUN. REGS. tit. 24, § 108.5 (2012). Signs relating to a specific event must, as before, be removed within 30 days after the event. *Id.* § 108.6. The current rule thus treats event-related signs, in some circumstances, less favorably than signs unrelated to any event: Assuming an event-related sign is posted fewer than 150 days before the event, the requirement that it be removed within 30 days after the event means it may not be displayed for the full 180-day period it would otherwise enjoy under the regulation if it were unrelated to an event.

The District notes that MASF filed its amended complaint on the heels of the 2010 rule, and contends that the Complaint expressed only MASF's intent to violate the then-comparatively-restrictive 60-day limit that the 2010 rule imposed on signs not related to an event. But MASF's intent is not so narrowly circumscribed: It intends to "engage in postering to the same extent as is afforded others." Bray Affidavit

¶ 32, Organizations' Add. 9. The organization has reasserted, since the rule revision in 2012, that it plans to post signs that would "violate the challenged regulations, specifically keeping them affixed for 180 days despite the regulations requiring any poster that is 'related to a specific event' to be removed 30 days post-event." *Id.* ¶ 35. MASF also intends to post signs that contain both information related to events and information of continuing relevance and expresses uncertainty as to whether such signs are subject to the 30-day post-event limitation. *See id.* ¶ 37. The District's arguments that MASF lacks standing therefore fail.

B. The District's Rule Does Not Violate the First Amendment

The District's regulation of the public's use of city lampposts as convenient places to post signs is a content-neutral time, place, and manner restriction that is sufficiently tailored to a significant governmental interest in avoiding clutter to comport with the First Amendment. As the district court held, "the District's lampposts are a textbook example of a limited or designated public forum." *ANSWER III*, 798 F. Supp. 2d at 145. The District might have chosen not to make its lampposts available as a place for the people to put up their signs. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 814-15 (1984). But once it allows members of the public to post signs on its lampposts, the government lacks the "power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

The level of constitutional scrutiny is determinative here. MASF contends that the lamppost rule is

content-based so subject to strict scrutiny under *Reed v. Town of Gilbert*, whereas the District of Columbia says the rule is a content-neutral time, place, and manner restriction quite different from the content-based sign-posting regulations struck down in *Reed*. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed,* 135 S. Ct. at 2226. Government may, however, impose content-neutral limitations on the duration and manner in which the public uses government property for expressive conduct like sign-posting. "'[C]ontent-neutral' time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986).

We review *de novo* the district court's grant of summary judgment to the organizations on their First Amendment claim. *Hodge v. Talkin*, 799 F.3d 1145, 1155 (D.C. Cir. 2015).

1. ***The Rule Is Content Neutral.*** The District of Columbia's lamppost rule makes a content-neutral distinction between event-related signs and those not related to an event. The District requires that, whatever their content or viewpoint, event-related signs be removed within thirty days after the event to prevent them from accumulating as visual clutter. That rule is not a "regulation of speech," but "a regulation of the places where some speech may occur." *Hill v. Colorado*, 530 U.S. 703, 719 (2000). It does not target the "communicative content" of those signs, such as

by distinguishing among various events by topic, *see Reed*, 135 S. Ct. at 2226-27, but uniformly restricts the duration that event notices may remain physically affixed to public lampposts. The rule's clutter-minimizing rationale does not depend on the content of a sign's message. *See Hill*, 530 U.S. at 723; *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

Content distinctions are of special concern under the First Amendment because they pose the risk that government is favoring particular viewpoints or subjects. But a broad-based, general distinction between event-based signs and other signs poses no such risk. It instead simply reflects the common-sense understanding that, once an event has passed, signs advertising it serve little purpose and contribute to visual clutter. The promulgation and function of the District of Columbia's wholly viewpoint neutral lamppost rule reveals "not even a hint of bias or censorship." *Taxpayers for Vincent*, 466 U.S. at 804.

The fact that District officials may look at what a poster says to determine whether it is "event-related" does not render the District's lamppost rule content-based. The "event-related" definition is just as content neutral as was Colorado's "free zone" sustained in *Hill*, which prevented persons approaching patients on the sidewalk outside abortion clinics to come closer than eight feet to engage "in 'oral protest, education, or counseling' rather than pure social or random conversation." 530 U.S. at 721. The Court in *Hill* acknowledged that "the content of the oral statements made by an approaching speaker must sometimes be examined to determine whether the knowing approach is covered by the statute," but noted that such "cursory examination" did not render the statute facially content based. *Id.* at 720, 722. So,

too, laws banning "picketing," and injunctions aimed at "demonstrating" that do not bar other types of expressive conduct are not rendered content based merely because, at a general level, the character of the expressive activity must be taken into account to discern whether the law applies. *See id.* at 722-23 & n.30 (citing *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 366-67 n.3 (1997); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 759 (1994); *Frisby v. Schultz*, 487 U.S. 474 (1988); *United States v. Grace*, 461 U.S. 171 181 n.10 (1983); *Police Dept. of Chicago v. Mosley*, 408 U.S. at 98). So, too, the fact that a District of Columbia official might read a date and place on a sign to determine that it relates to a bygone demonstration, school auction, or church fundraiser does not make the District's lamppost regulation content based.

MASF contends that *Reed* requires us to apply strict scrutiny because "[t]he regulation singles out specific subject matter—that deemed 'related to a specific event'—for differential treatment," and that, per *Reed*, there is no "exception from the content-neutrality requirement for event-based laws." Cross-Appellants' Supp. Br. at 6 (quoting *Reed*, 135 S. Ct. at 2231). But *Reed* does not view a bare distinction between event-related and other signs as itself content-based. The aspect of the Sign Code invalidated in *Reed* that the Court held to be content-based was its further distinctions among signs—including among event-related signs—based on their subject matter.

The Town of Gilbert's complex Sign Code exempted twenty-three categories of signs—based on their content— from the town's general ban on posting outdoor signs, and made additional content dis-

tinctions among the categories of exempted signs, including several content distinctions among event-related signs. 135 S. Ct. at 2224-25. In particular, the Sign Code gave different amounts of leeway to event-related signs depending on whether the event was, for example, political, commercial, construction-related, "special-event," or religious or charitable. Political signs, including any "temporary sign designed to influence the outcome of an election called by a public body," *id.* (quoting Gilbert, Ariz., Land Development Code (Sign Code or Code), Glossary of General Terms, at 23 (2005)), enjoyed relatively generous time limits; they could be posted for up to sixty days before a primary election, and, if the candidate to which they referred advanced to the general election, they could remain posted until fifteen days following the general election, *id.* at 2225. Signs relating to Temporary Uses and Special Events could be posted up to 24 hours in advance and remain posted through the day of the event, whereas Garage Sale signs and Bazaar signs could remain posted only until the "end of the sale." Gilbert, Ariz., Land Development Code, Art. 4.402(K), (O), (Y). The Gilbert Sign Code permitted builders to post weekend directional signs "no earlier than 4:00 p.m. on Friday of each week" and had to remove them "no later than 8:00 a.m. on the following Monday." *Id.* Art. 4.405(B)(2)(f).

The Town of Gilbert's Sign Code gave least favorable treatment to the kind of sign that the petitioner church in *Reed* sought to use: "Temporary Directional Signs Relating to a Qualifying Event." 135 S.Ct. at 2225. Such a sign, defined as one that directed people to any "assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational,

or other similar non-profit organization," could only be displayed for twelve hours before the event, and had to be removed within an hour after the event. *Id.* The Sign Code thus afforded more leeway to electioneering signs and even signs relating to specified Temporary Uses such as farmers' markets or fireworks displays than to signs for morning church services, which for the most part could not go up until after dark in winter, and had to be removed the next morning before coffee and doughnuts were fully digested.

The rule the organizations here challenge, in contrast, distinguishes only between signs that are event-related and signs that are not. That distinction is not itself content-based under *Reed*. The organizations assert that *Reed* held that the "event-based" category is necessarily content-based because it "singles out specific subject matter—that deemed 'related to a specific event'—for differential treatment." Appellee Supp. Br. at 6. But *Reed* did not so hold. The passage the organizations invoke was directed at the notion the court of appeals had advanced that an otherwise "obvious content-based inquiry," such as the distinction between "political" and "ideological" signs relating to an upcoming election, would be somehow rendered content-neutral and thereby "evade strict scrutiny review simply because an event (*i.e.* an election) is involved." *Reed*, 135 S. Ct. at 2231.

Indeed, *Reed* makes clear that a municipality may continue to treat event-related signs differently from non-event-related signs by means of time, place, and manner restrictions, as long as it does not distinguish among types of event based on content. What *Reed* held constitutionally suspect was the way

in which the Town of Gilbert's Sign Code made content-based distinctions among different types of issues and events, and even different types of signs relating to the same event. *See Reed*, 135 S Ct. at 2227. Unlike the content-based treatment of event-related signs invalidated in *Reed*, District of Columbia law treats all event-related signs alike and is thus content neutral.

The Court in *Reed* emphasized that differences in time limits depending on the "communicative content" of the signs was what subjected the Town of Gilbert Sign Code to strict scrutiny. *See id.* at 2227. Because Gilbert's Sign Code treated "the Church's signs inviting people to attend its worship services...differently from signs conveying other types of ideas," it was content-based regulation. *Id.* The Court emphasized that the Sign Code's distinctions did not merely "hinge on 'whether and when an event is occurring,'" and did not just "permit citizens to post signs on any topic whatsoever within a set period leading up to an election." *Id.* at 2231. Rather, the Code impermissibly required town officials to examine each sign to determine whether, for example, it was "designed to influence the outcome of the election" and so must come down within fifteen days thereafter, or more generally "ideological," in which case no time limit applied. *Id.* at 2231.

Justice Alito's concurring opinion in *Reed* even more squarely rejects the position the organizations advance here that the distinction between event-related and other signs is itself content-based. Writing for three of the six justices in the majority, Justice Alito specifies that a regulation "imposing time restrictions on signs advertising a one-time event" does not by token of the "event-related" category as

such amount to a content-based distinction. *Id.* at 2233 (Alito, J., concurring). Rules treating event-related signs as a group differently based on their time-limited nature "do not discriminate based on topic or subject and are akin to rules restricting the times within which oral speech or music is allowed." *Id.* That is, such rules are time, place, or manner restrictions, constitutionally permissible if they are narrowly tailored to serve a significant governmental interest. The three justices who concurred in *Reed* also clearly would not strictly scrutinize the rule we face here. *See id.* at 2236 (Breyer, J., concurring in the judgment) (concluding that even the regulation at issue there "does not warrant 'strict scrutiny'"); *id.* at 2236-38 (Kagan, J., joined by Ginsburg and Breyer, JJ., concurring in the judgment) ("The absence of any sensible basis for these and other distinctions dooms the Town's ordinance under even the intermediate scrutiny that the Court typically applies to 'time, place, or manner' speech regulations. Accordingly, there is no need to decide in this case whether strict scrutiny applies to every sign ordinance in every town across this country containing a subject-matter exemption.").

All four of the opinions in *Reed* confirm that the District of Columbia's lamppost rule is not a content-based regulation of speech. The District's rule governs the time event-related signs may remain on public lampposts after the event has passed because obsolete signs cause a particular aesthetic harm; the rule makes no distinctions among event-related signs based on their particular communicative content. *Reed*'s definition of content-based regulation does not sweep in rules like the District's that merely distinguish between all signs related to events and all non-event-related signs. It is therefore not subject to the

strict scrutiny applicable to content-based regulation of speech, but must only meet the lesser constitutional scrutiny applicable to content-neutral rules affecting speech.

Accordingly, we proceed to consider the validity of the regulation under the standard applicable to content-neutral regulation of speech.

2. ***The Regulation Withstands Intermediate Scrutiny.*** Even if the regulation is content neutral, MASF argues, it nevertheless violates the First Amendment. The district court granted partial summary judgment to MASF on the ground that the regulation could not pass muster under the intermediate scrutiny applicable to content-neutral regulation of speech.

A basic principle of the First Amendment—that "[e]ven protected speech is not equally permissible in all places and at all times," *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985)—permits the government to impose "reasonable time, place, and manner regulations as long as the restrictions 'are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" *United States v. Grace*, 461 U.S. 171, 177 (1983) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)); *see Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298 n.8 (1984). Those same standards apply whether the regulated speech occurs in a traditional public forum—*i.e.* streets and parks—or on public property that the government has designated for the public's use as a forum for speech and other expressive conduct, such as the lampposts in this case. *Perry Educ. Ass'n*, 460 U.S. at 45-46. It is the District of Colum-

bia's burden to show that its regulation serves a substantial governmental purpose and is tailored to that purpose. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2540 (2014); *Edwards v. District of Columbia*, 755 F.3d 996, 1002-03 (D.C. Cir. 2014). We conclude that it meets that burden here.

The District's interest is plainly significant. "[M]unicipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression." *Taxpayers for Vincent*, 466 U.S. at 806; *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981) (finding no "substantial doubt" that the governmental objective of furthering "the appearance of the city" is a "substantial governmental goal[]"); *Mahoney v. Doe*, 642 F.3d 1112, 1118 (D.C. Cir. 2011). The district court accepted that the prevention of clutter and litter is a substantial interest, *see ANSWER IV*, 905 F. Supp. 2d at 334 n.4, and MASF does not challenge that conclusion here, *see* Organizations' Br. 44.

Instead, MASF argues that the District of Columbia has failed to show that its regulation actually serves that interest. But the event-related distinction in the District's regulation turns on the very non-speech feature of that activity that makes it proscribable in the first place—that is, the visual blight of superannuated event signs. The District distinguishes event-related from non-event-related signs based on its "weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression." *Taxpayers for Vincent*, 466 U.S. at 806. The District's reasoning is straightforward: All signs have both communicative value and aesthetic costs. Leading up to an event, the communicative value of a sign related to that event outweighs

the aesthetic harm that sign causes. But after the event, the communicative value of the sign is greatly diminished. The sign then becomes, from the District's perspective, little more than visual clutter. *See* Robbins Letter at 2. There is also greater risk that an event-related sign will be abandoned after the event it announces, and not maintained like a sign with continuing relevance. Failure to remove such a sign is itself a manifestation of neglect.

As the Supreme Court has explained, where the basis for distinguishing between types of communicative conduct "consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992). Such is the case here. That is not to say that an event-related sign loses all communicative value after the event has occurred. A viewer might have some interest, for example, in knowing what kinds of events had taken place (or been advertised) in the neighborhood in the past, even though she had missed the event itself. That an event-related sign might have some residual continuing relevance, however, does not bar the District from determining, in a content-neutral, across-the-board manner, that the visual clutter outweighs any such interest.

The district court held that the District, "by submitting no evidence whatsoever" of the relationship between its admittedly substantial interest and the challenged regulation, had failed to meet its burden on summary judgment. *ANSWER IV*, 905 F. Supp. 2d at 344. The District responds that it has sought, since it first established criteria for permitting the public to post signs on District lampposts, to protect "legitimate governmental interests in caring

for city lampposts and neighborhood aesthetics while contemporaneously affording citizens ample opportunity to exercise their First Amendment rights." D.C. Council, Report on Bill 3-179, at 3 (Sept. 26, 1979). The District was not required in these circumstances to submit studies, statistics or other empirical evidence in order to defend the event-related distinction as a narrowly tailored means to serve its substantial aesthetic interest. That relationship is less a matter to be established by empirical evidence than it is the result of a straightforward line of reasoning: "A poster for an event that has already occurred is more likely to constitute litter and blight than a poster for a future event" or a non-event-related sign. *ANSWER III*, 798 F. Supp. 2d at 148. As the Supreme Court has observed, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000).

The District's aesthetic judgment that an event-related sign for an event that has passed contributes to visual clutter is utterly plausible and not novel. *See Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 16 (D.C. Cir. 2009) (explaining that because "a value judgment based on the common sense of the people's representatives" is not like a justification based on "economic analysis that [is] susceptible to empirical evidence," such a common-sense judgment need not be supported by an evidentiary showing); *see also Blount v. S.E.C.*, 61 F.3d 938, 944-45 (D.C. Cir. 1995) (holding that there is no need to show evidence of any specific quid pro quo to support the regulation against First Amendment challenge because the dynamic to which regulation responded was "self-

evident[]"). The justification for the rule's requirement that event-related signs be removed within thirty days of the event is just the sort of common-sense judgment for which empirical data is likely to be both unavailable and unnecessary.

The District has also shown that its lamppost rule leaves open ample alternative channels of communication. The rule does not limit anyone's ability to say in multiple ways and for unlimited duration the very same thing she or he seeks to announce on lamppost posters. People may hand out leaflets or speak to passers-by with the same message, or put that message on bumper stickers. They may circulate or march wearing or holding the very same signs, post or erect the same signs on private property with the owners' permission, and post messages on various electronic and physical billboards, publications, or pages to communicate about their events. Nothing in the challenged rule prevents anyone from using such channels for as long as they like, even after their event has taken place. The challenged rule merely limits event-related posters from continuing to occupy the limited space on publicly owned lampposts more than thirty days after the relevant event has passed.

