UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ERIC S. CLARK, Plaintiff - Appellant, v. CITY OF WILLIAMSBURG, KANSAS, Defendant - Appellee.	No. 19-3237 (D.C. No. 2:17-CV-02002-HLT) (D. Kan.)

ORDER AND JUDGMENT*

(Filed Jan. 14, 2021)

Before **TYMKOVICH**, Chief Judge, **BRISCOE**, and **BACHARACH**, Circuit Judges.

Plaintiff Eric Clark, a resident of the City of Williamsburg, Kansas (the City), filed this action claiming that the City's attempted enforcement of its sign ordinance against him violated his First Amendment rights, and that the City's code enforcement officer violated his Fourth Amendment rights by walking onto

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

his property and attempting to speak with him. The district court granted partial summary judgment in favor of Clark on his First Amendment claim, but granted summary judgment in favor of the City on Clark's Fourth Amendment claim. The First Amendment claim proceeded to a jury trial on the issue of damages, where the jury awarded Clark one dollar in nominal damages. Clark now appeals the district court's summary judgment rulings in favor of the City on his First and Fourth Amendment claims. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm the judgment of the district court.

I

Clark lives in a house located in a sparsely populated area within the northern limits of the City. The front of the house faces the east. A gravel driveway runs from the back of the house, where there is a small parking lot type of area, around the south of the house and eastward to a road (K-273 Highway, also known as Dane Avenue) that runs north and south along the eastern boundary of Clark's property.

Clark purchased the property on July 29, 2003. It is undisputed that in the early 1970s the prior owners deeded a total of .49 acres of the property, located on the eastern edge directly adjacent to the existing public road, to the State Highway Commission of Kansas for highway purposes. It is disputed whether the City now has rights in that .49 acres of the property; the City maintains that it does, while Clark denies this.

On February 13, 2015, Tony De La Torre, a code enforcement officer employed part-time by the City, conducted an inspection of what he believed to be the City's right-of-way in front of Clark's residence. Ten days later, on February 23, 2015, De La Torre sent Clark a written "NOTICE OF VIOLATION" (hereinafter Notice of Violation). ROA at 581. The Notice of Violation stated that De La Torre, during his inspection, "found that there [we]re three large barrels, several signs, and other affixed objects . . . located with [sic] the City's eighty foot easement" that "w[ould] need to be removed." *Id.* The Notice of Violation further stated that "[u]nder the City[' s] . . . Ordinance, political signs shall not be placed on or otherwise affixed to any public building or sign, right of way, sidewalks, utility pole, street lamp post, tree, or other vegetative matter, Public Park, or other public property." *Id.* The Notice of Violation stated that De La Torre would "be conducting a re-inspection of the right of way on March 9, 2015," and it advised that "[i]f the violations [we]re not corrected a citation m[ight] be issued and objects removed from the City easement." *Id.* Lastly, the Notice of Violation stated that if Clark "ha[d] any questions" or believed he "received th[e] letter in error," he should "contact City Hall immediately by phone . . . or actions w[ould] continue toward resolution." *Id.*

On February 25, 2015, Clark sent a letter to De La Torre acknowledging the Notice of Violation. *Id.* at 583. The letter noted, in part, that the Notice of Violation "failed to identify the specific lawful authority for alleging any violation." *Id.* The letter further stated that,

"[t]o [Clark's] knowledge, [he was] not in violation," and it in turn asked De La Torre to "please provide the specific law/code/ordinance/etc" that he "believe[d] [wa]s being violated." *Id.* The letter also stated that if De La Torre was "unaware of liability under 42 U.S.C. 1983, and costs (§ 1988)," he should "become familiar with [his] exposure to personal liability as well as liability to the City." *Id.*

On March 16, 2015, De La Torre returned to Clark's property with the intent of speaking to Clark about, and hopefully resolving, the alleged violations. *Id.* at 464, ¶ 26; *Id.* at 530 (De La Torre deposition). De La Torre parked his vehicle on the City's right-of-way near the road and began walking up the gravel driveway towards Clark's house. *Id.* at 464, ¶ 26. On that day, there were no "No Trespass" signs posted on the property anywhere between the road and the house. *Id.* at 462, ¶ 15. There was no sidewalk or worn path leading to the front porch and door of the house. The front porch was covered and Clark had placed a tarp over the front porch to partially enclose it. There was a chair and an old mattress near the entrance to the front porch, and a visitor would have had to squeeze by the chair and the mattress to enter the front porch area. According to De La Torre, "[i]t was very evident that there was no way that [he] could get to the front porch because of the objects that were on the porch." *Id.* at 530. Because of that, and because he also "heard someone in the back" of Clark's house, he proceeded to walk up the gravel driveway and toward the back of the

house, rather than attempting to approach the front porch and front door of the house. *Id.*

At the back of Clark's house, Clark had hung sheets on ropes to form a ten-foot square canopy with fabric walls that enclosed the back door to the house. De La Torre walked to within ten feet or less of this enclosure and called out for Clark. Clark exited the rear door of his house, walked through and exited the square fabric canopy, and began yelling at De La Torre to get off of his property.[1] According to De La Torre, Clark then turned and went inside his house. De La Torre returned to his vehicle and left. According to Clark, De La Torre did not leave until Clark threatened to call the sheriff. De La Torre was physically present on Clark's property for approximately three to six minutes (De La Torre estimated it was three to four minutes, while Clark estimated it was five to six minutes).

On March 18, 2015, Clark sent a lengthy letter to the City. The letter acknowledged that Clark's property "border[ed] a right of way," but asserted that Clark "ha[d] the right to place anything anywhere on [his] private property that [wa]s subject to right of way usage so long as it d[id] not unduly interfere with the purposes of the right of way." *Id.* at 592. The letter warned the City that it was violating, or threatening

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[1] According to Clark, he asked De La Torre to leave three or four times, and approximately 10 to 15 seconds expired between each request.

to violate, Clark's Constitutional rights, and it advised that Clark might file suit against the City.

Following receipt of Clark's letter, the City's Mayor met with the City Attorney, who recommended that the City not continue its investigation of potential ordinance violations by Clark. The Mayor and the City Council subsequently met and purportedly decided not to pursue the Notice of Violation any further. The Notice of Violation, however, has never been formally withdrawn by the City.