There are admitted advantages to postering: It is a relatively inexpensive method for an organization to broadcast its message; it can be targeted to a particular neighborhood; and it requires less time commitment than leafletting or a direct-advocacy campaign. *See, e.g.*, *Taxpayers for Vincent*, 466 U.S. at 812. But the District's regulation does not foreclose affixing posters to public lampposts as a channel of communication; it merely imposes reasonable limits on the duration that a poster may be left up after the

event has passed. Moreover, as the Supreme Court explained in upholding a complete ban on the posting of signs on publicly owned lampposts, even a full ban does

> not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited. To the extent that the posting of signs on public property has advantages over these forms of expression, there is no reason to believe that these same advantages cannot be obtained through other means.

Id. at 812 (citation and footnote omitted); *see also id.* n.30.

The District's regulation amounts to a reasonable time, place, and manner restriction. Given the nature and plausibility of the District's justification for requiring event-related signs to be removed within thirty days of the event, there was no need for the District to introduce evidence demonstrating the relationship between that justification and the regulation.

C. MASF's Vagueness Challenge Fails

MASF presents a further facial challenge to the lamppost regulation on the ground that it is unconstitutionally vague. A law may be vague in violation of the Due Process Clause for either of two reasons: "First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *see F.C.C. v. Fox Television Stations, Inc.*, 132

S. Ct. 2307, 2317 (2012). MASF made both types of arguments to support its vagueness claim, but in granting summary judgment to MASF the district court addressed only the discriminatory-enforcement theory, holding that the definition of "event" in section 108.13 of the regulation delegates impermissible enforcement discretion to the District's inspectors. *ANSWER IV*, 905 F. Supp. 2d at 348. The court found it unnecessary to decide whether section 108.13 also fails to give constitutionally adequate notice of what amounts to an event-related sign, *see id.*, and on appeal MASF does not press a notice theory of vagueness. We therefore consider only whether section 108.13 delegates impermissibly unbridled enforcement discretion.

First, we address a potential threshold obstacle. The District contends that a facial vagueness challenge is foreclosed by the Supreme Court's decision in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). Under *Humanitarian Law Project*, a party whose own expressive activity is clearly proscribed cannot challenge a law's vagueness as it might apply to facts not before the court. *Id.* at 20. *Humanitarian Law Project* addressed "only whether the statute 'provide[s] a person of ordinary intelligence fair notice of what is prohibited,'" 561 U.S. at 20 (quoting *United States v. Williams,* 553 U.S. 285, 304 (2008)), observing that "Plaintiffs do not argue that the material-support statute grants too much enforcement discretion to the Government." *Id.* We are aware of no decision that has applied *Humanitarian Law Project* to bar a facial challenge like MASF's that a law is so vague as to subject the challenger itself to standardless enforcement discretion. *See Fox*, 132 S. Ct. at 2317-18 (assuming facial vagueness challenges

remain available when based on an enforcement-discretion theory).

Indeed, it is not apparent how the *Humanitarian Law Project* rule—barring a person to whom a legal provision clearly applies from challenging its facial failure to give sufficient notice to others, *see* 561 U.S. at 20—could apply to a claim that a law is so vague as to fail to guide the government's enforcement discretion. At least in a pre-enforcement posture, such a claim is by its nature facial. "Self-censorship is immune to an 'as applied' challenge, for it derives from the individual's own actions, not an abuse of government power." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988). "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Therefore, "only a facial challenge can effectively test the statute." *City of Lakewood*, 486 U.S. at 758; *see also Morales*, 527 U.S. at 52 (holding that vagueness that "fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests" is subject to facial challenge).

Whereas *Humanitarian Law Project* determined that the law's applicability to the particular plaintiff was clear, a court faced with an arbitrary-enforcement theory has no way to discern in advance whether the exercise of unbridled enforcement discretion will spare the plaintiff's constitutionally protected expression from prosecution. *Cf., e.g., Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992) (describing as "irrelevant" the uncodified criteria actually applied to the challenger's case by offi-

cials allegedly imbued with undue enforcement discretion). And once enforcement discretion has been exercised to punish constitutionally protected expression and the speaker defends on that ground, the vagueness defect escapes review. We thus proceed on the assumption that a facial, pre-enforcement vagueness challenge of the kind MASF presents here is consistent with *Humanitarian Law Project*. *Cf. Agostini v. Felton,* 521 U.S. 203, 237 (1997) (noting that lower courts should not conclude that cases overrule precedent by implication).

On the merits of MASF's claim that section 108.13 is void for vagueness, we begin with the "basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A statute authorizes an impermissible degree of enforcement discretion—and is therefore void for vagueness—where it fails to "set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'" *Smith v. Goguen*, 415 U.S. 566, 573 (1974) (quoting *Grayned*, 408 U.S. at 108). "When speech is involved," the Supreme Court has cautioned, "rigorous adherence" to the requirement of a reasonable degree of clarity "is necessary to ensure that ambiguity does not chill protected speech." *Fox*, 132 S. Ct. at 2317.

Section 108.13 sets reasonably clear guidelines for law enforcement officers to determine whether a sign is event related, and therefore is not unconstitutionally vague. The regulation defines an "event" as "an occurrence, happening, activity or series of activities, specific to an identifiable time and place, if referenced on the poster itself or reasonably determined

from all circumstances by the inspector." D.C. MUN. REGS. tit. 24, § 108.13. Section 108.13 does not give enforcement officials so little guidance as to permit them to "act in an arbitrary or discriminatory way." *Fox*, 132 S. Ct. at 2317. In any system that relies on the administration of laws of general applicability in many different circumstances, some degree of ambiguity is all but inevitable. And, indeed, there is some evidence in this record that section 108.13 is susceptible of inconsistent application. "What renders a statute vague," however, "is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Williams*, 553 U.S. at 306. Here, the fact targeted by the "event-related" limitation is clear: To relate to an "event," a sign must relate to "an occurrence, happening, activity or series of activities, specific to an identifiable time and place." That is not a vague standard.

Those laws that courts have held to be constitutionally infirm for vagueness gave significantly less guidance to enforcement agents than does 108.13's definition of an event-related sign. In *Kolender*, for example, a statute requiring a suspect to present "credible and reliable" identification gave police impermissibly open-ended enforcement discretion. *Kolender v. Lawson*, 461 U.S. 352, 358-60 (1983). That statute "contain[ed] no standard for determining" how to meet the highly subjective "credible and reliable" requirement. *Id.* at 358. In *Niemotko v. Maryland*, too, no standard or guideline whatsoever cabined the Park Commissioner's and the City Council's discretion whether to grant a permit to hold a demonstration in the city park; officers were empowered to rely on nothing more than their own inclina-

tions regarding each permit request. 340 U.S. 268, 271-72 (1951); *see also, e.g.*, *Armstrong v. D.C. Pub. Library*, 154 F. Supp. 2d 67, 81-82 (D.D.C. 2001) (striking for vagueness a regulation prohibiting "objectionable" appearance in a library). The District of Columbia's criteria for defining an "event-related" lamppost sign, in contrast, adequately specify that the post-event time limitation applies to signs announcing an event or series of events of the type that occur at a specified time and place.

MASF sees impermissible leeway in section 108.13's explicit recognition of the enforcement officer's authority to refer to "all circumstances" to determine whether a poster is event related. *See* D.C. MUN. REGS. tit. 24, § 108.13. In particular, section 108.13 directs enforcement officers to consider not only the poster itself, but to use their common sense and background knowledge to determine whether, in context, a poster in fact relates to "an occurrence, happening, activity or series of activities, specific to an identifiable time and place." Thus, the event-relatedness of even a terse sign announcing a renowned local athletic event, a seasonal charity event, or a candidate for election could be determined to be event related in part based on circumstances apart from the poster itself. Nothing about such an inquiry renders the law vague. To the extent enforcement agents draw on surrounding circumstances to *un*reasonably infer that a sign is event related in accordance with the District's rule, the event-relatedness restriction would not apply. *See* D.C. MUN. REGS. tit. 24, § 108.13. So long as their inferences are reasonable, however, the rule's open-endedness about the evidence that may be used to meet that standard does not convert its otherwise clear limitation into an impermissibly vague one.

MASF highlights deposition testimony from the District's inspectors that, it argues, shows the unconstrained discretion section 108.13 affords the police inspectors. Inspectors confirmed that they had some leeway to assess event-relatedness, *see ANSWER IV*, 905 F. Supp. 2d at 347 & n.10, and were not unanimous as to whether a 2012 poster stating simply "GRAHAM!" pertained to the reelection campaign of City Council member Jim Graham and so was event-related. MASF also highlights testimony of Inspectors who had difficulty deciding the time limitation applicable to posters listing multiple events with different dates. But the most that evidence shows is that section 108.13 might be misapplied in certain cases. It does not show that section 108.13 lacks criteria to cabin enforcement discretion.

As the Supreme Court explained in the analogous context of a facial First Amendment challenge to a licensing scheme, "the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion [unlawfully], but whether there is anything in the ordinance preventing him from doing so." *Forsyth Cty*, 505 U.S. at 133 n.10. The District's regulation guards against the unlawful exercise of discretion by delimiting what qualifies as an event: "an occurrence, happening, activity or series of activities, specific to an identifiable time and place." D.C. MUN. REGS. tit. 24, § 108.13. Ostensible vagueness about "whether the incriminating fact . . . has been proved" is not vagueness at all. *Williams*, 553 U.S. at 306. We accordingly hold that section 108.13 is not void for vagueness.

D. The District Court Correctly Dismissed the Organizations' Other Claims

We next consider the organizations' cross-appeal. They appeal from the district court's 2011 dismissal of ANSWER's claim that the District retaliated against it in violation of the First Amendment by citing as violations posters that were lawful under the regulation. *ANSWER III*, 798 F. Supp. 2d at 153-55. They also appeal the court's dismissal of MASF's claim that the District's regulation imposes a system of "strict liability" in violation of the First Amendment. *Id.* at 152-53. We review *de novo* the district court's decision under Rule 12(b)(6) to dismiss those claims, *see English v. District of Columbia*, 717 F.3d 968, 971 (D.C. Cir. 2013), and we affirm.

1. ***ANSWER Fails to State a § 1983 Claim.*** In its complaint, ANSWER alleged that the District's issuance of ninety-nine notices of violation against it had been "in bad faith and for the purpose of harassment." Supplemental Complaint ¶¶ 42-43, ANSWER III, 798 F. Supp. 2d 134 (No. 07-1495). The district court found that ANSWER had plausibly pled a constitutional violation, but dismissed the complaint for failure to allege that a custom or policy of the District had caused that violation. *ANSWER III*, 798 F. Supp. 2d at 154-55.

Section 1983 "give[s] a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe v. Pape*, 365 U.S. 167, 172 (1961) *overruled on other grounds by Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978). Both states and cities can be sued under section 1983, *Monell*, 436 U.S. at 663, 690, and for that purpose the District of Columbia is treated as a city, *Jones v. Horne*, 634

F.3d 588, 600 (D.C. Cir. 2011). The District may be liable under section 1983, but only to the extent permitted under *Monell*— *i.e.*, only based on action that "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or for harm "visited pursuant to governmental 'custom' even though such custom has not received formal approval." *Monell*, 436 U.S. at 690-91. Under *Monell*, "a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.* at 691. The "touchstone of" a section 1983 claim against a municipality is that "official policy is responsible for a deprivation of rights protected by the Constitution." *Id.* at 690. That is, the alleged policy or custom must have "caused the violation." *Warren v. District of Columbia*, 353 F.3d 36, 38 (D.C. Cir. 2004).

ANSWER has not alleged that a custom or policy lay behind the notices of violation the District issued to it. On appeal, ANSWER argues that "the 99 enforcement actions were sufficiently pervasive and numerous to constitute a custom." Organizations' Br. 67. A section 1983 plaintiff may establish causation in several ways, but ANSWER has not contended that any District custom or policy was "the moving force of the constitutional violation." *Jones*, 634 F.3d at 601. Nor has ANSWER sought to show causation based on a failure to train or "deliberate indifference." *See Baker v. District of Columbia*, 326 F.3d 1302, 1306 (D.C. Cir. 2003). It makes no case that a policymaker knowingly ignored the alleged pattern of retaliatory enforcement. *See Jones*, 634 F.3d at 601. ANSWER does not even identify by name or title any policy maker who knew of the enforcement actions

the District took against it. The closest ANSWER comes to claiming a role for a policymaking official is its discussion of the District's Department of Public Works' General Counsel's voluntary dismissal of the enforcement actions against ANSWER. But at most that shows a policymaker's involvement in curbing allegedly unconstitutional enforcement.

The district court was correct, then, to dismiss ANSWER's claims because the organization "never coherently allege[d] the existence of a broader municipal custom or practice that explains the issuance of those tickets" citing ANSWER for violating the sign posting rule. *ANSWER III*, 798 F. Supp. 2d at 154.

2. *The Regulation Does Not Impose "Strict Liability."* MASF contends that the District's regulation imposes a "strict liability" regime in violation of the First Amendment. Strict liability in criminal statutes burdening speech is "generally disfavored." *United States v. Sheehan*, 512 F.3d 621, 629 (D.C. Cir. 2008). But we need not decide whether the imposition of civil fines on a strict-liability basis would be constitutional here because, as we construe the regulation, it does not impose strict liability.

Section 108.1 says, "No person shall affix a sign, advertisement, or poster to any public lamppost or appurtenances of a lamppost, except as provided in accordance with this section." D.C. MUN. REGS. tit. 24, § 108.1. MASF asserts in its complaint that the District "imposes strict liability for violation of these regulations upon persons or groups whose name or address is identified in a poster even if the person/group did not produce the poster." First Am. Compl. ¶ 25, *ANSWER I*, 570 F. Supp. 2d 72 (No. 07-1495); *see id.* ¶¶ 25-32. By "strict liability," MASF seems to mean something closer to "vicarious liabil-

ity"—that is, holding one party liable for the actions of another. *See generally* Liability, Black's Law Dictionary (10th ed. 2014).

Section 108.1 by its terms provides that no person may "affix" an offending sign to a lamppost. On its face, therefore, section 108.1 does not impose liability on anyone other than the person who "affixes" the sign to the lamppost. The District in defending the rule assures us that it makes "a person liable only if that person is responsible for the unlawfully posted sign because, for example, he or she directed or encouraged the posting or his or her employee or agent posted it." Gov't Reply Br. at 39.

MASF invokes *Schneider v. New Jersey*, 308 U.S. 147 (1939), in which the Supreme Court held that a municipal ordinance imposing liability on the distributors of pamphlets for the litter left by the recipients of the pamphlets was unnecessarily burdensome on the speech rights of the pamphleteers. *Id.* at 162. The *Schneider* Court held that imposing liability on the distributor of the pamphlets could not be justified by the cities' interest in preventing litter because the cities had an obvious alternative method to prevent litter: They could impose liability on "those who actually throw papers on the streets." *Id.*

But MASF gives us no reason to think that an organization would be held liable under section 108.1 if it did not "affix" a sign, but rather had its sign affixed by someone else acting without its authority who then failed timely to remove it. Nor has MASF raised a material question of fact as to whether the District has enforced the regulation to impose the type of strict or vicarious liability of which the *Schneider* Court disapproved. In light of the District of Columbia's binding assurances and the lack of rec-

ord evidence to the contrary, we do not read section 108.1 to impose strict or vicarious liability, and so affirm the district court's decision to dismiss MASF's strict-liability claim.

E. Discovery Sanctions are Vacated

Finally, we address the discovery sanctions the district court imposed against the District of Columbia under Federal Rule of Civil Procedure 16(f). We review the district court's award of sanctions for an abuse of discretion, *see Perkinson v. Gilbert/Robinson, Inc.*, 821 F.2d 686, 689 (D.C. Cir. 1987), and vacate it.

Rule 16(f)(2) gives courts a tool to enforce compliance with its scheduling orders. That rule directs that a court, "[i]nstead of or in addition to any other sanction, . . . must order the party, its attorney, or both to pay the reasonable expenses—including attorney's fees—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 16(f)(2). But a court may award sanctions under Rule 16(f) only where a party violates an unambiguous order. *See Ashlodge, Ltd. v. Hauser*, 163 F.3d 681, 684 (2d Cir. 1998), *overruled on other grounds, as stated in New Pac. Overseas Grp. (U.S.A.) Inc. v. Excal Int'l Dev. Corp.*, 272 F.3d 667, 669 (2d Cir. 2001) ("To sustain sanctions under Rule 16(f), an order must be unambiguous . . . ."); *cf. United States v. Day*, 524 F.3d 1361, 1372 (D.C. Cir. 2008). The order that the District allegedly violated here was ambiguous.

The court's scheduling order authorized MASF to take discovery but was silent as to the District. Before the court issued the order, the District and

MASF had submitted a joint status report. The joint report explained that the District believed discovery was "unnecessary here, as the remaining facial vagueness challenge presents a purely legal question." J.A. at 97. MASF, however, proposed that the court allow it to propound ten interrogatories, ten requests for production, fifteen requests for admission, and allow it to take six depositions. In response to MASF's suggestion, the District suggested the court allow MASF ten interrogatories, five requests for production, and one deposition. Neither party addressed the scope of District's anticipated discovery in the event that the court imposed discovery constraints on MASF.