On July 10, 2015, Clark attended a session of the City's Municipal Court. On the docket that day were two status hearings for other defendants; Clark did not have a matter on the docket. Clark, however, proceeded to "disrupt[] the proceedings and would not permit the judge to open court." *City of Williamsburg v. Clark*, No. 115,921, 2016 WL 5171918 at *1 (Kan. Ct. App. Sept. 16, 2016). During the court session, Clark (a) refused to stop videotaping the proceedings, despite being told to stop by the court, (b) questioned the Municipal Court judge's authority to conduct the proceedings, (c) refused to identify himself by name, and (d) refused to remain silent. The judge, in response, found Clark in direct contempt of court and sentenced him to two hours in jail. ROA at 132, ¶ 31. Clark unsuccessfully appealed that matter to the Kansas Court of Appeals. *City of Williamsburg*, 2016 WL 5171918 at *1, 6.

On July 22, 2015, the City suspended the Code Enforcement Officer position due to budget constraints. De La Torre left the City's employment as a Code

Enforcement Officer and has not been replaced. Since approximately that time, the City has also been without a municipal court judge, and no judge has held a municipal judicial proceeding in the City since May 2016.

On May 20, 2019 (approximately 11 days after the district court in this case determined that one subsection of the challenged sign ordinance was unconstitutional), the City Council passed a motion imposing a moratorium on enforcement of any provision of the City's sign regulations pending "further study." ROA at 1141.

II

On January 23, 2017, Clark, appearing pro se, initiated this action by filing a complaint pursuant to 42 U.S.C. § 1983 against the City. ECF No. 1. The complaint alleged, in pertinent part, that "[t]he City implemented policies which were the moving force behind the deprivation of the constitutionally protected rights of Clark, including the First and Fourth Amendments' rights to freedom of expression and right to be free from unreasonable searches." *Id.* at 11. Count I alleged a violation of Clark's First Amendment rights. Count II alleged a violation of Clark's Fourth Amendment rights. The complaint asked for relief in the form of damages and declaratory and injunctive relief, including enjoining the City from enforcing its sign

regulations and from entering any part of Clark's property without an invitation from Clark in writing.[2]

On June 1, 2018, Clark filed a motion for partial summary judgment seeking a "liability determination" as to his claims. ROA at 146. Clark asserted in his brief in support that "[b]ut for the City's [sign]" ordinance, he "would have placed political signs . . . in the unpaved portion of the right of way" on his property "nearer than 20 feet from the centerline of the road and left them in place . . . from July 4, 2016 to December 31, 2016 and . . . would have placed political signs outside of any right-of-way, but within an area of his private property which the City enforces its right of way restrictions . . . and left them in place . . . from July 4, 2015 to December 31, 2016." *Id.* at 150, ¶ 10. Clark further asserted that his "property is 'in a residential one district' and" that, "but for the City's regulation (Article 8, § 4(A)(6))," he "would have placed newly personalized political signs outside of any right-of-way and in excess of ten(10) [sic] square feet." *Id.*, ¶ 12.

With respect to his Fourth Amendment claim, Clark argued that "[t]he moving force of actions which violated [his] . . . right to be free from unreasonable searches . . . was the City's Zoning Regulations which direct[ed] such enforcement action. . . ." *Id.* at 182. Clark also argued that "the City's lack of guidance

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[2] On February 14, 2018, Clark filed an amended complaint that was substantially similar to the original complaint. Both the original and amended complaints included claims for inverse condemnation or an unconstitutional taking of Clark's property by the City. Those claims are not at issue in this appeal.

(failure to train) to the City's Code Enforcement Officer" resulted in a violation of his Fourth Amendment rights. *Id.* According to Clark, De La Torre violated his Fourth Amendment rights by failing to proceed to the front door of Clark's house and, instead, "explor[ing] another path that lead[]" towards the back of Clark's house and "hollering or yelling in effort to make contact" with Clark. *Id.* at 185.

Lastly, with respect to his First Amendment claim, Clark argued, in pertinent part, that the City's sign ordinance was "content based" and infringed on his First Amendment rights. *Id.* at 194. In support, he argued that the ordinance "prohibit[ed], through a chilling effect," his "ability . . . to express himself freely on certain topics at certain times, in certain manners, and in certain places." *Id.* at 200.

On August 9, 2018, the City filed its own motion for summary judgment. With respect to Clark's First Amendment claim, the City argued that Clark lacked standing to challenge the City's sign ordinance. In support, the City noted that most of the provisions of that ordinance "ha[d] never been applied nor even threatened to be applied to him or his property," and that the one provision that was implicitly relied on in the Notice of Violation (which addressed signs located on the City's rights-of-way) was never actually enforced against Clark. *Id.* at 477. The City also argued that "[e]ven if Clark had standing to challenge the" subsection of the ordinance that "restrict[ed] signs on public property, that [sub]section d[id] not transgress the First Amendment" because it was content neutral. *Id.*

at 481. Lastly, the City argued that the court should sever any offending portions of the ordinance.

As for Clark's Fourth Amendment claim, the City argued that De La Torre's brief entry onto Clark's property on March 16, 2015, did not constitute an illegal search prohibited by the Fourth Amendment. More specifically, the City argued that "[b]ecause De La Torre never left the driveway, never entered any 'curtilage' of Clark's residence and never performed any search subject to Fourth Amendment restrictions, his three to four-minute entry onto Clark's property in an effort to talk with [Clark] did not transgress the Fourth Amendment." *Id.* at 493. The City also argued that, even if De La Torre had violated Clark's Fourth Amendment rights, he was not acting pursuant to any City policy and, thus, the City was not responsible for his actions.

On May 9, 2019, the district court issued a memorandum and order that granted in part and denied in part both parties' motions. The district court granted partial summary judgment in favor of Clark on his First Amendment claim "that Article 8, § 4.A.(6)" of the City's sign ordinance "[wa]s an unconstitutional content-based restriction." *Id.* at 1081. The district court also concluded that Clark lacked standing to challenge any other provisions of the City's sign ordinance, and thus granted summary judgment in favor of the City as to that portion of Clark's First Amendment claim. *Id.* at 1081-82. As to Clark's Fourth Amendment claim, the district court granted summary judgment in favor

of the City on the grounds that "there was no search of Clark's property." *Id.* at 1-2.

On May 17, 2019, May 20, 2019, and May 21, 2019, Clark filed motions to amend the judgment. The district court denied those motions on June 19, 2019.