MASF and the District each submitted a proposed scheduling order: The District's order contemplated that "each party may not propound more than ten (10) interrogatories (including sub-parts) and five (5) requests for production of documents, and may not take more than one (1) deposition." J.A. at 103. That is, the District's proposed order tracked the limited discovery it had suggested in the Joint Status Report, contemplating that the limits would apply equally to both parties. MASF's proposed order suggested less restrictive limits on its own discovery, and did not specify whether or to what extent the District's discovery would be restricted. With some stylistic modifications, the court adopted MASF's proposed order, stating that "plaintiff is authorized to propound not more than" the specified numbers of interrogatories, requests for production, requests for admission, and deposition notices; the order made no mention of any discovery restriction on the District of Columbia.

The District sent eleven interrogatories and three requests for production to MASF and ANSWER. After plaintiffs' counsel objected, the District withdrew six of its interrogatories but insisted on its right to conduct discovery. MASF then moved for a protective order and sanctions. The court granted the motion.

We acknowledge the district courts' prerogative to sanction parties for noncompliance with their orders, but we must vacate the sanctions here because the underlying order was ambiguous as to whether it limited the District's discovery rights. It expressly lowered the default caps in the Federal Rules of Civil Procedure only as to the plaintiffs. The order referred more generally to the earliest date on which "discovery requests may be served" and when "the parties" should file their dispositive motions. J.A. at 105. In context, the order could reasonably be read (a) to leave the District's discovery rights as specified in the Federal Rules, (b) to implicitly subject it to the same lower caps the court applied to plaintiffs, or (c) to permit limited discovery to the plaintiffs while by negative implication barring any discovery whatsoever by the District.

In the context of the dueling proposed orders—one equally limiting both parties and the other, which the court accepted, speaking only to plaintiffs—the court's order could reasonably be read to constrain only the plaintiffs. Such one-sided treatment seems sensible enough given that the District, which as defendant did not bear the burden of proof, was unlikely to need extensive discovery in any event. That same reasoning might, alternatively, support reading the order as setting limits equally applicable to both parties, given that the District had

urged the court to proceed without any discovery and presumably was willing to work within any constraints it could persuade the court to impose. Alternatively, framed as it was affirmatively to "authorize" the plaintiffs, and only plaintiffs, to take the specified discovery, and issuing against the backdrop of the District's initial argument against any discovery for either party, the order might be read—as the court evidently intended—to preclude the District from taking any discovery.

There are, however, strong background principles that cut against the district court's intended reading. Under Rule 26, a party may take discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Critically, a party has that prerogative without the order of a court. A court order may "otherwise limit[]" a party's discovery right, but a court's affirmative permission is not a prerequisite to the taking of discovery. *Id.* Given the general discovery authorizations in the Federal Rules of Civil Procedure, which are not contingent on court orders granting permission, the district court's scheduling order was ambiguous. Sanctions for the District's service of discovery requests were therefore unwarranted, and are vacated.

* * *

For the foregoing reasons, we reverse the district court's grant of summary judgment to MASF on its facial First Amendment and due process challenges to the District of Columbia's regulation and remand for the district court to enter summary judgment for the District. We affirm the court's decision to dismiss ANSWER's claim for damages and MASF's claim al-

leging an impermissible strict liability regime. Finally, we vacate the court's award of sanctions.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ACT NOW TO STOP WAR AND END RACISM COALITION, *et al.*,

Plaintiffs,

v.

THE DISTRICT OF COLUMBIA

Defendant.

07-cv-1495 (RCL)

ORDER

Pending before the Court is the plaintiff's Motion for Summary Judgment, June 22, 2012, ECF No. 60, and defendant's cross-Motion for Summary Judgment, June 22, 2012, ECF No. 59. Upon consideration of the cross-motions, each party's Opposition, ECF Nos. 62 & 64, each party's Reply, ECF Nos. 65 & 66, and the record herein, consistent with the Memorandum Opinion issued this date, it is hereby:

ORDERED that plaintiff's Motion for Summary Judgment [60] is GRANTED IN PART; it is

FURTHER ORDERED that defendant's Motion for Summary Judgment [59] is DENIED; it is

FURTHER ORDERED that subsections 108.6 and 108.13 of the regulations pertaining to signs, placards and posters at 24 D.C. CODE MUN. REGS. § 108 (2012) are declared and found to be unconstitutional and in violation of the First Amendment to the U.S. Constitution and the Due Process Clause; it is

FURTHER ORDERED that the portion of subsection 108.11 of 24 D.C. CODE MUN. REGS. § 108 (2012) reading "and if the sign is for an event, the

date of the event" is declared and found to be unconstitutional and in violation of the First Amendment to the U.S. Constitution; it is

FURTHER ORDERED that the District of Columbia is enjoined from enforcing subsections 108.6 and 108.13 of 24 D.C. CODE MUN. REGS. § 108 (2012); and it is

FURTHER ORDERED that the District of Columbia is enjoined from enforcing the portion of subsection 108.11 of 24 D.C. CODE MUN. REGS. § 108 (2012) reading "and if the sign is for an event, the date of the event."

IT IS SO ORDERED.

Signed, Royce C. Lamberth, Chief Judge, November 29, 2012.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ACT NOW TO STOP WAR AND END RACISM COALITION, *et al.*,

Plaintiffs,

v.

THE DISTRICT OF COLUMBIA

Defendant.

07-cv-1495 (RCL)

MEMORANDUM OPINION

The Court considers whether the fourth iteration of the District of Columbia's law regulating the posting of signs on lampposts passes First Amendment muster. The law's most recent version treats signs relating to an "event" differently from "non-event" signs when determining how long the signs may remain posted. The District has amended the law twice since this Court's last substantive opinion. While these amendments bring the law closer to constitutionality, the District has not properly explained the event/non-event distinction, and has added a definition of "event" that explicitly delegates broad administrative discretion to enforcement officers. Therefore the plaintiff is entitled to summary judgment.

I. BACKGROUND

A. Early History of the Case

From 1980 until the filing of this suit in 2007, the rules for posting on the District's lampposts exempted campaign and public safety signs from the generally-applicable durational limits, and required that campaign posters be removed within thirty days

after the general election. At the time, the law stated:

108.5: A sign, advertisement, or poster shall not be affixed for more than sixty (60) days, except the following:

(a) Signs, advertisements, and posters for individuals seeking political office in the District...; and

(b) Signs designed to aid in neighborhood protection from crime shall be exempt from the sixty (60) day time period.

108.6: Political campaign literature shall be removed no less than thirty (30) days following the general election.

108.7: Each sign, advertisement, or poster shall contain the date upon which it was initially affixed to a lamppost.

108.8: Each sign, advertisement, or poster shall be affixed securely to avoid being torn down or disengaged by normal weather conditions.

108.9: Signs, advertisements, and posters shall not be affixed by adhesives that prevent their complete removal from the fixture, or do damage to the fixture.

108.10: No more than three (3) versions or copies of each sign, advertisement, or poster shall be affixed on one (1) side of a street within one (1) block.

108.11: Within twenty-four (24) hours of posting each sign, advertisement, or poster, two

> (2) copies of the material shall be filed with an agent of the District of Columbia so designated by the Mayor. The filing shall include the name, address, and telephone number of the originator of the sign, advertisement, or poster.

24 D.C. CODE MUN. REGS. § 108 (1980).

In the summer of 2007, Act Now to Stop War and End Racism Coalition ("ANSWER")—a "grassroots civil rights organization which seeks to engage the public in communications opposing war and racism, among other issues," Affidavit of Brian Becker 1–2, Mar. 14, 2008, ECF No. 11-1 ("ANSWER Affidavit")—posted signs advertising its September 15th "March to Stop the War" on public lampposts and electrical boxes throughout the city. The District cited ANSWER for numerous violations of § 108.9, the provision regarding the use of adhesives. *See* Ex. 1 to Def.'s First Mot. Dismiss, Feb. 6, 2008, ECF No. 8-1 (reproducing four Notices of Violation, all referencing § 108.9). ANSWER contested the tickets before the District's Office of Administrative Hearings ("OAH").

In addition to its claims before the OAH, ANSWER challenged the District's postering regulations in this Court. Compl., Aug. 21, 2007, ECF No. 1. Unlike in the administrative proceeding, ANSWER sued in federal court with a co-plaintiff, Muslim American Society Freedom Foundation ("MASF"), which "focuses on empowering the Muslim-American community through civic education, participation, community outreach, and coalition building including First Amendment assemblies in opposition to war and in support of civil rights." Affidavit of Imam Mahdi Bray, Mar. 14, 2008, ECF No 11-2 ("MASF Affidavit").

In their complaint, the plaintiffs alleged that the regulations were facially unconstitutional because they contained improper content-based distinctions in violation of the First Amendment, First Am. Compl. ¶¶ 7–8, Dec. 18, 2007, ECF No. 3; were unconstitutionally vague and overbroad, *id.* ¶¶ 42–44; violated plaintiffs' right to anonymous speech, *id.* ¶ 39; and imposed a strict liability regime that violated plaintiffs' due process rights, *id.* ¶¶ 25–34. Both plaintiffs submitted affidavits explaining that they had refrained from posting signs on public lampposts in the manner they would prefer because of the regulations, and that they were suing on behalf of themselves and "all others engaged in civil rights advocacy" whose speech had been similarly "chilled." MASF Affidavit 1–2; ANSWER Affidavit 1–2.

The District moved to dismiss the complaint. Def.'s First Mot. Dismiss, Feb. 6, 2008, ECF No. 8. The District argued, among other theories, that MASF lacked standing because it suffered no injury from the regulations, *id.* at 14–20, and that the Court should abstain from adjudicating ANSWER's claims under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), because ANSWER could present its constitutional claims through the administrative proceedings at the OAH. Def.'s First Mot. Dismiss 4–8. The Court agreed with both arguments and granted the District's motion to dismiss. *Act Now to Stop Racism and End War Coal. v. Dist. of Columbia* (*ANSWER I*), 570 F. Supp. 2d 72 (D.D.C. 2008). Plaintiffs appealed.

On November 2, 2009—shortly before the United States Court of Appeals for the District of Columbia Circuit heard oral arguments—the District's De-

partment of Transportation ("Department") issued a Notice of Emergency and Proposed Rulemaking REVISING THE POSTER RULES. D.C. MUN. REGS. TIT. 56, §§ 8759–60 (Nov. 6, 2009). The new rules allowed:

> all signs that are not lewd, indecent, or vulgar, or do not pictorially represent the commission of or the attempt to commit any crime to be posted on a structure in public space for sixty (60) days, and a sign, advertisement, or poster related to a specific event may be affixed any time prior to an event but shall be removed no later than thirty (30) days following the event for which it is advertising or publicizing.

Id. at 8759. The Department explained that the emergency rulemaking was "necessitated by the immediate need to address the continuing threat to the public welfare posed by an unequal treatment of noncommercial advertising in the public space." *Id.* The Department characterized the new regulations as "a technical amendment" that "removes a time limit distinction that exists between political and nonpolitical advertising that has raised First Amendment concerns." *Id.* The revised provisions, which became final on January 8, 2010, D.C. MUN. REGS. tit. 57, § 528 (Jan. 8, 2010), read as follows:

> 108.5: A sign, advertisement, or poster not related to a specific event shall be affixed for no more than sixty days.
>
> 108.6: A sign, advertisement, or poster related to a specific event may be affixed any time prior to the event but shall be removed no later than thirty (30) days following the event to which it is related.

24 D.C. CODE MUN. REGS. §§ 108.5–108.6 (2011).

The Court of Appeals decided the case on grounds that did not require consideration of these new rules. The Court first reversed on the issue of MASF's standing. Judge Williams explained that MASF's affidavit "plainly indicat[ed] an intent to engage in conduct violating the 60-day limit" and that this qualified as the "credible statement by the plaintiff of intent to commit a violative act" that the D.C. Circuit had previously held to constitute standing in a First Amendment facial challenge. *Act Now to Stop Racism and End War Coal. v. Dist. of Columbia* (*ANSWER II*), 589 F.3d 433, 435 (D.C. Cir. 2009) (quoting *Seegars v. Gonzales*, 396 F.3d 1248, 1253 (D.C. Cir. 2005)).

The Court of Appeals also remanded on some of the claims by ANSWER that this Court had initially declined to consider under the *Younger* abstention doctrine. Judge Williams explained that "the district court appropriately abstained" on the claims related to § 108.9, the adhesive provision, which ANSWER had directly challenged in the OAH. *Id.* But on the other claims, the Court of Appeals held that "consistent with *Younger*, ANSWER may raise constitutional challenges in federal district court that are completely independent of and severable from the violations it is facing in the District's administrative proceedings." *Id.*

With the case back before the Court, plaintiffs updated their complaint to account for the revised regulations. Suppl. Pleading, May 5, 2010, ECF No. 22-1. They maintained the claims that they had previously asserted, including their principal allegation that the regulations draw an unconstitutional, content-based distinction between signs carrying a gen-

eral political message and signs related to political campaigns. *Id.* ¶ 4. While the new regulations replaced the explicit exception for signs posted in support of "individuals seeking political office" with a more general category for signs "related to a specific event," plaintiffs argued that the District had "simply substituted a new set of unconstitutional content-based distinctions for the prior set of unconstitutional content-based distinctions." *Id.*

Plaintiffs added two new counts in their supplemental pleading. First, in addition to facially challenging §§ 108.5–108.6 of the new regulations, they added an "as applied" challenge alleging that the provisions are improperly content-based and undefined. *Id.* ¶¶ 102–04. Second, ANSWER added a claim that the District had violated 42 U.S.C. § 1983 by issuing "baseless" citations "in retaliation for the ANSWER Coalition's exercise of its lawful rights to free speech through lawful postering activities." *Id.* ¶¶ 105–06. ANSWER based this claim on ninety-nine citations it received from the District in March and April 2010, which it alleges were issued "notwithstanding the fact that the Coalition had fully complied with the [amended] regulations." *Id.* ¶ 44 (emphasis omitted).[1]

B. The Court's July 2011 Ruling on Defendant's Motion to Dismiss

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[1] This case was originally assigned to Judge Henry H. Kennedy, who presided over this case until his retirement in 2011. The case was reassigned by consent to Chief Judge Royce C. Lamberth on May 4, 2011. Reassignment of Civil Case, ECF No. 36. The proceedings discussed in the next section, Part II.B., occurred under Chief Judge Lamberth, who is currently assigned to this case.

The District again moved to dismiss all of plaintiffs' claims. Def's Second Mot. Dismiss, June 2, 2010, ECF No. 26. Thereafter, ANSWER voluntarily dismissed its prospective claims under Counts One and Two, leaving MASF to pursue those facial constitutional challenges alone. Stipulation of Dismissal, Oct. 25, 2010, ECF No. 35. On July 21, 2011, this Court granted in part and denied in part the District's motion. *Act Now to Stop Racism and End War Coal. v. Dist. of Columbia* (*ANSWER III*), 798 F. Supp. 2d 134 (D.D.C. 2011). This Court ruled that MASF had standing to bring its facial challenge, but both plaintiffs lacked standing for their new "as applied" claims. *Id.* at 143. The Court then considered the merits of MASF's First Amendment challenges. When determining whether the claims could survive a motion to dismiss, the Court "must accept as true all of the factual allegations contained in the complaint," *Atherton v. Dist. of Columbia*, 567 F.3d 672, 681 (D.C. Cir. 2009), and grant plaintiffs "the benefit of all inferences that can be derived from the facts alleged." *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994).

The Court found that the signs were "a form of expression protected by the Free Speech Clause." *Id.* at 144 (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994)). Next, the Court found that the lampposts are "a textbook example of a limited or designated public forum, in which public property has been 'opened for use by the public as a place for expressive activity.'" *Id.* at 145 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983)).

The Court then considered whether the law could meet the standards for a designated public forum, which permits content-neutral regulations which are

narrowly tailored to serve a significant public interest, and leave open ample alternatives for communication.[2] *Id.* (citing *Burson v. Freeman*, 504 U.S. 191, 197 (1992)). While the law was viewpoint-neutral—applying equally to anti-war and pro-war posters—it was not necessarily content-neutral. "The guidelines provide substantially different treatment to two posters that are identical in every respect except that one contains content related to an event while the other does not." *Id.* at 146.

The Court also rejected the District's arguments that "the regulations are content-neutral because they do not totally prohibit a type of expression or a specific message but rather merely regulate the manner in which the message may be conveyed" and "that the regulations should be judged content-neutral even if [they] have some incidental effect on speech because they promote a content-neutral purpose—reducing litter and blight." *Id.* at 146–47 (citations omitted). The Court explained that restrictions that impose differential burdens on speech must still reviewed for content neutrality, *id.* at 146 (citing *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 642 (1994)), and that the regulations at issue did not clearly accomplish a content-neutral purpose in a content-neutral manner, *id.* at 147.

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[2] If the regulations are found to be content-based, they can still be constitutional if they survive strict scrutiny. *Burson*, 504 U.S. at 198. Under this demanding standard, the District would have to show that "the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* While not impossible to meet, *see id.*, this is a very difficult hurdle to clear.

The Court summarized its main concerns with the District's regulations as follows:

Viewed on its own, § 108.5, which limits posters "not related to a specific event" to a hanging time of sixty days, is unproblematic. An across-the-board durational restriction would limit litter by requiring posters of all types to be taken down after a certain number of days. Likewise, the provision of § 108.6 requiring posters related to events to be "removed no later than thirty (30) days following the event" is straightforward. A poster for an event that has already occurred is more likely to constitute litter and blight than a poster for a future event or a general political message. This Court's concern arises from the other half of § 108.6, which allows posters related to a specific event to be "affixed any time prior to the event." It is not clear how allowing posters to hang for an indefinite period of time before an event advances the District's interest in reducing litter....

In the absence of an explanation for how this distinction between event and non-event signs advances the District's objective of litter prevention, the differential burdens imposed by §§ 108.5–108.6 present serious First Amendment concerns. *City of Ladue*, 512 U.S. at 52 ("Exemptions from an otherwise legitimate regulation of a medium of speech may...diminish the credibility of the government's rationale for restricting speech in the first place."). In particular, given that the District has announced that elections qualify as "events" under the new regulations, Pl.'s

> Notice, this distinction could be seen as a way of resurrecting the old rules that prioritized election-related speech—including the political communications of the government officials who make and enforce the rules—over general issue advocacy and political expression.

Id. at 148. After considering whether the law could be narrowly tailored and leave alternative channels of communication open, the Court denied the District's motion to dismiss Count One of the complaint. *Id.* at 149–50. The Court suggested that "an across-the-board durational restriction that applies without exceptions based on the content of the signs would address the constitutional concern while preserving the District's interest in preventing litter." *Id.* at 149.

The Court also refused to dismiss MASF's claim that that the law is unconstitutionally vague and overbroad. MASF contends that the law does not adequately define which posters "relate to an event," does not give adequate notice to potential speakers, and allows for arbitrary enforcement. *Id.* at 150–51. While "some of plaintiff's ... scenarios str[uck] the Court as a bit far-fetched," the Court found "practical uncertainties ... raise[d] the possibility that the law 'fail[s] to provide the kind of notice that will enable ordinary people to understand which conduct it prohibits.'" *Id.* at 151 (quoting *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999)).

The Court dismissed plaintiffs' claims that the registration requirement "represents an unconstitutional restraint on their right to anonymous speech," and "that the District imposed a system of 'strict liability' enforcement in violation of the Due Process Clause." *Id.* at 152–53. The Court found these claims

legally meritless. *Id.* The Court also dismissed ANSWER's § 1983 claim that the "District harassed it with a series of bogus and false notices of violation." *Id.* at 153 (citations omitted). While ANSWER alleged a violation of its constitutional rights, it could not meet its "'burden of pleading the existence of a municipal custom or practice that abridges [its] federal constitutional or statutory rights.'" *Id.* at 154 (quoting *Bonaccorsy v. Dist. of Columbia*, 685 F. Supp. 2d 18, 27 (D.D.C. 2010)). The Court dismissed all of ANSWER's active claims, leaving only MASF's facial constitutional challenges. The Court ordered the case to proceed to discovery to give the District "an opportunity to clarify the questions remaining about the meaning of the term 'event' and the relation of [the] event/non-event distinction in §§ 108.5–108.6 to the anti-littering interest it asserts." *Id.* at 155.

C. Current Regulations

Following *ANSWER III*, the District twice amended its postering regulations. On August 26, 2011, the Department of Transportation amended the disputed regulations to read:

> 108.5: A sign, advertisement, or poster shall be affixed for no more than one hundred eighty (180) days.
>
> 108.6: A sign, advertisement, or poster related to a specific event shall be removed no later than thirty (30) days following the event to which it is related. This subsection is not intended to extend the durational restriction in subsection 108.5.

D.C. MUN. REGS. tit. 58, § 7688 (Aug. 26, 2011). The following month, the District further amended the

regulations. D.C. MUN. REGS. tit. 58, § 8410 (Sept. 30, 2011). First, the District required the person posting the sign, in their filing with the District, to designate the date of the event for event-related signs:

> 108.11: Within twenty-four hours of posting each sign, advertisement, or poster, two (2) copies of the material shall be filed with an agent of the District of Columbia so designated by the Mayor. The filing shall include the name, address, and telephone number of the originator of the sign, advertisement, or poster, *and if the sign is for an event, the date of the event.*

Id. (new text in italics). Furthermore, the amendment added a subsection defining "event":

> 108.13: For purposes of this section, the term 'event' refers to an occurrence, happening, activity or series of activities, specific to an identifiable time and place, if referenced on the poster itself or reasonably determined from all circumstances by the inspector.

24 D.C. CODE MUN. REGS. § 108.13 (2012) (providing current 108.13 definition of "event"). These regulations are currently in effect. D.C. MUN. REGS. tit. 59, § 273 (Jan. 20, 2012).

On June 22, 2012, MASF and the District filed cross-motions for summary judgment. Pl.'s Mot. Summ. J, ECF No. 60; Def.'s Mot. Summ. J., ECF No. 59. The Court now considers these motions and will grant in part MASF's motion, and deny in toto defendant's motion.

II. LEGAL STANDARD

A. Summary Judgment

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The mere existence of *any* factual dispute will not defeat summary judgment; "the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247–48 (emphasis in original). A fact is material if, under the applicable law, it could affect the outcome of the case. *Id.* A dispute is genuine if the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* Because "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge," the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. A nonmoving party, however, must establish more than "the existence of a scintilla of evidence" in support of its position. *Id.* at 252. The inferences drawn from the evidence "must be reasonably probable and based on more than mere speculation." *Rogers Corp. v. E.P.A.*, 275 F.3d 1096, 1103 (D.C. Cir. 2002) (citations omitted). In addition, the nonmoving party may not rely solely on allegations or conclusory statements. *See Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999). The nonmoving party must present specific facts that would enable a reasonable jury to find in its favor. *Id.* If the evidence presented is "merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249–50.

The filing of a cross-motion for summary judgment does not "concede the factual allegations of the opposing motion." *CEI Washington Bureau, Inc. v. Dep't of Justice*, 469 F.3d 126, 129 (D.C. Cir. 2006). Cross-motions for summary judgment are treated separately. *See Sherwood v. Washington Post*, 871 F.2d 1144, 1147 n.4 (D.C. Cir. 1989) ("[I]t does not matter that the District Court was faced with cross-motions for summary judgment. 'The rule governing cross-motions for summary judgment...is that neither party waives the right to a full trial on the merits by filing its own motion; each side concedes that no material facts are at issue only for the purposes of its own motion.'") (quoting *McKenzie v. Sawyer*, 684 F.2d 62, 68 n.3 (D.C. Cir. 1982)). The court may—despite the parties' stipulations that there are no disputed facts—find that material facts are in dispute, deny both motions, and proceed to trial. *Id.* at 1147 n.4.

B. Public Forum Doctrine

The First Amendment provides that "Congress shall make no law ...abridging the freedom of speech." U.S. CONST., amend. I. The Supreme Court has long held that this restriction applies not only to Congress, but also to state and municipal governments. *Lovell v. Griffin*, 303 U.S. 444, 450 (1938). While the First Amendment "reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,'" *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)), a municipal government "may sometimes curtail speech when necessary to advance a significant and legitimate state interest," *Members*

of the City Council of City of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984).

Courts in this Circuit generally follow three steps in assessing a First Amendment challenge: "first, determining whether the First Amendment protects the speech at issue, then identifying the nature of the forum, and finally assessing whether the...justifications for restricting...speech 'satisfy the requisite standard.'" *Mahoney v. Doe*, 642 F.3d 1112, 1116 (D.C. Cir. 2011) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985)). The first step here is undisputed. "[S]igns are a form of expression protected by the Free Speech Clause[.]" *City of Ladue*, 512 U.S. at 48. The Court will focus on the second and third steps: identifying the nature of the forum and determining the requisite standard.

1. Identifying the Nature of the Forum

The second step is to determine the nature of the forum in which the protected speech occurs. Public forum doctrine "divides government property into three categories for purposes of First Amendment analysis." *Oberwetter v. Hilliard*, 639 F.3d 545, 551 (D.C. Cir. 2011). One category is the traditional public forum, which encompasses public areas that have "by long tradition or by government fiat...been devoted to assembly and debate." *Perry*, 460 U.S. at 45. A second category is the limited public forum or designated public forum, which comprises "public property which the State has opened for use by the public as a place for expressive activity." *Id.* The final category is the nonpublic forum, which consists of government property that is "not by tradition or designation a forum for public communication." *Id.* at 46. In determining which analysis to apply to a given

means of expression, the "dispositive question is not what the forum is called, but what purpose it serves." *Boardley v. U.S. Dep't of the Interior*, 615 F.3d 508, 515 (D.C. Cir. 2010).

2. Determining the Requisite Standard

The next step is determining and applying the requisite standard. The test for a designated public forum is the same as that for a traditional public forum. *Perry*, 460 U.S. at 46. The key question is whether the law is a content-based or content-neutral regulation of speech. Content-based regulations are subject to strict scrutiny, and will only be upheld if "the regulation is necessary to serve a compelling state interest and...is narrowly drawn to achieve that end." *Burson*, 504 U.S. at 197–98. Content-neutral regulations are judged under a less rigorous "time, place or manner" test, which permits restrictions when "they are narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002) (citations omitted). "Deciding whether a particular regulation is content based or content neutral is not always a simple task. We have said that the 'principal inquiry in determining content neutrality...is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'" *Turner*, 512 U.S. at 642 (quoting *Ward*, 491 U.S. at 791) (alterations in original). Generally, "laws that by their terms distinguish favored

speech from disfavored speech on the basis of the ideas or views expressed are content based," while "laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." *Id.*

Laws that discriminate based on viewpoint are most odious. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *see also Hastings Christian Fellowship v. Martinez*, 130 S. Ct. 2971, 3006 (2010) ("We have never before taken the view that a little viewpoint discrimination is acceptable.") (Scalia, J., dissenting). However, courts should be careful not to "conflate content neutrality with viewpoint neutrality." *ANSWER III*, 798 F. Supp. 2d at 146. "Regulation of the subject matter of messages, though not as obnoxious as viewpoint-based regulation, is also an objectionable form of content-based regulation." *Hill v. Colorado*, 530 U.S. 703, 722 (2000).

Laws that distinguish "based only upon the manner in which speakers transmit their messages to viewers, and not upon the messages they carry" are content-neutral. *Turner*, 512 U.S. at 645. Furthermore, a "'regulation that serves purposes unrelated to the content of the expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.'" *Hastings*, 130 S. Ct. at 2994 (quoting *Ward*, 491 U.S. at 791). The "mere assertion of a content-neutral purpose will not be enough to save a law which, on its face, discriminates based on content," *Turner*, 512 U.S. at 642–43 (citations omitted)—"that distinction must actually advance the content-neutral purpose the city asserts," *ANSWER III*, 798 F. Supp. 2d at 147 (original formatting omitted).

C. Substantial Overbreadth and Vagueness

MASF also challenges the District's law as unconstitutionally overbroad and vague on its face. In the First Amendment context, courts are especially concerned about overbroad and vague laws that may have a chilling effect on speech. *See, e.g., Reno v. American Civil Liberties Union*, 521 U.S. 844, 871–72 (1997) ("The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on speech.") (citing *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965)). Courts are suspicious of "[b]road prophylactic rules in the area of free expression[,]" and therefore "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963) (citations omitted).

The doctrines of substantial overbreadth and vagueness[3] often overlap, and Courts frequently blend them together. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129 (1992) ("[A] party [may] challenge an ordinance under the overbreadth doctrine in cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker, and in cases

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[3] The vagueness doctrine, itself, encompasses the doctrine of standardless delegation of administrative discretion. *See City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). Sometimes, "standardless delegation" is treated as a separate, freestanding doctrine. *See* SMOLLA & NIMMER ON FREEDOM OF SPEECH § 6:2 (2012) (stating that doctrines of overbreadth, vagueness, and standardless delegation of administrative discretion "are analytically distinct"). This Court will follow the lead of the Supreme Court and treat "standardless delegation" as a form of unconstitutional vagueness.

where the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected."); *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1982) ("We have traditionally viewed vagueness and overbreadth as logically related and similar doctrines."); *Hunt v. City of L.A.*, 601 F. Supp. 2d 1158, 1167 n.6 (C.D. Cal. 2009) ("The doctrines of overbreadth, unbridled discretion, and vagueness overlap.") (citing SMOLLA & NIMMER ON FREEDOM OF SPEECH §§ 6:1–6 (2008)). While noting the conceptual similarities, this Court heeds the warning not to "confuse vagueness and overbreadth doctrines," *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 n. 9 (1982), and explain each doctrine separately.

1. Vagueness and Standardless Delegation of Administrative Discretion

"Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). Vague laws violate the Due Process clause of the Constitution, and this doctrine is not limited to laws regulating speech. *See Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972) (vagrancy statutes void for vagueness under Due Process clause). Requiring some precision in the law vindicates the "underlying principle that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Harriss*, 347 U.S. 612, 617 (1954). Perhaps more importantly, this doctrine reigns in the discretion of enforcement officers:

> [T]he more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors and juries to pursue their personal predilections."

Kolender, 461 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 574–75 (1974)).

"[T]he Supreme Court has stated that the vagueness doctrine should be applied with special exactitude where a statute might impinge on basic First Amendment freedoms." *Sharkey's. Inc. v. City of Waukesha*, 265 F. Supp. 2d 984, 990 (E.D. Wis. 2003) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)); *see also F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (June 21, 2012) ("[T]he void for vagueness doctrine addresses at least two connected but discrete due process concerns: Regulated parties should know what is required of them so they can act accordingly; and precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to these requirements is necessary to ensure that ambiguity does not chill protected speech."). Courts in this circuit have strictly enforced the vagueness doctrine. *See Armstrong v. D.C. Public Library*, 154 F. Supp. 2d 67, 77, 81 (D.D.C. 2001) ("[W]hen a regulation lacks terms which can be defined objectively, a court will strike it down for vagueness."; "[T]his Circuit has ruled that officials must have explicit guidelines

in order to avoid arbitrary and discriminatory enforcement.") (citations omitted).

The vagueness doctrine does not require "perfect clarity and precise guidance...even of regulations that restrict expressive activity." *Ward*, 491 U.S. at 794. "Condemned to the use of words, we can never expect mathematical certainty from our language." *Grayned*, 408 U.S. at 110. Regulations "cannot, in reason, define proscribed behavior exhaustively or with consummate precision." *United States v. Thomas*, 864 F.2d 188, 195 (D.C. Cir. 1988). Courts "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Washington State Grange v. Washington Republican Party*, 552 U.S. 442, 449–50 (2008) (citing *United States v. Raines*, 362 U.S. 17, 22 (1960)).

2. Substantial Overbreadth

A Court may facially invalidate a law if there is "no set of circumstances under which the law would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). "In the First Amendment context, however" the Supreme Court "recognizes 'a second type of facial challenge,' whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (quoting *Washington State Grange*, 552 U.S. at 449 n.6). Courts require that the overbreadth of the law be substantial "not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008).

The Supreme Court has established a two-step test for analyzing substantial overbreadth. First, a

court must "construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *Id.* at 293. Second, a court must consider "whether the statute, as [the court has] construed it, criminalizes a substantial amount of protected expressive activity." *Id.* at 297. While this test is considerably less stringent than the *Salerno* test, the Supreme Court warns that "[i]nvalidation for overbreadth is strong medicine that is not to be casually employed." *Id.* at 293 (citations omitted).

III. DISCUSSION

The District's sign regulations are unconstitutional for two reasons. First, the law is an unconstitutional regulation of protected speech in a designated public forum. The District has not properly justified the distinction it draws between events and non-events. The District has not offered any admissible evidence explaining how its regulations further any content-neutral purposes. *See* Def.'s Statement of Material Facts, June 22, 2012, ECF No. 59-1 ("Def.'s SMF") (providing nothing how regulations achieve content-neutral purposes). The Court cannot accept the District's inadmissible *ipse dixit* that the law's event/non-event is narrowly tailored to promote esthetics and litter control, and the District has provided no admissible evidence about how the law accomplishes those interests. Thus, the law fails intermediate scrutiny—the lowest level applicable to a law regulating speech in a public forum.

Secondly, the regulations fail because they *explicitly* delegate administrative discretion to enforcement officers. A sign could be related to an event if "reasonably determined from all circumstances by the inspector." 24 D.C. CODE MUN. REGS.

§ 108.13 (2012); Pl.'s Statement of Material Facts ¶8, June 22, 2012, ECF No. 60-1 ("Pl.'s SMF"). The Court recognizes that language is imprecise, and it cannot expect definitions to cover every imaginable scenario. Yet, when a law touches on the sensitive area of free speech, more specificity is required. A legislature cannot explicitly delegate ambiguous cases to the rudderless "reasonable" judgment of individual enforcement officers.

MASF has "show[n] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(a), and MASF is entitled to summary judgment. Since the District's cross-motion seeks summary judgment on identical issues, granting MASF summary judgment logically precludes granting the District's motion.