On July 17, 2019, the case proceeded to a jury trial on the issue of damages relating to Clark's First Amendment claim. At the conclusion of the evidence, the jury found that Clark did not suffer compensatory damages as a result of the Notice of Violation, and it awarded him $1 in nominal damages.

Judgment was entered in the case on July 18, 2019. Clark filed a motion to amend the judgment and a motion for new trial, both of which the district court denied. Clark then filed a timely notice of appeal.

III

Clark asserts six issues in his appeal. The first four of those issues pertain to his First Amendment claim. The last two of those issues pertain to his Fourth Amendment claim. For the reasons that follow, we reject all six issues and affirm the judgment of the district court.

The First Amendment claim

We begin by addressing the four issues that pertain to the district court's resolution of Clark's First Amendment claim.

a) Clark's standing to challenge regulatory provisions

In the district court, Clark sought to challenge all provisions of the City's sign ordinance. The City, in its motion for summary judgment, argued in pertinent part that Clark lacked standing to challenge any part of the City's sign ordinance. The district court granted in part and denied in part the City's motion and concluded that Clark lacked standing to challenge anything other than the subsection of the ordinance that was effectively cited in the Notice of Violation. In Issue IV of his opening appellate brief, Clark challenges the district court's grant of partial summary judgment in favor of the City on the issue of standing.

"We review a district court's grant of summary judgment de novo, applying the same legal standard as the district court." *Powell v. Bd. of Cty. Comm'rs of Muskogee Cty.*, 978 F.3d 1165, 1170 (10th Cir. 2020) (quotation marks omitted). Under that legal standard, "[t]he 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).

To establish standing, a plaintiff such as Clark must show: (1) he has suffered an "injury in fact" that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable

decision. *See Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). At the summary judgment stage, a plaintiff, in order to establish standing, must "set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citations and quotations omitted).

The City's sign ordinance is found in Article 8 of the City's Zoning Regulations. Generally speaking, the ordinance classifies signs into functional and structural types, establishes general standards for the size and placement of signs, establishes exemptions from the regulations, sets forth design, construction and maintenance requirements, outlines the types and sizes of signs permitted in each type of zoning area, and establishes procedures for the removal of unsafe or illegal signs.

Section 3 of Article 8 establishes the "General Standards" for signs that are erected within the City's limits. ROA at 80-82. Section 4 of Article 8 sets forth specific "Exemptions" from the "General Standards" outlined in Section 3. *Id.* at 82-83. Of relevance here is § 4.A.(6), which states, in pertinent part, that "[t]he following signs shall be exempt from the requirements of this article":

> Political signs, not exceeding a total of 20 square feet in area on a lot of record zoned for non-residential purposes, or which is vacant and unplatted, regardless of the zoning district classification; and not exceeding a total

> of ten (10) square feet on a lot of record in a residential zone district. Political signs shall be displayed for no more than a four-week period preceding and a one-week period following an election. Political signs shall not be placed on or otherwise affixed to any public building or sign, right-of-way, sidewalk, utility pole, street lamp post, tree or other vegetative matter, or any public park or other public property.
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> The City recognizes that the expression of political speech is an important and constitutionally protected right; that political signs have certain characteristics that distinguish them from many of the other types of signs permitted and regulated by the City, including the fact that these signs generally do not meet the regular structural design of permanent signs, given their temporary nature; that political signs therefore present a potential hazard to persons and property; and that the City must impose reasonable time limits on the display of political signs for these reasons.

Id.

The district court concluded that Clark lacked standing to challenge any provision of Article 8, except for § 4.A.(6). It was that subsection, the district court concluded, that De La Torre implicitly referenced in the Notice of Violation that he issued to Clark. Although Clark argues on appeal that the entirety of the City's sign ordinance should have been addressed and declared unconstitutional, he points to no evidence

that could establish that he was personally impacted, let alone injured, by the application of any of the other provisions of the ordinance. More specifically, there is no evidence that any City officer found that the signs posted on Clark's property were in violation of any of the other provisions of the City's sign ordinance, or in turn that any City officer ever pursued removal of such signs by issuing written notice to Clark pursuant to the procedures outlined in Article 8, § 10 of the City's sign ordinance.[3] *See Winsness v. Yocom*, 433 F.3d 727, 732 (10th Cir. 2006) ("The mere presence on the statute books of an unconstitutional statute, in the absence of enforcement or credible threat of enforcement, does not entitle anyone to sue, even if they allege an inhibiting effect on constitutionally protected conduct prohibited by the statute."). Further, it is undisputed that the City decided not to pursue the Notice of Violation that was issued by De La Torre.

In light of this undisputed evidence, we agree with the district court that Clark lacks standing to challenge any provision other than Article 8, § 4.A.(6).[4]

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[3] Clark, in his opening brief, argues that some of the other provisions of Article 8 would apply to him and would prevent his political signs if, as the district court directed, Article 8, § 4.A.(6) is severed from Article 8. Aplt. Br. at 19. Those arguments, however, are entirely speculative and do not reflect what actually happened in this case.

[4] We also note two other relevant facts: there is no compliance officer currently employed by the City, and the City has "pass[ed] a moratorium on enforcement of any part of the sign code pending further analysis of the constitutionality of the code." Aple. Br. at 13. These facts appear to render moot Clark's

b) The district court's severance of Article 8, § 4.A.(6)

The district court granted partial summary judgment in favor of Clark on his First Amendment claim, concluding that Article 8, § 4.A.(6) of the City's sign ordinance "[wa]s a content-based regulation that d[id] not pass strict scrutiny." ROA at 1091. The district court in turn severed Article 8, § 4.A.(6) "from the City's sign ordinance." *Id.* at 1100.