MASF also challenges the sign regulations on the grounds that they are unconstitutionally overbroad—although the law may be applied in some instances without offending the First Amendment, its overly-broad sweep penalizes a significant amount of constitutionally-protected speech. Def.'s Mot. Summ. J. 38–40. MASF relies heavily on cases that conflate overbreadth with vagueness; the Court strives to treat those doctrines separately. The problem with the sign regulations isn't that they regulate *too much* speech, or regulate certain categories of speech that the District cannot touch. A law that imposes an across-the-board durational limit on all signs, or properly explains the fit between the event/non-event distinction and content-neutral interests, could be constitutional. The real problems are the lack of justification for the event/non-event distinction, and the

explicit delegation of administrative discretion to individual decisionmakers.

A. MASF's Challenge that the Law is Unconstitutionally Content-Based

There are three steps in this kind of First Amendment challenge: determining whether the First Amendment protects the speech, determining the forum in which the speech occurs, and then assessing whether the regulations meet the requisite standard. *See* Part III.B *supra*; *Mahoney*, 642 F.3d at 1116. The District's latest amendments do not change how the Court would assess the first two steps; therefore, the Court will re-state and adopt, in the following two sections, its analysis in *ANSWER III*, 798 F. Supp. 2d at 144–45.

1. Do the Regulations Implicate Protected Speech?

The first step here is clear. "[S]igns are a form of expression protected by the Free Speech Clause[.]" *City of Ladue*, 512 U.S. 43, 48 (1994). That is particularly true given the subject of the signs plaintiff seeks to post—political opinions on public issues such as war and racial profiling. *Snyder*, 131 S. Ct. at 1211 ("[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values' and is entitled to special protection.") (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)); *City of Ladue*, 512 U.S. at 54 (characterizing antiwar speech as "absolutely pivotal"). Plaintiff's desire to post signs bearing political messages easily qualifies as protected speech.

2. What is the Nature of the Forum?

The second step is to determine the nature of the forum where the protected speech occurs. This is

slightly more complicated than the first step, but still raises no serious doubt. The "lamppost[s] and appurtenances" referenced by the regulations, 24 D.C. CODE MUN. REGS. § 108.1 (2012), are government property. The District's lampposts are not a traditional public forum; their purpose is not to serve as a means of expression. Unlike streets and parks, the quintessential public fora, they have not "immemorially been held in trust for the use of the public and, time out of mind...been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939). On the other hand, the District's lampposts cannot be considered a nonpublic forum. While the Supreme Court found Los Angeles's utility poles to be a nonpublic forum in *Taxpayers for Vincent*, 466 U.S. at 815, there is an important distinction between that case and this one. The Los Angeles ordinance banned all signs on utility poles. *Id.* Here, the District explicitly permits a wide array of postings on public lampposts. The District's lampposts cannot constitute a nonpublic forum given that the regulations designate them as a lawful place for posting. 24 D.C. CODE MUN. REGS. § 108 (2012). Instead, the District's lampposts are a textbook example of a limited or designated public forum, in which public property has been "opened for use by the public as a place for expressive activity." *Perry*, 460 U.S. at 45.

3. Are the Regulations Content-Neutral or Content-Based?

The next step is determining whether the regulations are content-neutral or content-based, and determining whether strict or intermediate scrutiny applies. The District has amended its regulations in

response to the Court's July 2011 opinion. While these amendments do not solve all the regulations' constitutional problems—*see* Part III.A.5 *infra*—the Court will reexamine the content-neutrality of the regulations and not simply rely on its analysis in *ANSWER III*.

a. Content-neutral justifications for laws with incidental effects on content—legal standard and burden of proof

The District argues that its regulations are content-neutral because they are "justified without reference to the content of the regulated speech." Def.'s Mot. Summ. J. 9 (quoting *Ward*, 491 U.S. at 789). But the "mere assertion of a content-neutral purpose will not be enough to save a law which, on its face, discriminates based on content." *Turner*, 512 U.S. at 642–43.

Simply by pointing to the words of the regulations and asking the Court to apply the controlling law, MASF has met its initial summary judgment burden. It has shown that the sign regulations regulate protected speech in a designated public forum, and places differential burdens on different types of speech. *See* Pl.'s SMF ¶8; Def.'s SMF ¶¶5–6; Def.'s Opp'n to Pl.'s SMF 3, July 17, 2012, ECF No. 62-1 ("The District does not dispute paragraph 8 of the [plaintiff's] SMF, as the quoted text is contained in the current regulations."). The burden then shifts to the District to show how its law is narrowly tailored to achieve a significant, content-neutral interest. *See ANSWER III*, 798 F. Supp. 2d at 148 ("In the absence of an explanation for how th[e] distinction between event and non-event signs advances the District's objective of litter prevention, the differential

burdens imposed by [the sign regulations] present serious First Amendment concerns."). The District asserts in its briefs, without reference to any legislative history or supporting affidavits, that the regulations promote esthetics and reduce litter.[4] Def.'s Mot. Summ. J. 11–12. At this stage, such conclusory statements are insufficient.

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[4] One might argue that the District fails at a more basic level; not only does it fail to introduce any evidence explaining how its law achieves its interests in litter control and esthetics, it fails to introduce evidence showing that its interests are in fact litter control and esthetics. In fact, the District does not introduce any legislative history or affidavit explaining why it passed the law; again, it simply relies on *ipse dixit* in its briefs.

Unlike with the issue of narrow tailoring, *see infra* Part.III.A.4, the Court can take judicial notice of public records evincing the intent behind Section 108. In its Notice of Emergency Rulemaking, the District noted its amendment of the sign regulations "retain[s] the intent of the Council when it passed the Street Sign Regulation Amendment Act of 1979, D.C. Law 3-50, 26 DCR 2733 (December 21, 1979)." D.C. MUN. REGS. tit. 56, §§ 8759–60 (Nov. 6, 2009). The stated intent of that law was to control litter and promote esthetics and public safety. 26 DCR 2733 (1979).

Furthermore, the District's Notice of Proposed Rulemaking states that sign regulations serve to, *inter alia*, "[r]educe [ ] traffic hazards," "[p]rotect property values," and "[p]rovide an attractive visual environment[.]" D.C. MUN. REGS. tit. 56, §§ 10022–99 (Aug, 17, 2012). (However, the Proposed Rulemaking's conclusory statement that its sign regulations "advance these governmental interests and objectives and are the minimum amount of regulation necessary to achieve them," *id.*, is evidence of nothing, especially considering it applies to dozens of different sections—including regulations of billboards and public art.) While this Proposed Rulemaking has yet to become final, it provides more evidence that the District has litter control and esthetics interests in mind when regulating signs.

The Supreme Court held in *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), that the burden is on the government to explain how its law furthers its interests. Cincinnati prohibited the distribution of "commercial handbills" through newsracks installed on public property. The city did not completely ban newsracks and allowed the distribution of newspapers. *Id.* at 412–15. Cincinnati claimed that its interests in "ensuring safe streets and regulating visual blight" justified this distinction. *Id.* at 415. The Court held the law unconstitutional, as the city did not properly justify its law: "It was the city's burden to establish a reasonable fit between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition of newsracks as the means chosen to serve those interests." *Id.* at 416. Although Discovery Network challenged the law, the Court did not require Discovery to prove that Cincinnati had an impermissible or insufficient interest; instead the Supreme Court put the onus on the city to defend its law:

> In the absence of some basis for distinguishing between "newspapers" and "commercial handbills" that is relevant to an interest asserted by the city, we are unwilling to recognize Cincinnati's bare assertion that the "low value" of commercial speech is a sufficient justification for its selective and categorical ban on newsracks dispensing "commercial handbills." Our holding, however, is narrow. As should be clear from the above discussion, we do not reach the question whether, given certain facts and under certain circumstances, a community might be able to justify differential treatment of commercial and noncommercial newsracks. We simply hold

> that on this record Cincinnati has failed to make such a showing. Because the distinction Cincinnati has drawn has absolutely no bearing on the interests it has asserted, we have no difficulty concluding, as did the two courts below, that the city has not established the "fit" between its goals and its chosen means that is required[.]

Id. at 428. The Court also distinguished between content and viewpoint-discrimination. The Court rejected a need for "evidence that the city has acted with animus toward the ideas contained in respondents' publications," *id.* at 429, and the argument that "'discriminatory...treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas'" *id.* (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Board*, 502 U.S. 105, 117 (1991) (also rejecting argument)).

b. Content-neutral justifications for laws with incidental effects on content—the District's failure to explain with admissible evidence

The District has failed to meet its burden and introduce any admissible evidence[5] explaining how

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[5] The party opposing summary judgment may rely on evidence "capable of being converted into admissible evidence at trial" to "survive summary judgment." *Greer v. Paulson*, 505 F.3d 1306, 1315 (D.C. Cir. 2007). Generally, this allows an opposing party to submit evidence such as sworn affidavits (which themselves would not be admissible at trial if the witness were available to testify) to establish that there is a genuine issue of disputed fact, and the case should go to trial. *See Gleklen v. Dem. Congressional Campaign Comm., Inc.*, 199 F.3d 1365, 1369 (D.C. Cir. 2000). But a party opposing summary judgment "may not

District's regulations achieve content-neutral interests. It does not introduce any relevant legislative history, municipal regulation, or affidavit. The District's attorneys simply assert that the District's regulations promote esthetics and reduce litter. *See* Def.'s Mot. Summ. J. 11–12. Such unsworn *ipse dixit* is evidence of nothing. *See, e.g.*, *Schoch v. First Fidelity Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990) ("unsupported allegations in [a non-movant's] memorandum and pleadings are insufficient to repel summary judgment"); *Int'l Distrb. Corp. v. Am Dist. Tel. Co.*, 569 F.2d 136, 139 (D.C. Cir. 1977) ("[A] party may not avoid summary judgment by mere allegations unsupported by affidavit."); *see also Akers v. Liberty Mut. Group*, 744 F. Supp. 2d 92, 96 (D.D.C. 2010) ("Because the objective of summary judgment is to prevent unnecessary trials, and because '[v]erdicts cannot rest on inadmissible evidence,' it follows that the evidence considered at summary judgment must be capable 'of being converted into admissible evidence.'") (quoting *Greer v. Paulson*, 505 F.3d 1306, 1315 (D.C. Cir. 2007)).

The District points to other cases where courts recognized that sign regulations were motivated by significant interests in reducing visual clutter. Def.'s Mot. Summ. J. 13–16 (citing *Covenant Media of S.C. v. City of N. Charleston*, 493 F.3d 421 (4th Cir. 2007); *Wag More Dogs, Ltd. Liability Corp. v. Cozart*, 680 F.3d 359 (4th Cir. 2012); *Reed v. Town of Gilbert, Ariz.*, 587 F.3d 966 (9th Cir. 2009)). These cases show that litter control and esthetics can act as sig-

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rest upon mere allegations or denials." *Anderson*, 477 U.S. at 256. The unsupported statements of counsel are not capable of being transformed into admissible evidence, and therefore cannot be considered at this stage.

nificant content-neutral interests. *Covenant Media*, 493 F.3d at 434 ("North Charleston's interests in regulating signs were completely unrelated to the messages displayed: They were to "eliminate confusing, distracting and unsafe signs, assure the efficient transfer of information; and enhance the visual environment[.]"); *Wag More Dogs*, 680 F.3d at 368 ("Arlington enacted the ordinance to, among other aims, promote traffic safety and the County's aesthetics, interests unrelated to messages displayed."); *Reed*, 587 F.3d at 981 (city has "significant interests in aesthetics and traffic safety"). These cases also show that sign regulations are not content-based simply because they distinguish between different types of signs. *Covenant Media*, 493 F.3d at 434 (although "the Sign Regulation required looking generally at what type of message a sign carries to determine where it can be located, this 'kind of cursory examination' did not make the regulation content-based.") (quoting *Hill*, 530 U.S. at 721); *Wag More Dogs*, 680 F.3d at 365 (rejecting "wooden logic" that all laws imposing different requirements are content-based; embracing "a practical analysis of content neutrality, requiring that a regulation do more than merely differentiate based on content to qualify as content based"); *Reed*, 587 F.3d at 978 ("[T]his regulation is a good example that the 'officer must read it' test is not always determinative of whether a regulation is content based or content neutral."). They show how municipalities may treat different kinds of signs differently without violating the Constitution.

The holdings in *Covenant Media, Wag More Dogs*, and *Reed* would support arguments the District could make to defend its sign regulations. The cases cannot, however, replace the need for the District to make its own arguments. As *Cincinnati*

holds, the District has "the burden to establish a reasonable fit between its legitimate interests...[and] the means chosen to serve those interests." 507 U.S. at 416; *see also Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989) ("[T]he State bears the burden of justifying its restrictions...and must affirmatively establish the reasonable fit we require."). The Court must determine whether the District's event/non-event distinction is narrowly tailored to achieve its interests. This is a case-specific inquiry. *Covenant Media, Wag More Dogs*, and *Reed* may show that, in other instances, cities have justified differential treatment of signs to further esthetics. But the laws in those cases deal with different kinds of sign regulations; none are sufficiently similar to prove that the kinds of differential burdens the District places on event and non-event signs would be similarly justified. *Covenant Media*, 493 F.3d at 424–25 (regulation exempted signs "identifying or advertising a business...located on the premises where the sign is installed" from size and zoning requirements applicable to other "billboards"); *Wag More Dogs*, 680 F.3d at 363–64 (petitioner objects to differential permit requirements placed on business signs); *Reed*, 587 F.3d at 971–78, 981–83 (considering requirements placed on "Temporary Directional Signs Relating to a Qualifying Event"—signs placed outside of event site for less than a day—and distinctions between commercial and non-commercial speech).

Reed presents the most analogous case, but there are still important differences. The law in *Reed* regulates the placement of signs on private property, not in a designated public forum. 587 F.3d at 976–77 (law specifically prohibits placing signs "[o]n fences, boulders, planters, other signs, vehicles, utility facili-

ties, or any structure"). The signs in *Reed* direct someone to the place of a particular event, and are not used to broadly advertise future events. *Id.* at 979–80. The sign regulation in *Reed* is very limited; it only allows signs to be displayed "up to 12 hours before, during, and 1 hour after the Qualifying Event ends." *Id.* at 977. This kind of ordinance does not address the kinds of signs at issue in the present case—campaign signs posted months before the election; signs advertising political marches and rallies weeks in advance. The present case is not like *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000), where the Supreme Court found that Missouri's law was so similar to the campaign finance regulations approved in *Buckley v. Valeo*, 424 U.S. 1 (1976), and its progeny that Missouri need not introduce extensive empirical evidence in support of its law. *Nixon*, 528 U.S. at 391 ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised."). There is no evidence that the District relied on the experiences of the municipalities referenced in *Covenant Media, Wag More Dogs*, and *Reed* when passing its regulations.

The District's reliance on the Supreme Court's decisions in *Turner*, *Nixon* and *Renton* is misplaced. The District argues:

> [T]he government need not produce affirmative evidence that the challenged regulations are having the intended effect. *See Turner*, 512 U.S. at 666 ("[W]hen trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical support *or at least sound reasoning*

> on behalf of its measures") (emphasis added) (quoting *Century Communications Corp. v. FCC*, 835 F.2d 292, 391(D.C. Cir. 1987)). The reasoning contained herein is more than sufficient to demonstrate the constitutionality of the District's postering regulations....
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> In *Nixon*, the Supreme Court upheld a Missouri campaign-finance law against a First Amendment challenge, despite the fact that the state does not preserve legislative history. *Nixon*, 528 U.S. at 393. The "evidence" introduced by the government there included a single affidavit from a state legislator and numerous newspaper articles. *Id.* (citing, *inter alia*, *City of Renton v. Playtime Theatres*, 457 U.S. 41, 51–52 (1986) ("The First Amendment does not require a city, before enacting...an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city rests upon is reasonably believed to be relevant to the problem that the city addresses")).