In Issues I and II of his opening appellate brief, Clark argues that the district court erred in "conclud[ing] that severing one exemption," i.e., Article 8, § 4.A.(6), "would cure the unconstitutionality of the entire ordinance." Aplt. Br. at 4. In support, Clark argues that "the District Court appears to have failed to apprehend that within the severed exemption was a primary authorizing provision for allowing political signs on CLARK's residential property—apart from also enumerating a 'right of way' restriction for political signs (which the District Court appeared to view as the sole constitutionality problem)." *Id.* (emphasis omitted). Clark argues that "[t]he District Court's severance of that authorizing provision changed the controlling law(ordinance) [sic] such that previously permitted political signs were no longer authorized on CLARK's property (even outside of the right of way) leaving the regulation bare of authorization for any

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challenge to any portion of the City's sign ordinance other than Article 8, § 4.A.(6). *See Jordan v. Sosa*, 654 F.3d 1012, 1023-24 (10th Cir. 2011) (discussing constitutional and prudential mootness).

political signs except for one token expression of '[f]lags or emblems of a government or of a political, civil, philanthropic, educational or religious organization'." *Id.* Lastly, Clark argues that "[b]ecause the First Amendment issue for trial was framed based solely upon harm from the single severed provision, rather than [the City's sign] ordinance being found to be more broadly unconstitutional, . . . there is a reasonable probability that, but for the improper framing of the issue for trial, the result of the proceeding would have been different." *Id.* at 5.

Because Clark lacks standing to challenge any part of the City's sign ordinance other than Article 8, § 4.A.(6), we conclude it is unnecessary for us to address these arguments. In the event that the City lifts the moratorium it has imposed on enforcement of its regulations and in turn attempts to enforce other portions of its sign ordinance against Clark, Clark would then have the opportunity to file a new lawsuit challenging the City's actions.

c) Framing of the First Amendment issue for trial

In Issue III of his opening brief, Clark argues that the district court "erred by improperly framing the First Amendment issue for trial." Aplt. Br. at 15. Clark asserts that "[t]his argument is predicated upon an errant interpretation (See ISSUE I) and improper severing (See ISSUE II)." *Id.* According to Clark, "[t]he District Court's ruling necessarily framed the issue for

trial as being limited to *only* one provision of the" City's sign ordinance. *Id.* (emphasis in original). He argues that "[i]f . . . Article 8 were found to be more broadly unconstitutional instead, then [he] could have shown additional evidence of damages at trial." *Id.* at 15-16. Clark asserts that "[w]ith a different understanding (e.g., that the entirety of Article 8 was unconstitutional) going into trial, [he] could have shown further injury through evincing what [De La Torre's] belief was when he issued the notice of violation to [Clark] about 'other affixed objects', e.g., threatened removal of a cross and even removal of a mailbox."[5] *Id.* at 16 (citation omitted).

For the reasons already discussed, we conclude that the district court did not err in limiting the damage issues at trial to those pertaining to Article 8, § 4.A.(6). Simply put, Clark lacks standing to challenge any other provision of the City's sign ordinance.

The Fourth Amendment claim

We now turn to the two challenges that Clark asserts in his appeal to the district court's resolution of his Fourth Amendment claim. In Issue V of his opening appellate brief, Clark argues that the district court "erred by granting summary judgment to the CITY on the Fourth Amendment claim—either by improperly drawing inferences in favor of the movant rather than

[5] Clark concedes that these objects were not mentioned in the Notice of Violation, but he asserts that De La Torre mentioned those items during his deposition in this matter. Aplt. Br. at 17.

the nonmovant and/or by improperly finding a fact not actually asserted by any party." Aplt. Br. at 27 (capitalization in original). In Issue VI, Clark argues that the district court "erred in its determination of law concerning the Fourth Amendment as applied to the undisputed evidence" and he concedes that "[t]he issue is somewhat derivative of Issue V. *Id.* at 37. Thus, in sum, Clark is challenging the district court's grant of summary judgment in favor of the City with respect to Clark's Fourth Amendment claim.

We begin our analysis of Clark's arguments by briefly reviewing the Supreme Court case on which Clark has consistently relied in support of his Fourth Amendment claim, *Florida v. Jardines*, 569 U.S. 1 (2013). In *Jardines*, the Supreme Court "consider[ed] whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a "search" within the meaning of the Fourth Amendment." *Id.* at 3. At the outset of its opinion, the Court noted that "[t]he Fourth Amendment provides in relevant part that the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.'" *Id.* at 5. In other words, the Court noted, the Fourth Amendment "establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When the Government obtains information by physically intruding' on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has "undoubtedly occurred." *Id.* (quotations omitted). The Court then noted that

"when it comes to the Fourth Amendment, the home is first among equals," and that "the area immediately surrounding and associated with the home," i.e., the home's curtilage, is "part of the home itself for Fourth Amendment purposes." *Id.* at 6 (quotations omitted). The curtilage, the Court noted, "is intimately linked to the home, both physically and psychologically, and is where "privacy expectations are most heightened." *Id.* at 7 (quotations omitted).

Because "the officers' investigation" in *Jardines* "took place in a constitutionally protected area," i.e., the front porch of the home, the Court "turn[ed] to the question of whether [the investigation] was accomplished through an unlicensed physical intrusion." *Id.* Addressing that question, the Court noted that "[w]hile law enforcement officers need not shield their eyes when passing by the home on public thoroughfares, an officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares and enters the Fourth Amendment's protected areas." *Id.* (quotations and citation omitted). The Court in turn noted that it has recognized an "implicit license" that "typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* at 8. Thus, the Court held, "a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do." *Id.* "But," the Court also held, "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating

evidence is something else." *Id.* at 9. The Court explained:

> There is no customary invitation to do that. An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker. To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police. The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose. * * * Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search.

Id. (emphasis in original) (footnote omitted).

Having outlined the holding in *Jardines*, we next turn to the district court's analysis and rejection of Clark's Fourth Amendment claim. The district court recognized at the outset that Clark was "alleg[ing] that De La Torre performed an unlawful search of his property on March 16, 2015," and that "Clark attribute[d] this to the City's zoning ordinance or else the City's failure to train its code enforcement officers, either of which he contend[ed] ma[de] the City liable for De La Torre's actions." ROA at 1103. The district court noted, however, that the threshold question was whether De La Torre's actions were unconstitutional in the first place. *Id.* As to that issue, the district court noted that

Clark's theory was "that De La Torre entered his property seeking information about whether Clark would remove the signs and did so in a manner that 'exceeded the implied license of *Florida v. Jardines*.'" *Id.* (quoting ECF No. 79 at 34–35). More specifically, the district court noted that "Clark t[ook] issue with the fact that De La Torre did not knock on his front door but instead walked down the driveway after hearing noises toward the back" of the house. *Id.*

To address Clark's theory, the district court began by outlining the applicable law, with particular emphasis on *Jardines*. *Jardines*, the district court noted, "explained that an implicit license exists that allows visitors to 'approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave,'" and that "[t]he same license is extended to law enforcement officers." *Id.* at 1104 (quoting *Jardines*, 569 U.S. at 8). Clark, the district court in turn noted, was arguing "that *Jardines* drew an explicit line about what is allowed for a knock-and-talk" and that, in particular, it authorized entry only by the front path of a home. *Id.* The district court rejected Clark's interpretation of *Jardines*: "It [*Jardines*] did not hold that was the only permissible way to approach a house." *Id.* (emphasis in original). Rather, the district court stated, the facts of *Jardines* involved an officer "bringing a drug-sniffing dog onto the front porch [of a home] to do an investigation." *Id.* at 1104–05. The district court also noted that in *United States v. Shuck*, 713 F.3d 563 (10th Cir. 2013), we held that officers did not violate the defendant's Fourth

Amendment rights by approaching the back door of his trailer and conducting a knock-and-talk. *Id.* at 1105. The district court emphasized that in reaching our conclusion, we concluded that the evidence established that approaching the back door of the trailer was the normal route of access for visitors. *Id.*

The district court concluded that "[t]he facts in *Shuck* [we]re similar to the facts in" Clark's case. *Id.* at 1106. The district court stated that it was "undisputed that there was no path to the front porch" of Clark's home "from the driveway, the steps were partially blocked with vegetation, and items on the porch at least partially blocked the front door." *Id.* The district court also stated that Clark admitted "that he had 'trained' at least some of his visitors to come to the back entrance, and that he hoped the state of the front entrance would deter visitors." *Id.* "These undisputed facts," the district court concluded, "coupled with De La Torre hearing someone towards the back of the house, made his decision to walk that way in an attempt to contact Clark entirely reasonable," and that "no reasonable jury could find otherwise." *Id.* The district court also concluded that "[t]he fact that the front door was partially visible, as Clark contend[ed], d[id] not change the fact that De La Torre reasonably assumed that the front door was not the primary entrance." *Id.* In addition, the district court concluded De La Torre did not exceed the scope of the license because "[w]hen Clark asked him to leave, he did so," and that "[i]t [wa]s undisputed that De La Torre was at the property no more than a few minutes and left within a minute of

being asked to leave." *Id.* Ultimately, the district court concluded it "d[id] not need to determine whether De La Torre entered the curtilage of Clark's home, because even if he did, his actions in trying to find Clark on the property were taken in accordance with the implied license to approach the house," and that "[n]o reasonable jury could conclude there was a search of Clark's property under these facts."[6] *Id.*

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[6] The dissent ignores this latter part of the district court's ruling and suggests, erroneously, that the question of whether a search occurred is not properly before us on appeal. In fact, the issue of whether a search occurred for purposes of the Fourth Amendment was raised by the parties in their summary judgment pleadings and ultimately addressed by the district court in its memorandum and order ruling on the summary judgment motions.

Indeed, Clark himself squarely presented the issue in his own motion for partial summary judgment. In that motion, Clark sought a "[l]iability determination for Fourth Amendment violation," and alleged in support that there was an "unconstitutional search." R. at 159-60 (capitalization omitted). In support, Clark alleged that De La Torre "enter[ed] upon the curtilage of Clark's property seeking information about compliance without a warrant and without any applicable exception to the Fourth Amendment warrant requirement." *Id.* at 181. He further argued that "[w]hen the government engages in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion constitutes a violation of the Fourth Amendment." *Id.* Clark argued that because De La Torre "had a purpose of seeking information," and "for reason of hearing noises, skip[ped] any attempt to knock on the front door, and explore[d] another path that lead[] towards the noises heard and beg[an] hollering or yelling in an effort to make contact in order to gather the information sought, his actions became an unreasonable search of the curtilage of Clark's home." *Id.* at 185.

In Issue V of his appellate brief, Clark argues that the district court erred in a number of respects in granting summary judgment in favor of the City on his Fourth Amendment claim. We need not address each of those arguments in detail, however, because even if we were to assume that the district court erred in the respects asserted by Clark, none of those errors undermine the district court's ultimate conclusion that the City was entitled to summary judgment on Clark's Fourth Amendment claim. As the Supreme Court in *Jardines* noted, the Fourth Amendment prohibits, in pertinent part, unreasonable searches and thus

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The City, in its response to Clark's motion for partial summary judgment and in its own motion for summary judgment, argued that De La Torre's entry onto Clark's property did not constitute an illegal search prohibited by the Fourth Amendment. *Id.* at 686. More specifically, the City argued that "De La Torre performed no search but only sought to contact Clark by walking down his driveway to the rear of Clark's residence." *Id.* The City also argued that "[e]ven if the brief presence of De La Torre on Clark's property is considered under Clark's version of the incident, no Fourth Amendment violation occurred." *Id.* at 691.

On May 9, 2019, the district court issued a memorandum and order ruling on both Clark's motion for partial summary judgment and the City's motion for summary judgment. The district court denied Clark's motion for partial summary judgment, and granted the City's motion for summary judgment, "on Clark's Fourth Amendment claim (because there was no search of Clark's property)." *Id.* at 1081-82.

As a result, we conclude that the question of whether a search occurred within the scope of the Fourth Amendment is, contrary to the dissent's assertion, properly before us on appeal. And, because we conclude that no search occurred, we conclude it is unnecessary to address the other various points raised by the dissent concerning what constitutes the curtilage of Clark's home.

prohibits the government from "obtain[ing] information by physically intruding on" a person's home. 569 U.S. at 5. Here, it is undisputed that De La Torre entered Clark's property with the sole intent of speaking consensually with Clark and attempting to resolve the alleged violations. Further, it is undisputed that he did not succeed in that goal. Although De La Torre asked to speak with Clark, Clark responded immediately by yelling at De La Torre to leave. De La Torre complied and, as a result, did not speak with Clark and thus gathered no information. In short, no "search" occurred for purposes of the Fourth Amendment. *See Jardines*, 569 U.S. at 9 n.4 ("[I]t is not a Fourth Amendment search to approach the home in order to speak with the occupant, because all are invited to do that"); *United States v. Carloss*, 818 F.3d 988, 993 (10th Cir. 2016) (concluding that officers did not conduct a Fourth Amendment search when they approached the front door of a home and attempted to consensually speak with the occupant).