Def.'s Mot. Summ. J. 11, n.7. The Court agrees that the District need not introduce extensive evidence that its regulations promote esthetics or reduce litter. *See Turner*, 512 U.S. at 666. But the Court cannot accept "mere conjecture as adequate to carry a First Amendment burden." *Nixon*, 528 U.S. at 392. In all three cases cited, the government provided *some* evidence—outside of the unsworn statements of counsel—to show how the law would further content-neutral interests. In *Turner*, "Congress enacted the 1992 Cable Act after conducting three years of hearings on the structure and operation of the cable tele-

vision industry. The conclusions Congress drew from its factfinding process are recited in the text of the Act itself." 512 U.S. at 632 (citations omitted). In *Renton*, the "resolution contained a clause explaining that" businesses which have as their "primary purpose the selling, renting or showing of sexually explicit materials...would have a severe impact upon surrounding businesses and residences." 475 U.S. at 44 (internal quotation marks omitted). Renton's City Council, prior to enacting the law, "referred the matter to the city's Planning and Development Committee" who "held public hearings, reviewed the experiences...of other cities, and received a report from the City's Attorney's Office advising as to developments in other cities." *Id.* And while the District points out that an affidavit and some newspaper articles were sufficient to meet the government's burden in *Nixon*, 528 U.S. at 393, at least Missouri provided *something*.[6]

The District emphasizes *Turner*'s statement that "'when trenching on first amendment interests...the government must be able to adduce either empirical

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[6] The District points to two news articles from the Washington Post discussing the visual blight caused by campaign signs. Def.'s Mot. Summ. J. 19. However, neither of these articles explains *why* the Council enacted these regulations. In fact both of them relate to efforts in Virginia, not Washington, D.C., to curb election signs. *See* Holly Hobbs, *Signs of election time*, WASH. POST, Oct. 20, 2011, at T17 (describing political signs in Fairfax County, Virginia); Shya Somashekhar, *Looking for Sign-Free Roadsides: County Considers Pact with VDOT*, WASH. POST, Sept. 18, 2008, at T1 (describing efforts in Loudoun County, Virginia to regulate political signs). Unlike in *Renton*, there is no evidence that the District's Department of Transportation or City Council considered the efforts in other jurisdictions when amending its sign regulations.

support *or at least sound reasoning* on behalf of its measures.'" 512 U.S. at 666 (quoting *Century*, 835 F.2d at 304) (emphasis added). The District may argue that its filings—and the arguments contained therein—constitute the 'sound reasoning' needed to defend the sign regulations. Def.'s Mot. Summ. J. 10–12. However, even if 'sound reasoning' could suffice, that reasoning cannot rest solely on lawyers' arguments. Directly before quoting *Century*, the *Turner* Court stated: "Th[e] obligation [of the Court] to exercise independent judgment when First Amendment rights are implicated...assure[s] that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." 512 U.S. at 666. Therefore, while the Court may defer to the "sound reasoning" of the government—and not require extensive empirical evidence—it must have some way to independently test the government's reasoning. Relying on the unsupported, unsworn *ipse dixit* of counsel is the opposite of "exercis[ing] independent judgment when First Amendment rights are implicated." *Id.* It would be ironic if *Turner* held that the government need not introduce any evidence to defend its law under the First Amendment, and may simply rest on unsworn conclusory statements. The *Turner* Court did not find the government's 'sound reasoning'—supported by properly submitted statistics, studies, and legislative history—sufficient to defend the law, and remanded the case to develop an even "more thorough factual record." *Id.* at 668.

The District also cites, in its Reply, *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 439 (2002), which states: "In effect [the dissenting Justices ask[] the city to demonstrate, *not merely by appeal to common sense*, but also with empirical data, that its ordi-

nance will successfully lower crime. Our cases have never required that municipalities make such a showing, certainly not without *actual and convincing evidence from plaintiffs to the contrary.*" (presented as quoted in Def.'s Reply 8). As with *Turner*, *Nixon* and *Renton*, the District presents language out of context to try to show that the government may rely solely on lawyers' arguments to demonstrate the proper "fit" between the law and the government's interests. *Alameda Books* concerned an ordinance, similar to the one in *Renton*, regulating the siting of adult entertainment establishments. *Id.* at 433–34. Los Angeles submitted relevant legislative history and a 1977 report from the Department of City Planning to explain the interests behind the law, and how the law is narrowly tailored to accomplish those interests. *Id.* at 430. The key dispute between Justice O'Connor and the dissenting Justices was not whether the government had any evidentiary burden to explain its regulation of speech; the dispute concerned *how much* evidence the government had to provide to meet this burden. *Id.* at 438–42. The sides disagreed over whether Los Angeles could rely on the 1977 Study to demonstrate the reasonable "fit" required by the First Amendment. *Id.* Although the majority was willing to grant the city considerable deference to address the secondary effects of pornographic speech, "[t]his is not to say that a municipality can get away with shoddy data or reasoning. The municipality's *evidence* must fairly support the municipality's rationale for its ordinance." *Id.* at 438 (emphasis added). Los Angeles had an "evidentiary requirement" to justify its law, despite the fact that it did not facially discriminate against particular viewpoints. *Id.* at 439. Justice O'Connor recognized that the "City Council is in a better position than the

Judiciary to gather and evaluate data on local problems," *id.* at 440, but weighed this against the Court's "'obligation to exercise independent judgment when First Amendment rights are implicated.'" *Id.* (quoting *Turner*, 512 U.S. at 666). *Alameda Books* suggests that once a city introduces evidence on how its law is narrowly tailored to mitigate the secondary effects of speech, the conclusions the city draws from that evidence deserves judicial deference. It does not hold, as the District suggests, that a government has no evidentiary burden whatsoever when treading on First Amendment rights.

At one point, the District claims there is "ample evidence in the legislative and public records to uphold the District's scheme." Def.'s Mot. Summ. J. 11. But the District never directed the Court to this evidence. A conclusory claim that supporting evidence may exist is not enough to defeat plaintiff's summary judgment motion. *See, e.g.*, *Celotex Corp v. Catrett*, 477 U.S. 317, 325 (1986) (disapproving "a line of cases allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings"); *Engl v. Aetna Life Ins. Co.*, 139 F.2d 469, 473 (2d Cir. 1943) (allowing an opposing party to "reserve one's evidence when faced with a motion for summary judgment" would render "useless the very valuable remedy of summary judgment"). At summary judgment the Court cannot rely on "mere allegations or denials." *Anderson*, 477 U.S. at 256; *see also* 10A WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE § 2727 (3d ed. 2012) ("A judge may not resolve a summary-judgment motion by 'assumptions' about matters that have not been properly presented in the manner prescribed by the rule or that are not the subject of the judicial notice doctrine.").

4. Would the regulations survive the applicable standard?

The District does not seem to treat this case as one arising under the First Amendment. It does not act as if it needs to do anything to justify its law, except to suggest that the plaintiff has not met *its* burden. *Cf. Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 885 (1990) ("Rule 56 does not require the moving party to negate the elements of the nonmoving party's case."). The law undeniably touches First Amendment rights, and therefore the Court cannot analyze it under the rational basis standard. The Court must subject the law to at least intermediate scrutiny, which applies to content-neutral regulations. Because of the District's total failure to explain the "fit" between the event/non-event distinction and any content-neutral justification, the law fails intermediate scrutiny and is unconstitutional.

Under intermediate scrutiny, the Court allows content-neutral time, place, and manner regulations of speech that "are narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." *Ward*, 491 U.S at 791. In analyzing laws for narrow tailoring:

> [O]ur decisions require [ ] a fit between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but...a means narrowly tailored to achieve the desired objective. Within those bounds we leave

> it to governmental decisionmakers to judge what manner of regulation may best be employed.

S.U.N.Y. v. Fox, 492 U.S. at 480 (internal quotation marks and citations omitted) (applied to public forum context in *Cincinnati*, 507 U.S. at 417). Although the District has discretion in tailoring a solution to the litter problems posed by event signs, it still has the burden to "establish a 'reasonable fit' between its legitimate interests in safety and esthetics" and the event/non-event distinction drawn by the law. *Cincinnati*, 507 U.S. at 417; *see also S.U.N.Y. v. Fox*, 492 U.S. at 480 ("[T]he State bears the burden of justifying its restrictions...and must *affirmatively establish* the reasonable fit we require.") (emphasis added).

In *Alameda Books*, the Supreme Court explained how a court should approach whether a law purporting to regulate the secondary effects of speech is content-neutral, and whether such a law is narrowly tailored:

> In *Renton*, the Court distinguished the inquiry into whether a municipal ordinance is content neutral from the inquiry into whether it is "designed to serve a substantial government interest and do[es] not unreasonably limit alternative avenues of communication." 475 U.S., at 47–54. The former requires courts to verify that the "predominate concerns" motivating the ordinance "were with the secondary effects of adult [speech], and not with the content of adult [speech]." *Id.*, at 47....The latter inquiry goes one step further and asks whether the municipality can demonstrate a connection between the speech

> regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance. Only at this stage did *Renton* contemplate that courts would examine evidence concerning regulated speech and secondary effects. *Id.*, at 50-52.

535 U.S. at 440-41. This case makes clear that content-neutral laws are subject to intermediate scrutiny, *id.* at 440 ("municipal ordinances receive only intermediate scrutiny if they are content neutral"), and under intermediate scrutiny the government has an *evidentiary* burden to demonstrate the connection between the regulation of speech and a substantial, independent government interest, *id.* at 439 (characterizing *Renton*'s burden on government to justify its regulation of speech as an "evidentiary requirement").

After a half-year discovery period, and sufficient time to prepare complete summary judgment motions, there is still no "explanation for how th[e] distinction between event and non-event signs advances the District's objective." *ANSWER III*, 798 F. Supp. 2d at 148. The District has not properly explained how the regulations' distinction "advance[s] the content-neutral purpose the city asserts." *Id.* at 147. Even if the Court is willing to defer to the District's "greater experience with and understanding of the secondary effects that follow certain protected speech," *Alameda Books*, 535 U.S. at 442, the District has given the Court nothing to which it can defer. Taking the unsworn, conclusory statements of counsel at face value would completely obliterate the Court's "obligation to exercise independent judgment when First Amendment rights are implicated." *Turner*, 512 U.S. at 666.

Since this law touches on protected speech in a public forum, the Court cannot provide its own justification for the law based on what the District *might have* thought, or put the burden on the plaintiff to prove that the District could not have any non-discriminatory motives. *Cf. Am. Bus Ass'n v. Rogoff*, 649 F.3d 734, 742 (D.C. Cir. 2011) (law did not implicate First Amendment and was "subject only to rational basis-review," under which "a legislature...need not actually articulate at any time the purpose or rationale supporting its classification."). The First Amendment's public forum doctrine does not permit such deference. *Perry*, 460 U.S. at 46.

5. The District's 2011 amendments do not solve all the constitutional problems

The District amended the sign regulations in 2011 after this Court's opinion in *ANSWER III*. Addressing the previous iteration of the law, *ANSWER III* suggested that "limit[ing] posters 'not related to a specific event' to a hanging time of sixty days[ ] is unproblematic." 798 F. Supp. 2d at 148. It also suggested that "requiring posters related to events to be 'removed no later than thirty (30) days following the event' is straightforward. A poster for an event that has already occurred is more likely to constitute litter and blight than a poster for a future event or a general political message." *Id.* The Court was most worried by the fact that the regulations allowed posters relating an event to hang for an indefinite time before the event. *Id.* This provision seriously undercut any possible argument that the event/non-event distinction could advance content-neutral interests in reducing litter, and since "the District has announced that elections qualify as 'events' under the new regulations this distinction could be seen as

a way of resurrecting the old rules that prioritized election-related speech[.]" *Id.*

The District's latest amendments address some of these issues. Rather than allowing an event poster to hang indefinitely before the event, all posters are subject to a one hundred eighty day durational limit. Pl's SMF ¶ 8. The only difference is that event posters must be removed within thirty days after the occurrence of the event, but these thirty days do not extend the 180-day limit. *Id.* This change may alleviate worries that the District is pushing the same unconstitutional preference for campaign signs in a less obviously discriminatory package. The District's amended law combines two features the Court found less offensive—the time limit for non-event posters, and the 30-day post-event limit for event posters—and removes the feature the Court found most odious—allowing event posters to hang indefinitely pre-event. *See ANSWER III*, 798 F. Supp. 2d at 148.

The District took commendable measures to address pressing constitutional concerns. Nevertheless, the regulations still distinguish between event and non-event signs without any admissible justification for this difference. They still regulate protected speech in a designated public forum. When the Court suggested that "[a] poster for an event that has already occurred is more likely to constitute litter and blight than a poster for a future event or a general political message," *id.* at 148, the Court was considering the District's Motion to Dismiss. In such a posture, the Court generally does not look at facts outside the pleadings. *See Nat'l Postal Professional Nurses v. U.S. Postal Service*, 461 F. Supp. 2d 24, 28 (D.D.C. 2006) ("When addressing a motion to dismiss under Rule 12(b)(6), the Court generally may not

look outside the facts contained within the four corners of the complaint, unless it treats the motion to dismiss as a motion for summary judgment.") (internal citations and quotation marks omitted). The relevant inquiry there is whether the "complaint states a plausible claim for relief," *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), not whether the moving party has shown "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(a). At summary judgment, however, the District has the burden of introducing evidence explaining how the regulations are narrowly tailored, and the court must look beyond the pleadings and briefs.

ANSWER III suggested that the most straightforward way to avoid constitutional problems would be to subject all posters to the same durational limits. *Id.* at 155 ("There is, of course, another alternative available to the District's officials. They can revise the regulations to include a single, across-the-board durational restriction that applies equally to all viewpoints and subject matters."). Granted, this is not the only option available to the District—with a proper content-neutral justification, it might constitutionally distinguish between event and non-event signs. Yet, when courts have approved of content-neutral sign regulations, they still subjected those laws to intermediate scrutiny. If the District wants to treat different types of signs differently, it must provide evidence justifying this distinction. *See id.* at 148 ("In the absence of an explanation for how this distinction between event and non-event signs advances the District's objective of litter prevention, the differential burdens imposed by §§ 108.5–108.6 present serious First Amendment concerns.") The

2011 amendments, while a step in the right direction, did not obviate this requirement.

6. MASF is entitled to summary judgment

MASF has met is summary judgment burden. It has put forward undisputed facts showing that the District's regulations regulate protected speech in a designated public forum. It has shown that the law facially makes distinctions between certain types of speech. These questions are primarily legal—essentially, the Court need only apply the controlling law to the plain text of the regulations. Pl.'s SMF ¶ 8; Def.'s SMF ¶¶ 5–6; Def.'s Opp'n to Pl.'s SMF 3. After the plaintiff makes this showing, the burden then shifts to the District to provide evidence justifying its law and demonstrating that it is narrowly-tailored to accomplish a significant content-neutral interest. The District's complete failure to introduce evidence for which it would have the burden at trial means that the plaintiff is entitled to summary judgment now, and the Court should not further delay this matter.

Cincinnati held that the government has the burden of explaining the purposes of its law and how it achieves those purposes. 507 U.S. at 417. With the burden now on the government, the District may not simply rest on its pleadings to oppose MASF's motion for summary judgment. One of the most-cited Supreme Court cases in history,[7] *Celotex Corp v.*

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[7] An empirical study found, as of June 2005, that *Celotex* is the second most frequently cited case of all time by federal courts and tribunals. The first and third most cited cases—*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 474 U.S. 574 (1986)—are related summary judgment opinions issued the same year. Adam

Catrett, 477 U.S. 317 (1986), makes this clear. The Supreme Court held:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

477 U.S. at 322–23 (quoting Fed. R. Civ. P. 56(c)). The Supreme Court elaborated:

> In cases...where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a mo-

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M. Steinman, *The Irrepressible Myth of* Celotex*: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 143 (2006). These cases are often called the "*Celotex* Trilogy." *See id.* at 94. As of November 2012, a WestLaw search returns over 154,000 federal cases citing *Celotex*.

> tion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

Id. at 324 (quoting Fed. R. Civ. P. 56). *Celotex* meant "to disapprove a line of cases allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings," *id.* at 325—which the District tries to do by submitting no evidence whatsoever.

This case is over five years old. This Court, after narrowing the remaining issues, opened a 120-day discovery period and set a schedule for dispositive motions. Sched. Order, ECF No. 48. The Court and the plaintiff put the District on notice that the purposes and operation of its regulations would be at issue. *ANSWER III*, 798 F. Supp. 2d at 155 ("[T]he District will have an opportunity [during discovery] to clarify...the relation of event/non-event distinction in §§ 108.5–108.6 to the anti-littering interest it asserts."); Pl.'s Notice of Dep. 2, May 3, 2012, ECF No 54-1 (requesting information on "[t]he purpose of the postering regulations; the asserted interests in promulgating the postering regulations" and "[h]ow, and to what extent, the event/non-event distinction advances and/or accomplishes the purpose(s) of the postering regulation.").[8] The District's complete fail-

[8] The District refused to answer MASF's questions, instead moving for a protective order. Def.'s Mot. Protective Order, May 14, 2012, ECF No. 54. The Court's action today moots this mo-

ure to justify its law should not further delay this case. As the Second Circuit stated in a seminal case:

> If one may thus reserve one's evidence when faced with a motion for summary judgment there would be little opportunity "to pierce the allegations of fact in the pleadings" or to determine that the issues formally raised were in fact sham or otherwise unsubstantial. It is hard to see why a litigant could then not generally avail himself of this means of delaying presentation of his case until the trial. So easy a method of rendering useless the very valuable remedy of summary judgment is not suggested in any part of its history or in any one of the applicable decisions.

Engl, 139 F.2d at 473 (detailed in 10A WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE § 2727 (3d ed. 2012)). The District may claim that it was mistaken, that it did not know that it had to produce evidence of anything. This is not a reason to deny MASF summary judgment. Following the Supreme Court's lead in *Cincinnati*, and the summary judgment precedent of *Celotex*, the Court holds that while the District "might be able to justify differential treatment" of signs relating to event and signs bearing a general message, "on this record [the District of Columbia] has failed to make such a showing." *Cincinnati*, 507 U.S. at 428. Therefore, MASF has shown there is "no genuine dispute as to any material fact and is...entitled to judgment as a matter of law,"

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tion, as addressed in a separate Memorandum and Order issued later this date.

Fed. R. Civ. P. 56(a), and is entitled to summary judgment.

B. MASF's Challenge that the Law is Unconstitutionally Vague

MASF claims the District's sign regulations are unconstitutionally vague because they fail "to define what constitutes a sign to be 'related to a specific event,'" Pl.'s Mot. Summ. J. 1, and do not provide "sufficient guidance to the state's agents as to how to enforce the law," *id.* at 2. MASF believes the regulations' definition of "event" provides neither potential speakers nor enforcement officers any real guidance, and this uncertainty chills a substantial amount of protected speech. *Id.* at 33–34. The Court agrees that the sign regulations are unconstitutionally vague, but rests its decision on narrower grounds than urged by MASF. The most obvious problem with the regulations' definition of "event" is its explicit authorization of administrative discretion. The sign regulations provide the following definition of "event":

> 108.13: For purposes of this section, the term 'event' refers to an occurrence, happening, activity or series of activities, specific to an identifiable time and place, if referenced on the poster itself *or reasonably determined from all circumstances by the inspector.*

24 D.C. CODE MUN. REGS. § 108.13 (2012) (emphasis added). By delegating some cases to the "reasonable determination" of individual inspectors, the District fails to assure potential speakers that it will enforce the sign regulations in an objective, predictable manner. On this basis, the Court holds that the sign regulations facially lack the "precision and guid-

ance...necessary so that those enforcing the law do not act in an arbitrary or discriminatory way," *F.C.C. v. Fox*, 132 S. Ct. at 2317, and MASF is entitled to summary judgment.

1. MASF's broader argument that the sign regulations are vague

"Vagueness may invalidate a criminal law[9] for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *Morales*, 527 U.S. at 56. MASF argues that the District's regulations are void for both kinds of vagueness, and seek to "demonstrate that the regulations are discretionary, subjective, and not outcome-determinative, fail to adequately constrain enforcement officials' discretion, authorize or encourage arbitrary and/or biased enforcement, and fail to provide notice to enable ordinary people seeking to engage in constitutionally protected free speech postering as to what signs will or will not be subject to financial penalties." Pl.'s Mot. Summ. J. 2–3.

In support of their motion, MASF deposed four of the District's Solid Waste Inspectors, the government officials responsible for enforcing the sign regulations and issuing notices of violation. *See* Pl.'s SMF ¶¶ 15–18; Def.'s Opp'n to Pl.'s SMF ¶¶ 15–18; *see also* Exs. 5–6 to Pl.'s Mot. Summ. J (documents on Sol-

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[9] The District's sign regulations, 24 D.C. CODE MUN. REGS. § 108 (2012), constitute a penal statute. *See Washington v. D.C. Dep't of Public Works*, 954 A.2d 945, 948 (D.C. 2008) (Litter Control Act, under which the sign regulations are authorized and issued, is a penal statute).

id Waste Inspector duties and background of individual deponents); Broome Dep., May 15, 2012, Ex. 7 to Pl.'s Mot. Summ. J.; Hood Dep., May 15, 2012, Ex. 8 to Pl.'s Mot. Summ. J.; Lee Dep., May 17, 2012, Ex. 9 to Pl.'s Mot. Summ. J.; Barber Dep., May 15, 2012, Ex. 10 to Pl.'s Mot. Summ. J. Each deposition followed a similar pattern. At the beginning of the examination, plaintiffs' counsel provided the deponent with a complete and current copy of the District's sign regulations, and allowed the deponent to refer to this exhibit at all times. *See* Pl.'s Mot. Summ. J. 10; Pl.'s SMF ¶ 20; Def.'s Opp'n to Pl.'s SMF ¶ 20. Plaintiff's counsel then presented each Inspector with a series of hypothetical signs and asked whether each sign was related to an event, which event, and when the regulations require the sign to be taken down. *See* Pl.'s Mot. Summ. J. 10–33; Exs. 7–10 to Pl.'s Mot. Summ. J. (excerpts of deposition transcripts); Exs. 11–18 (hypothetical signs used in depositions). MASF's counsel asked each Inspector about several types of potentially-troublesome signs, including signs referring to a candidate's name, signs which may be related to more than one event, signs pertaining to future political events or a series of activities, and signs with hybrid content. Pl.'s SMF ¶¶ 21–22; Def.'s Opp'n to Pl.'s SMF ¶¶ 21–22. As MASF characterizes the examinations, the Solid Waste Inspectors provided conflicting statements on whether a sign relates to an event (and when it needs to come down), admitted that the regulations provide no guidance for particular signs in front of them, and frequently relied on their individual discretion to make close calls. Pl.'s Mot. Summ. J. 10–33.

The plaintiff places significant weight on these depositions, dedicating most of its Motion for Summary Judgment to discussing them. *Id.* In summary,

MASF claims that the Solid Waste Inspector depositions show:

> [N]ot even trained law enforcement officers responsible for issuing penalties through notices of violation can provide consistent applications of the regulations. Activists and organizations who wish to affix signs to lampposts have no notice as to how long a sign may remain posted under the regulations before the pain of financial sanction may be imposed. They are at the mercy and punishment of these agents who, lacking any guidance, have no choice but to be arbitrary in their enforcement; and whose biases and discriminations, whether conscious or unconscious, are unchecked by clear regulations that properly constrain discretion.

Id. at 34–35. MASF's vagueness challenge is broad. There is no easy fix for the problem—according to MASF, the regulations are "hopelessly vague." *Id.* at 2. MASF does not say what would be an acceptable definition of "event," although it might be one providing clear guidance to the Solid Waste Inspectors regarding the hypothetical signs used during the depositions.

2. The narrower grounds for finding the sign regulations vague

MASF's depositions yield interesting results and leave the reader with the impression that the sign regulations might be hopelessly vague. Solid Waste Inspectors contradict each other—and sometimes themselves—when presented with the hypothetical signs. *See id.* at 10–33. While MASF used "fake" posters, it based some of its hypotheticals on real world examples. *See* Pl.'s Reply 8–12 (submitting re-

al examples of campaign signs that simply state name of candidate and office, without specifying date of related "event").

The Court must be careful when determining how much weight to give these depositions. While the Court does not think MASF's counsel tried to mislead or confound the Solid Waste Inspectors, the Inspectors might be more easily confused in the unfamiliar context of a formal deposition. It is hard to determine how much of the Inspectors' confusion comes from the form of the depositions, rather than the regulations themselves. It is also hard to determine how much of the Inspectors' confusion comes from the regulations' definition of event, rather than the regulations' delegation of administrative discretion. Would the Inspectors have turned to their individual "reasonable determination" so quickly if the statute did not tell them they could do so? On several occasions, the Inspectors state that the sign regulations specifically allow them to use their personal judgment, and use this to justify moving away from any objective, codified standards.[10] While not direct

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[10] *See, e.g.*, Broome Dep. 31:18–22 ("Q: You would—as an enforcement officer, sir, you have the reasonable discretion, though, when you come across this exact same poster, 1-E, to treat it as a sign of general support for Graham, don't you?...A: Yes."); *Id.* at 38:7–38:19 ("Q. Where in the regulations does it suggest that you are constrained in any way? A. It doesn't constrain me in the regulations. It says I can use my judgment.... Q. Someone else's exercise of discretion and judgment might lead them to another reasonable conclusion, that is, it's related to the general election; correct? A. Correct."); Hood Dep. 15:19–17:19 ("Q. And as you apply the regulations as an enforcement officer, what's the removal date appropriate for this sign? A. It would actually be—it would be my discretion between 108.5 and 108.6.... Q. And the rules leave it up to you because of the na-

evidence that the sign regulations are vague, this testimony suggests problems with the guidance the law provides to enforcement officers.

When considering whether a statute is unconstitutionally vague, the Court should start with the text of the statute. *Cf. Forsyth*, 505 U.S. at 133 ("[T]he success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decision maker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so."). If the text of the statute—as interpreted—indicates that the law is vague, there may be no need for extrinsic evidence. In fact, several courts have disapproved of looking at anything other than the words of the law when facing a facial challenge. *See* Def.'s Reply 5–6 (collecting cases from outside D.C. Circuit). Furthermore, when considering a facial constitutional challenge, the Court should exercise "judicial restraint" to avoid "'unnecessary pronouncement on constitutional issues'" and "'premature interpretations of statutes.'" *Washington State Grange*, 522 U.S. at 450 (quoting *Raines*, 362 U.S. at 22). When faced with a broad constitutional challenge, a court should try to resolve the issue on narrower grounds if possible. *See, e.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217–18 (1995) (Court first considers narrowest of alternate grounds submitted for claim that congressional statute is unconstitutional); *Shelby Co., Ala. v. Holder*, 679 F.3d 848, 868–69 (D.C. Cir. 2012) ("courts will avoid deciding constitutional questions...if the litigation can be resolved on narrower grounds").

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ture of the sign, as to which one you might reasonably apply; correct? A. Yes.").

Therefore, the Court turns to the text of the sign regulations, which provide:

> 108.13: For purposes of this section, the term 'event' refers to an occurrence, happening, activity or series of activities, specific to an identifiable time and place, if referenced on the poster itself or reasonably determined from all circumstances by the inspector.

24 D.C. CODE MUN. REGS. § 108.13 (2012). At first glance, this definition of event may seem acceptable. After all, the Constitution does not require "perfect clarity and precise guidance...even of regulations that restrict expressive activity." *Ward*, 491 U.S. at 794. The District argues that ordinary people know what an "event" is and understand what it means for a poster to be "related to an event." *See* Def.'s Opp'n to Pl.'s Mot. Summ. J. 9 (citing *Hill*, 530 U.S. at 732 ("The likelihood that anyone would not understand any of those common words seems quite remote.")). The District defines an "event" as "an occurrence, happening, activity or series of activities, specific to an identifiable time and place[.]" 24 D.C. CODE MUN. REGS. § 108.13 (2012). While this definition is not absolutely comprehensive, it does not need to be. *See Thomas*, 864 F.2d at 195 (laws "cannot, in reason, define proscribed behavior exhaustively or with consummate precision"). MASF argues the Inspector depositions show that this definition is inadequate, Pl.'s Mot. Summ. J 33–35. But the District could counter that "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid 'in the vast majority of its intended ap-

plications.'" *Hill*, 530 U.S. at 733 (quoting *Raines*, 362 U.S. at 23).

The Court need not determine whether defining "event" as "an occurrence, happening, activity or series of activities, specific to an identifiable time and place," 24 D.C. CODE MUN. REGS. § 108.13 (2012), could be sufficient. If the District had stopped there, this would be a closer case. The regulations' definition of event continues, stating that an "'event' refers to an occurrence, happening," et cetera, "if referenced on the poster itself or reasonably determined from all circumstances by the inspector." *Id.* Since this explicitly delegates discretion, it provides the Court a narrower ground for finding the law unconstitutionally vague.[11]

The regulations allow a poster to be related to an event, even if the poster itself does not reference an event, if "reasonably determined from all circumstances by the inspector." 24 D.C. CODE MUN. REGS. § 108.13 (2012). This is a clear example of the kind of administrative discretion that the Due Process Clause and First Amendment abhor. *See, e.g.*, *Kolender*, 461 U.S. at 358. Using the modifier "reasonable" does not provide enough guidance. Telling an officer to act "reasonably" does not provide objective criteria cabining his discretion. Reasonable people frequently come to different conclusions.

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[11] Again, if the regulations ended with "if referenced on the poster itself," this would be a closer case. MASF might argue that the law does not make it clear when an event is "referenced on the poster itself." But the District could counter that imagining remote scenarios where the law is not perfectly clear does not mean the law is facially vague. *See Williams*, 554 U.S. at 305 ("Close cases can be imagined under virtually any statute.").

While MASF would not want the enforcement officers to act *unreasonably*, MASF might still worry about uneven and inconsistent implementation of the sign regulations; this fear could substantially chill protected speech. *See Reno*, 521 U.S. at 871–72. Moreover, the inspector is allowed to draw on "all circumstances" when making this "reasonabl[e] determin[ation]." 24 D.C. CODE MUN. REGS. § 108.13 (2012). The inspectors are not limited to considering clear, objective criteria when deciding whether a sign relates to an event. Since the inspectors may look at "*all* circumstances," this suggests they may consider whatever they find relevant as long as they come to a "reasonable" determination.

If a law presents a constitutional issue, a court should construe the statute—if possible—to avoid the constitutional problem. Courts assume that legislatures do not intend to pass unconstitutional laws, and this assumption acts as an interpretive tool. *See, e.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This canon does not work when its application would, in effect, rewrite the law. *See Clark v. Martinez*, 543 U.S. 371, 385 (2005) ("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means* of *choosing between them*.") (emphasis in original). Here, the Court cannot avoid the constitutional problems without doing considerable violence to the text, and must find the regulations' delegation of discretion unconstitutional. The District admits that "there exist no additional policies, rules, staff instructions, guidance or any documents or communications which further constrain the term 'event' or define what

characteristics render a sign to be 'related to a specific event.' There are no limiting or interpretive materials beyond what appears...on the face of the regulation itself." Pl.'s Reply 5; *see also* Def.'s Resps. to Pl.'s First Set of Reqs. 10–11, Mar. 13, 2012, ECF No. 60-3 (Ex. 4 to Pl.'s Mot. Summ. J.) (Requests for Admission Nos. 2 & 3).

If the Court construed the sign regulations to avoid constitutional problems about unfettered discretion, it would have to add or delete text. When engaging in statutory construction, courts are limited to interpreting the language before them; they may not drastically re-write the statute to save it from its drafters. *Stevens*, 130 S. Ct. at 1591–92 ("We will not rewrite a law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain, and sharply diminish Congress's incentive to draft a narrowly tailored law in the first place.") (alterations, citations and quotation marks omitted).

One might avoid the constitutional problem by limiting the Inspectors' "reasonabl[e] determin[ation]" to the definition listed elsewhere in the regulations. That is, an Inspector may reasonably determine that a poster is related to an event only if the poster itself references "an occurrence, happening, activity or series of activities, specific to an identifiable time and place[.]" 24 D.C. CODE MUN. REGS. § 108.13 (2012). This construction replaces subjective judgment with objective criteria. Since it relies on language from the regulations to limit the Inspectors' discretion, it stays closer to the intent of the District. This construction, however, basically makes a significant portion of the text inoperative. If the Inspectors are restricted to deciding whether

posters reference an "event" as described by § 108.13, why tell them they can draw on "all circumstances" to "reasonably determine[]" what an event is? 24 D.C. CODE MUN. REGS. § 108.13 (2012). If "all circumstances" simply means what is explicitly listed in the regulations, then "all circumstances" is basically surplus, inoperative language. This construction would "violate[] the established principle that a court should give effect, if possible, to every clause or word of a statute." *Moskal v. United States*, 498 U.S. 103, 109 (1990) (internal quotation marks omitted). The Court could read the impermissible discretion out of the regulations, but doing so would read a significant part of the text out of the regulations. *Cf. Clark*, 543 U.S. at 384 ("If we were...free to 'interpret' statutes as becoming inoperative when they 'approach constitutional limits,' we would be able to spare ourselves the necessity of ever finding a statute unconstitutional as applied. And the doctrine that statutes should be construed to contain substantive dispositions that do not raise constitutional difficulty would be a thing of the past; no need for such caution, since—whatever the substantive dispositions are—they become inoperative when constitutional limits are 'approached.'")

Furthermore, the sign regulations' use of "or" weighs against minimizing the grant of discretion. An "'event' refers to an occurrence, happening," et cetera, "if referenced on the poster itself *or* reasonably determined from all circumstances by the inspector." 24 D.C. CODE MUN. REGS. § 108.13 (2012) (emphasis added). A basic canon of statutory construction provides that, typically, "and" joins a conjunctive list, and "or" joins a disjunctive list. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 116 (2012). Since an

event is something "referenced on the poster itself" *or* "reasonably determined...by the inspector," 24 D.C. CODE MUN. REGS. § 108.13, this suggests that the administrative discretion is somehow distinct from the rest of the subsection. It suggests that an Inspector, if making a reasonable determination from all circumstances, can decide that a poster relates to an event even if that poster does not clearly list the time and place of the event. But if the Court construed the regulations to limit the Inspectors' discretion to strictly applying what has already been listed, it would effectively turn that "or" into an "and"—in violation of the general understanding of what "or" means in statutes.

There might be another way to avoid the constitutional problem. Instead of effectively nullifying part of the regulations, the Court could interpret "reasonable" and "circumstances" to provide clear, objective criteria to enforcement officers. This would preserve the text—the grant of discretion would still have some independent effect—and offer clear guidance to enforcement officers and potential speakers. However, if the Court did this it would essentially rewrite the statute. The terms "reasonably determined" and "all circumstances" do not give the Court enough to develop sufficiently clear standards. In order to achieve the required level of precision, the Court would need to provide its own criteria. In doing so, the Court would go beyond merely construing the statute, and would engage in lawmaking. This is not permissible, even to save a statute from unconstitutionality. *See, e.g.*, *United States v. Locke*, 471 U.S. 84, 96 (1985) ("We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question."); *Stevens*, 130 S.

Ct. at 1591 ("We will not rewrite a law to conform it to constitutional requirements[.]")