Finally, in Issue VI of his appellate brief, Clark argues, in pertinent part, that "[t]here should be no dispute that a 'knock and talk' is a search" that, to be reasonable, must "not stray outside of the implied license."[7] Aplt. Br. at 38. Again, we need not address this argument because, in light of the undisputed evidence presented in this case, we conclude that no "knock and talk" occurred in this case. Although De La Torre approached Clark and asked to consensually speak with

[7] The remainder of Issue VI, as Clark himself concedes, is basically a repeat of the arguments asserted in Issue V.

him, Clark immediately and repeatedly yelled at De La Torre to leave his property and De La Torre complied and left. Thus, De La Torre did not complete any "knock and talk" and gathered no information.

IV

The judgment of the district court is AFFIRMED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

Eric S. Clark v. City of Williamsburg, Kansas, No. 19-3237, Bacharach, J., concurring in part and dissenting in part.

This case arises from efforts by the City of Williamsburg, Kansas to enforce a sign code against Mr. Eric Clark. I agree with the majority that Mr. Clark lacked standing to challenge the relevant provisions of the sign code, so I join Parts I, II, and III(a)—(c) of the majority's opinion. But I respectfully disagree with the majority's disposition of Mr. Clark's Fourth Amendment claim.

To decide this claim, we must consider the scope of a homeowner's right to privacy. In considering the scope of this right, we recognize that

- municipal officers typically enjoy the same customary privileges enjoyed by other visitors and
- most visitors would expect permission to knock on a house's front door.

So municipal officers may ordinarily knock on the front door of a house without violating the Fourth Amendment.

But what if a homeowner obstructs the front door, signaling to visitors that they are not welcome? Could a reasonable factfinder infer that the homeowner doesn't want visitors to enter a partially enclosed back yard? The district court answered "no" and granted summary judgment to the city on the homeowner's Fourth Amendment claim. I disagree and would reverse the grant of summary judgment to the city.

1. The city's code-enforcement officer approached the back yard after seeing that visitors were not welcome at the front door.

Mr. Clark alleges a Fourth Amendment violation stemming from a visit by the city's code-enforcement officer, Tony De La Torre. Officer De La Torre saw that the front door was inaccessible,[1] but allegedly heard a sound in the back. So he walked up the driveway and, according to Mr. Clark, turned behind the house onto

[1] Mr. Clark contends that the evidence allowed a reasonable finding that the front door had been accessible to visitors. The city disagrees, as do I.

the gravel parking area. A few feet away stood an enclosure, consisting of a canopy of sheets draped around a swimming tank and the back door.

Mr. Clark heard someone entering his back yard and demanded that Officer De La Torre leave. He did.

2. Officer De La Torre had no implied license to enter the curtilage of Mr. Clark's house.

The resulting issue is whether Officer De La Torre violated the Fourth Amendment by intruding into Mr. Clark's curtilage without an implied license. The issue arose when the city moved for summary judgment, denying the existence of a search on grounds that Officer De La Torre had not entered the curtilage or exceeded an implied license.

A. We engage in de novo review and consider the evidence in the light most favorable to Mr. Clark.

Summary judgment is appropriate only if the city showed the absence of a genuine dispute of material fact. *T-Mobile Cent., LLC v. Unified Gov't of Wyandotte Cty., Kansas City, Kan.*, 546 F.3d 1299, 1306 (10th Cir. 2008). The district court granted summary judgment to the city, so we must conduct de novo review by considering the evidence in the light most favorable to Mr. Clark. *Id.*

B. The factfinder could reasonably consider the gravel parking area as part of the curtilage.

The Fourth Amendment supplies protection not only for one's house but also the curtilage, which is "the area to which extends the intimate activity associated with the sanctity of a [person's] home and the privacies of life." *Reeves v. Churchich*, 484 F.3d 1244, 1254 (10th Cir. 2007) (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)). The scope of the curtilage is a legal question. *United States v. Cousins*, 455 F.3d 1116, 1121 & n.4 (10th Cir. 2006) (en banc footnote). But this legal question turns on facts, which we consider in the light most favorable to Mr. Clark. *See United States v. Depew*, 210 F.3d 1061, 1067 (9th Cir. 2000) ("Determining whether an area is within a home's curtilage is a fact-intensive inquiry."); *Bleavins v. Bartels*, 326 F.3d 887, 891 (7th Cir. 2003) ("The inquiry into whether an area can be considered curtilage is fact-intensive."); *see also* Part 2(A), above (stating that the court must view the evidence favorably to Mr. Clark).

In determining whether a particular area constitutes part of the curtilage, we consider four factors:

1. proximity to the house,
2. existence of an enclosure,
3. use of the area, and
4. steps taken to enhance privacy.

United States v. Dunn, 480 U.S. 294, 301 (1987). In considering these factors, we must view the evidence in the light most favorable to Mr. Clark. *See* Part 2(A), above. When the evidence is viewed in this light, the first, third, and fourth factors support classification of the gravel parking area as part of the curtilage.

The first factor (proximity to the house) favors Mr. Clark. Officer De La Torre walked up the driveway to the side of Mr. Clark's house and then turned behind the house onto a gravel parking area. This parking area was not clearly visible from the street.[2]

The second factor (existence of an enclosure) favors the city because Officer De La Torre did not enter the enclosed canopy.

The third factor (use of the area) favors Mr. Clark's view that the gravel parking area was part of the curtilage. The area was used for parking, and only a few feet away stood the canopy over the small tank used for swimming. The factfinder could reasonably infer that parking vehicles and swimming are activities intimately tied to home life, so this factor supports treatment of the gravel parking area as curtilage. *See United States v. Alexander*, 888 F.3d 628, 633 (2d Cir. 2018) (upholding a finding that an area for parking cars was continuous with the back yard and within the curtilage); *Harris v. O'Hare*, 770 F.3d 224, 240 (2d Cir.

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[2] The city states that Officer De La Torre remained in an area that was visible from the street. Appellee's Resp. Br. at 22. But the city provides no citation for this statement.

2014) (referring to swimming as a private activity associated with the curtilage).

The fourth factor (steps taken to enhance privacy) also supports treatment of the gravel parking area as curtilage. This area lay adjacent to Mr. Clark's house and could not clearly be seen from the street. Passersby could see into the area only by approaching the back yard.