> In response to MASF's discovery requests, the District admitted:
>
> For the purposes of determining the date by which a poster must be removed, the postering regulations allow an enforcement agent to use reasoning and discretion and to consider any and all circumstances believed or known to the inspector in order to "reasonably determine[] from all circumstances" whether a sign is "related to a specific event" and what the date of the referenced specific event is.

Def.'s Resps. to Pl.'s First Set of Reqs. 12 (Request for Admission 10). Combined with the District's admission that there are no other materials construing the definition of "event," *id.* at 10–11 (Reqs. 2 & 3), this suggests that the District may interpret its statute as granting Inspectors administrative discretion above and beyond merely applying the plain text of the regulations. It at least suggests that the District does not place a narrow limiting construction on § 108.13.

The District argues that "[t]he fact that the inspectors here...may have some discretion in enforcing the regulations is immaterial." Def.'s Opp'n to Pl.'s Mot. Summ. J. 9. It is "common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances," *Morales*, 527 U.S. at 62 n.32, and "[a]s always, enforcement requires the exercise of some degree of police enforcement," *Grayned*, 408 U.S. at 114. No statutory definition of "event" can cover every possible scenar-

io, and an overly-verbose definition might serve to confuse more than clarify. Courts recognize that legislatures can never obviate the need for police officers to make reasonable, on-the-beat judgments about whether certain conduct violates the law. However, there is a difference between recognizing that administrative discretion is inevitable and writing that discretion into the law.

The District cites cases outside the First Amendment to argue that the inspectors' discretion is immaterial. Def.'s Opp'n to Pl.'s Mot. Summ. J. 9–10 (citing *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005) (interest at stake asserted under procedural component of Due Process Clause); *Morales*, 527 U.S. at 62 n.32 (vagrancy law does not implicate First Amendment rights, but a liberty interest protected by the Due Process Clause of the Fourteenth Amendment)).[12] Courts apply the vagueness doctrine with special exactitude when First Amendment interests are at stake. *See, e.g.*, *F.C.C. v. Fox*, 132 S. Ct. at 2317 ("When speech is involved, rigorous ad-

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[12] The District also cites *Grayned v. City of Rockford*—a First Amendment case—for the proposition that "enforcement requires the exercise of some degree of police judgment." 408 U.S. at 114. This recognition that some discretion is inevitable is *not* an endorsement of the District's position. Elsewhere in *Grayned*, the Supreme Court emphasized the need to hold laws affecting First Amendment interests to a higher standard: "[W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms;" *id.* at 109 (internal quotation marks omitted) and "Where First Amendment interests are affected, a precise statute evincing a legislative judgment that certain specific conduct be proscribed assures us that the legislature has focused on the First Amendment interests and determined that other governmental policies compel regulation." *Id.* at 109 n.5 (internal quotation marks and citations omitted).

herence to th[e] requirements [of the vagueness doctrine] is necessary to ensure that ambiguity does not chill protected speech."); *Sharkey's*, 265 F. Supp. 2d at 990 ("[T]he Supreme Court has stated that the vagueness doctrine should be applied with special exactitude where a statute might impinge on basic First Amendment freedoms.").

When First Amendment rights are at issue, the government must strive to be clear and precise. It should cabin discretion to ensure that its law is enforced fairly and predictably. It cannot simply allow each officer to independently decide whether certain speech runs afoul of the law. Even if the officers apply the law in good faith—without discriminatory motive or bias—the possibility of inconsistent enforcement can chill speech. The District's broad grant of administrative discretion to its Inspectors raises serious Due Process concerns. The Court cannot find a way to construe the law to avoid this constitutional problem, and must hold that § 108.13 is unconstitutional.

3. MASF is entitled to summary judgment

While MASF puts significant weight on the depositions of Solid Waste Inspectors, and the testimony raised some interesting points, the vagueness issue can be resolved by looking only at the words of the sign regulations. The District states that there is nothing outside of the regulations that interprets or constrains the regulations. Def.'s Resps. to Pl.'s First Set of Reqs. 10–11 (Requests for Admission Nos. 2 & 3). The District has submitted no relevant limiting construction that any court has placed on the sign regulations, nor has this Court found any.

By applying the principles of statutory construction and the vagueness doctrine to the plain text, the Court determines that the sign regulations delegate administrative discretion to individual enforcement officers in violation of the Due Process Clause. This Court, and the Court of Appeals, have previously found that MASF has standing to bring this facial challenge. *ANSWER II*, 589 F.3d at 435–36; *ANSWER III*, 798 F. Supp. 2d at 143. The Court decided the issue on narrower grounds not requiring the consideration of any extrinsic evidence. The question being essentially legal, not factual, MASF has sufficiently shown it is entitled to summary judgment on this issue. *See United States v. Phillip Morris USA, Inc.*, 327 F. Supp. 2d 13, 17 (D.D.C. 2004) ("[S]ummary judgment is appropriate for purely legal questions."); *325–343 56th Street Corp. v. Mobil Oil Corp.*, 906 F. Supp 669, 679 (D.D.C. 1995) ("When the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate. Such issues include matters turning on statutory interpretation.") (citations omitted).

C. MASF's Challenge that the Law is Unconstitutionally Overbroad

MASF also argues that the District's sign regulations are unconstitutionally overbroad. Under traditional overbreadth doctrine, a law touching First Amendment concerns would be invalid if a "substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Washington State Grange*, 552 U.S. at 449 n.6. The doctrine of substantial overbreadth creates an exception to the traditional facial challenge, where the party challenging the law must show that there is "no set of circumstances under which the law

would be valid." *Salerno*, 481 U.S. at 745. Because of concerns about chilling protected speech, such a strong showing is not required in free speech cases. *See Stevens*, 130 S. Ct. at 1587. When determining whether a law is substantially overbroad, a court must "construe the challenged statute," *Williams*, 553 U.S. at 293, and consider "whether the statute, as [the court has] construed it, criminalizes a substantial amount of protected expressive activity," *id.* at 297.

MASF relies primarily on cases that intertwine overbreadth with vagueness, quoting the following language:

> [A] party [may] challenge an ordinance under the overbreadth doctrine in cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker, and in cases where the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected.

Boardley, 615 F.3d at 513 (quoting *Forsyth*, 505 U.S. at 129) (quoted in Pl.'s Mot. Summ. J. 38). While Courts sometimes conflate overbreadth and vagueness, it is important to remember that the doctrines are distinct. A vague law may be overbroad—through its imprecision, it may have a large number of unconstitutional applications. One often accompanies the other, but not always. In this case, the problem is not that the law is overbroad; in order for the District to make the regulations constitutional, it does not necessarily have to narrow their sweep. A law applying the thirty-day restriction to all "event" signs could be constitutional if enforcement officers

and the public had clear guidance on what constituted an "event" sign, and the District properly justified the distinction. A law placing an across-the-board restriction on all signs could be constitutional, even though this change does not necessarily "narrow" the law's sweep.

Therefore, it would be analytically incorrect to say that the sign regulations are "substantially overbroad." Clarifying this does not significantly alter the plaintiff's position—often, MASF called the sign regulations "overbroad" when making an argument about vagueness and administrative discretion. Clarifying this does not change the ultimate result—the sign regulations' event/non-event distinction and definition of event are still unconstitutional.

D. Severability of the District's Sign Regulations

The Court has found that the District's differential treatment of signs relating to an event and signs bearing a general message is an unconstitutional regulation of speech in a designated public forum, and explicitly delegates overly broad discretion to individual decisionmakers. Now the Court must consider whether it can sever the unconstitutional aspects of the law from the remainder of the statute, and if the law is severable, the Court must make clear which provisions it finds unconstitutional.

"Generally speaking, when confronting a constitutional flaw in a statute," courts "try to limit the solution to the problem," severing any "problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 328–329 (2006). "Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question

of legislative intent, but the presumption is in favor of severability." *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984). The "invalid portions of a statute are to be severed '[u]nless it is evident that the [l]egislature would not have enacted those provisions which are within its power, independently of that which is not.'" *I.N.S. v. Chadha*, 462 U.S. 919, 931–32 (1983) (quoting *Buckley*, 424 U.S. at 108). A legislature "could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). "The more relevant inquiry in evaluating severability is whether the statute will function in a manner consistent with the intent" of the legislature after the court severs the unconstitutional provisions. *Id.* at 685. When the legislature "has explicitly provided for severance by including a severability clause in the statute" this heightens the presumption in favor of severability. *Id.* at 686. The "absence of a severability clause, however...does not raise a presumption against severability." *Id.* If "[t]he unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions, the normal rule is that partial, rather than facial, invalidation is the required course." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010) (internal citations and quotation marks omitted).

The first step is to clearly identify the unconstitutional provisions, so the Court can consider what the law would look like without those provisions. The law in question is Section 108 of the D.C. Code of Municipal Regulations, titled "Signs, Posters, and Placards;" it currently has thirteen subsections authorizing and regulating the posting of signs on pub-

lic lampposts. *See* Ex. 3 to Pl.'s Mot. Summ. J.; 24 D.C. CODE MUN. REGS. §§ 108.1–13 (2012). At this stage, MASF only challenges the regulations' distinction between event and non-event posters, and the regulations' definition of event. Pl.'s Mot. Summ. J. 1–3. Sections 108.5 and 108.6 draw the key distinction:

> 108.5: A sign, advertisement, or poster shall be affixed for no more than one hundred eighty (180) days.
>
> 108.6: A sign, advertisement, or poster related to a specific event shall be removed no later than thirty (30) days following the event to which it is related. This subsection is not intended to extend the durational restriction in subsection 108.5.

24 D.C. CODE MUN. REGS. §§ 108.5–6 (2012). Furthermore, the regulations define event as:

> 108.13: For purposes of this section, the term 'event' refers to an occurrence, happening, activity or series of activities, specific to an identifiable time and place, if referenced on the poster itself or reasonably determined from all circumstances by the inspector.

Id. at 108.13. These provisions are at issue.

The Court finds that subsections 108.6 and 108.13 are severable from the rest of the sign regulations. Since the District's lampposts are a designated—not traditional—public forum, declaring the entire law void might forbid the posting of *any* sign on

the District's lampposts.[13] In the alternative, voiding the entire law may open the lampposts to all comers, without any of the reasonable protections and limitations afforded by Section 108. The Court does not believe that the District intended—in the absence of the event-based restrictions—to either completely open or completely close the District's lampposts as a forum for speech. The sign regulations might still "function in a manner consistent with the intent" of the District without subsections 108.6 and 108.13. *Brock*, 480 U.S. at 685. Certainly, the District might prefer to subject event signs to the shorter periods provided by § 108.6, but the District could still be protected by the generally-applicable limit imposed by § 108.5.[14] The law is not made nonsensical or inoperative by severing subsections 108.6 and 108.13, and does not result in a law that the Court feels the District could not have intended.

The vast majority of the regulations' remaining 11 subsections make complete sense after excising subsections 108.6 and 108.13. The regulations' pro-

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[13] One could argue that the sign regulations are what designate the lampposts as a public forum in the first place, and in the absence of a law authorizing limited political speech, no one would have a free-standing "right" to post there. 24 D.C. CODE MUN. REGS. §§ 108.4 (2012) ("Any sign, advertisement, or poster that does not relate to the sale of goods or service may be affixed on public lampposts or appurtenances of a lamppost, subject to the restrictions set forth in this section."); *cf. Taxpayers for Vincent*, 466 U.S. at 815 (utility poles are not a traditional public forum and government may completely forbid the posting of signs thereupon).

[14] MASF does not challenge the across-the-board durational limit imposed by § 108.5, but challenges the differential treatment between signs that fall under § 108.5 and event signs under § 108.6.

hibition of posting on trees (§ 108.2), ban on indecent signs (§ 108.3), regulation of adhesives (§ 108.9), et cetera, do not depend on the regulations' event/non-event distinction. Only one subsection need be modified after the Court severs subsections 108.6 and 108.13 from the law:

> 108.11: Within twenty-four hours of posting each sign, advertisement, or poster, two (2) copies of the material shall be filed with an agent of the District of Columbia so designated by the Mayor. The filing shall include the name, address, and telephone number of the originator of the sign, advertisement, or poster, *and if the sign is for an event, the date of the event.*

24 D.C. CODE MUN. REGS. §§ 108.11 (2012) (emphasis added).[15] The District added the italicized text to subsection 108.11 after the Court's July 2011 motion to dismiss ruling. D.C. MUN. REGS. tit. 58, § 8410 (Sept. 30, 2011). This language depends on the unconstitutional distinction between event and non-event posters, and the Court believes that the District would not have intended to add it if subsections 108.6 and 108.13 were not part of the law; this language should be severed from the rest of the law.

It is possible to sever the sign regulations' unconstitutional provisions without making the rest of the law inoperable or unreasonable. Having found the sign regulations' event/non-event distinction and

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[15] Neither the District or MASF paid much attention to this provision. The District did not argue that it relies on the "event dates" designated in the filings to determine when a poster must come down.

definition of event unconstitutional, the Court holds subsections 108.6 and 108.13 unconstitutional but severable from the rest of Section 108. Furthermore, the portion of subsection 108.11 reading "and if the sign is for an event, the date of the event," is solely related to the unconstitutional distinction drawn by subsection 108.6, but severable from the rest of Section 108. Therefore subsections 108.1–5, 108.7–10, and 108.12 (inclusive) shall remain in effect. Subsection 108.11 shall remain in effect after the language referencing "events" is excised from the provision.

IV. CONCLUSION

When the District first passed its sign regulations in 1980, it expressed a clear preference for candidates seeking political office. 24 D.C. CODE MUN. REGS. § 108 (1980). After ANSWER—and later MASF—challenged the sign regulations, the District took steps to fix the problems in its law. Unfortunately, after five years of litigation and four amendments to the sign regulations, the law still fails First Amendment and Due Process scrutiny.

The Court lauds the District for opening its lampposts to political messages, when it might have never designated them a public forum in the first place. The Court commends the District's Department of Transportation for repeatedly amending the sign regulations to bring the law closer to constitutionality.

But once the District opens up public property to political speech, it has a responsibility to be fair, even, and precise in its regulations. If it chooses to make distinctions between different types of speech—even if its distinctions might appear benign—it must justify why it treats different kinds of speech differently, and explain how this distinction

furthers its significant interests. When treading on First Amendment interests, it should strive to limit administrative discretion, not codify and endorse it. In order to avoid chilling protected speech, the regulations must be clear, and provide objective standards for enforcement.

The District has a considerable interest in regulating how signs are posted on its lampposts. Speakers do not have a right to post signs wherever and however they want, but can be restrained by reasonable time, place and manner restrictions. Not every law that treats different types of speech differently is an impermissible content-based limitation. When a law is narrowly tailored to serve significant content-neutral interests, and leaves open ample alternative channels of communication, it can pass intermediate scrutiny.

MASF has a strong interest in knowing that the District will implement the sign regulations in a predictable, consistent, and objective manner. The fear of inconsistent, uneven enforcement can have a serious chilling effect on speech. The nature of speech at issue increases the chance of inconsistent applications. If MASF posts signs throughout the District, several different Solid Waste Inspectors will see the signs. As the depositions indicate, different Inspectors may come to different conclusions about the same signs. Furthermore, MASF has an interest in knowing that, when the District decides to place restrictions on protected speech, it has seriously considered those restrictions. Requiring the District to show that its law is narrowly tailored forces the government to consider whether it can achieve its goals by a less restrictive means. It forces the District to consider the effect of its speech regulations, and look

more closely at whether those regulations are necessary.

The Court rests its decision on narrower grounds than urged by MASF. The Court must exercise restraint and not unnecessarily decide extraneous matters. At this point, the Court does not decide whether the District could justify its event/non-event distinction if it properly explained how its law is narrowly tailored to promote litter control and esthetics. The Court does not decide whether the regulations' definition of "event"—if it did not explicitly delegate administrative discretion to inspectors—would be sufficient.

The Court hopes that it has provided the District some guidance going forward. The District may keep the law as is, with one across-the-board durational limit applying to all signs. It may reenact the event/non-event distinction—and an amended definition of event—and be prepared to explain the fit between the distinction and the law's purposes. But the District may not regulate protected speech in a designated public forum without being able to show that the law is narrowly tailored, and it may not allow officers to exercise broad individual judgment when enforcing the law.

For the reasons explained in this Memorandum Opinion, the Court will grant in part the plaintiff's Motion for Summary Judgment, ECF No. 60, and deny in toto defendant's cross-Motion for Summary Judgment, ECF No. 59.

A separate Order consistent with this Memorandum Opinion shall issue this date.

Signed, Royce C. Lamberth, Chief Judge, November 29, 2012.

APPENDIX D

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 12-7139
September Term, 2016
1:07-cv-01495-RCL
Filed On: March 24, 2017
Act Now to Stop War and End Racism Coalition and Muslim American Society Freedom Foundation,
Appellees
v.
District of Columbia,
Appellant

Consolidated with 12-7140

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges; Sentelle, Senior Circuit Judge

ORDER

Upon consideration of appellees' petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote, it is **ORDERED** that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: */s/ Ken R. Meadows*
Ken R. Meadows
Deputy Clerk