Precedent supports consideration of the gravel parking area as part of the curtilage. In *Collins v. Virginia*, 138 S. Ct. 1663, 1671 (2018), the Supreme Court considered a similar area part of the curtilage. There a driveway ran alongside a house and past the front part of the house; the relevant area was the end of the driveway, enclosed on two sides by a low wall and on the third side by the house itself. *Id.* at 1670–71. Similarly, in *Lundstrom v. Romero*, 616 F.3d 1108, 1128-29 (10th Cir. 2010), we concluded that the curtilage included an area abutting the back of a house.

As in *Collins*, the relevant area was a continuation of the driveway. Mr. Clark's gravel parking area was enclosed on two sides rather than three. But unlike the area in *Collins*, Mr. Clark's gravel parking area couldn't be seen clearly from the street. As in *Lundstrom*, the area at issue was near the back of the house. In light of *Collins, Lundstrom*, and Mr. Clark's evidence, I would regard the gravel parking area as part of the curtilage.

C. A genuine factual dispute exists on whether the implied license extended to the gravel parking area.

The resulting issue is whether Officer De La Torre had license, or permission, to enter the gravel parking area.

Permission can be express, but can also be implied from general societal practice. *Florida v. Jardines*, 569 U.S. 1, 8 (2013). For example, societal customs ordinarily create an expectation that someone can walk along a pathway to a front door and knock. *Id.*

The parties disagree on whether Mr. Clark's yard had a pathway to his front door. But regardless of a pathway, Mr. Clark apparently did not want visitors at his front door, for this is what they would have seen:

With this view of the front of Mr. Clark's house, would societal custom have led Officer De La Torre to think that he was welcome to go to the back yard and knock on Mr. Clark's back door? And would that sense of welcome have continued once Officer De La Torre approached the gravel parking area and saw that Mr. Clark had constructed a sheet canopy, preventing others from seeing into the area outside his back door? A reasonable factfinder could answer "no" to these questions.

In oral argument, the city was asked if Officer De La Torre would have had an implied license to enter the gravel parking area if Mr. Clark had posted a "no visitors" sign. The city answered "no." But a reasonable factfinder could consider Mr. Clark's obstructions outside his front door as a sign that he did not want uninvited visitors at *any* door.

The district court concluded that the implied license had extended to the gravel parking area, relying on *United States v. Shuck*, 713 F.3d 563 (10th Cir. 2013). There we reviewed the denial of a motion to suppress, so we considered the evidence in the light most favorable to the government. *Id.* at 567. But here we must do the opposite, considering the evidence in the light most favorable to Mr. Clark. *See* Part 2(A), above. *Shuck* does not help us determine whether an implied license exists if we view the evidence favorably to the homeowner.

The city argues that Officer De La Torre went to the back because he thought that Mr. Clark was there.

But Officer De La Torre did not say that he had heard Mr. Clark in the back. Instead, Officer De La Torre simply said that he had heard "a sound" in the back, which led him to believe that someone was working in the back. R. at 1053-54. A factfinder could reasonably infer that visitors would not ordinarily expect permission to enter a back yard based only on a sound suggesting that work was being done there, particularly when obstructions outside the front door indicate that uninvited visitors are not welcome.

The city disagrees, citing opinions for the proposition that an implied license permits entry into the back yard when the front door is inaccessible or an occupant appears to be home and doesn't answer the door.

In arguing that entry into the back yard was permissible, the city relies largely on opinions predating *Jardines: Galindo v. Town of Silver City*, 127 F. App'x 459, 466 (10th Cir. 2005) (unpublished); *United States v. Cavely*, 318 F.3d 987, 994 (10th Cir. 2003); *Estate of Smith v. Marasco*, 318 F.3d 497, 519 (3d Cir. 2003); *Alvarez v. Montgomery Cty.*, 147 F.3d 354, 357 (4th Cir. 1998); *United States v. Daoust*, 916 F.2d 757, 758 (1st Cir. 1990); *United States v. Freeman*, 426 F.2d 1351, 1352–53 (9th Cir. 1970); and *United States v. Diaz*, No.1:09cr9-SPM, 2009 WL 3675006, at *2 (N.D. Fla. Oct. 30, 2009) (unpublished), *aff'd*, 404 F. App'x 381 (11th Cir. 2010) (unpublished). In one of these opinions, the court did not provide any reasoning. *Daoust*, 916 F.2d at 758. In the other opinions, the courts reasoned that the homeowners had lacked reasonable expectations of privacy. *Galindo*, 127 F. App'x at 466; *Cavely*,

318 F.3d at 993–94; *Alvarez*, 147 F.3d at 357–58; *Freeman*, 426 F.2d at 1354; *Diaz*, 2009 WL 3675006, at *2. In the remaining opinion, the court ruled for the plaintiff, but used a *pre-Jardines* analysis based on the homeowner's expectation of privacy. *Marasco*, 318 F.3d at 521. *Jardines* affected the viability of all of these opinions by holding that the Fourth Amendment is implicated whenever an officer enters the curtilage without an express or implied license. 569 U.S. at 5–6, 9–11.

In arguing that officers could enter the back yard when an occupant does not answer the front door, the city relies on *Hardesty v. Hamburg Township*, 461 F.3d 646, 654 (6th Cir. 2006). This opinion also predated *Jardines;* and the Sixth Circuit ultimately abrogated *Hardesty*, noting that its reasoning was no longer viable after *Jardines. Morgan v. Fairfield Cty., Ohio*, 903 F.3d 553, 565 (6th Cir. 2018).

The city also relies on two other opinions:

- *Carroll v. Carman*, 574 U.S. 13 (2014) and
- *United States v. Garcia*, 997 F.2d 1273 (9th Cir. 1993).

But these opinions shed no light on the scope of Officer De La Torre's implied license. In *Carroll*, the Court expressly declined to decide whether an officer could knock on a door other than the front door. 574 U.S. at 20. In *Garcia*, the court concluded that officers had not exceeded an implied license. 997 F.2d at 1279–80. But there the officers reasonably mistook the back door for

the front door, and both doors were immediately accessible from a public area. *Id.*

* * *

If we view the evidence in the light most favorable to Mr. Clark, as required, a reasonable factfinder could infer that Officer De La Torre had entered the curtilage without an implied license.

The city contends that Mr. Clark had made it clear that he did not want uninvited visitors coming to his front door, leading them instead to the back door. But a reasonable factfinder could infer that Mr. Clark had also made it clear that he didn't want uninvited visitors coming to his back door, for he had constructed a canopy supplying privacy in his back yard.

The back yard was not visible from the street in front of the house, so why would Officer De La Torre assume that he was welcome to enter the back yard if he wasn't welcome at the front door? Because he heard a sound toward the back? Perhaps. But viewing the evidence favorably to Mr. Clark, a factfinder could reasonably infer that hearing a sound does not serve as an implied license to enter the back yard.

3. We should not sua sponte affirm on an argument that the city has not raised.

The majority doesn't consider the scope of the curtilage or existence of an implied license, relying instead on the absence of any information collected from Mr. Clark's property. But in district court and on

appeal, the city denied that a search had taken place solely on the ground that Officer De La Torre had not entered the curtilage or exceeded an implied license.

A. The majority erroneously relies on excerpts from the city's brief in district court, where the city denied a search based on the scope of the curtilage and existence of an implied license.

The majority points out that in district court, the city denied the existence of a search. But the city did not base the denial of a search on the failure to collect information; the city instead relied on the scope of the curtilage and the existence of an implied license. The majority's two examples illustrate the difference.

First, the majority quotes the city's statement that Officer De La Torre did not conduct a search because he just "walk[ed] down [the] driveway to the rear of Clark's residence. . . ." Maj. Op. at 22 n.6. The sentence continues: "which is the commonly-used entrance to Clark's residence." R. at 686. This was the city's argument that it hadn't conducted a search because Officer De La Torre had an implied license to enter the gravel parking area.

Second, the majority quotes the city's statement that Officer De La Torre's brief presence did not violate the Fourth Amendment. Maj. Op. at 22 n.6; R. at 691. This statement appears in an argument involving the time that Officer De La Torre took to leave, not the collection of information. R. at 691. Before discussing the

time taken by Officer De La Torre, the city had spent roughly 5-1/2 pages denying the existence of a search based on its arguments involving the curtilage and implied license. R. at 686–91. Given this context, the cited statement does not encompass an argument denying the existence of a search based on the failure to collect information. *See Crowson v. Washington Cty. State of Utah*, No. 19-4118, 19-4120, ___ F.3d ___, 2020 WL 7706471, at *9 n.9 (10th Cir. Dec. 29, 2020) (to be published) (declining to consider the appellee's single-sentence argument for an alternative ground to affirm because the appellee's argument was perfunctory); *Jordan v. Maxim Healthcare Servs., Inc.*, 950 F.3d 724, 742 n.14 (10th Cir. 2020) (stating that an appellee's "oblique nod" to an issue was perfunctory and likely didn't suffice to preserve an argument for affirmance).

B. Mr. Clark had no reason to present evidence on this issue when responding to the city's motion.

The majority points out that Mr. Clark briefly argued in district court that he was entitled to partial summary judgment because Officer De La Torre had tried to gather information. Maj. Op. at 22 n.6; R. at 181, 185. But the city did not contest this argument when seeking summary judgment. So when Mr. Clark responded to the city's summary-judgment motion, he noted the absence of a dispute over Officer De La Torre's purpose of collecting information. R. at 849. Mr. Clark could reasonably conclude that he had no need to further address the issue, for the city never

contested Officer De La Torre's intent to gather information or sought summary judgment on this basis.

If the city had denied a search based on the failure to collect information, Mr. Clark might have made further arguments or presented supporting evidence. *See John G. Alden, Inc. of Mass. v. John G. Alden Ins. Agency of Fla., Inc.*, 389 F.3d 21, 25 (1st Cir. 2004) ("At a minimum, the party preparing the response must have the motivation of knowing that it is the target of a summary judgment motion."). In my view, it is "unfair to affirm a summary judgment against a plaintiff for lack of evidence of an element of the cause of action unless the defendant has clearly challenged that lack of evidence in district court." *Evers v. Regents of the Univ. of Colo.*, 509 F.3d 1304, 1309–10 (10th Cir. 2007).

C. The district court denied the existence of a search based on the existence of an implied license, not the absence of any collection of information.

The majority also points out that the district court concluded that no search had taken place. But the district court relied solely on its conclusion that Officer De La Torre had not exceeded an implied license. For example, the court summarized the city's argument:

> Defendants counter that De La Torre never entered the curtilage of Clark's property, and even if he did, he did so in taking the most common path available to visitors in an attempt to contact Clark.

R. at 1103-04. Addressing this argument, the court concluded that Officer De La Torre had an implied license to go where he did. Based solely on this implied license, the court denied the existence of a search:

> Accordingly, the Court does not need to determine whether De La Torre entered the curtilage of Clark's home, because even if he did, his actions in trying to find Clark on the property were taken in accordance with the implied license to approach the house. No reasonable jury could conclude there was a search of Clark's property under these facts.

Id. at 1107. But the court did not make any findings about whether Officer De La Torre had collected information.

D. As a whole, the pertinent factors weigh against affirmance on a ground that the city hasn't presented on appeal.

But even if the majority were right about the city's argument in district court, the city's appellate arguments do not rely on the absence of information collected from Mr. Clark's property. The city's appellate arguments instead rely solely on the scope of the curtilage and existence of an implied license.[3]

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[3] For example, the city argues:

> [A]s noted by the dissent in *Florida v. Jardines*, 569 U.S. 1, 133 S. Ct. 1409 (2013), a "knock and talk" has as its purpose discovering information but a "knock and talk" is not a search because "all are invited to do

Despite the city's framing of the issue, we have discretion to affirm on other grounds if supported by the record. *Elkins v. Comfort*, 392 F.3d 1159, 1162 (10th Cir. 2004). In deciding whether to exercise this discretion, we consider three factors:

1. whether the ground was fully briefed and argued both in district court and on appeal,
2. whether the parties had a fair opportunity to develop the factual record, and
3. whether our decision would involve only questions of law.

Id.

In balancing these factors, reasonable minds can differ. In my view, however, these factors weigh against relying on the absence of a search based on the failure to collect information. Though the majority has raised an issue of law, the city has not briefed this issue and it turns on undeveloped facts.

In similar circumstances, we recently declined to affirm on a ground not presented in district court or on appeal, calling the practice "imprudent." *United States v. Chavez*, 976 F.3d 1178, 1203 n.17 (10th Cir. 2020).

> that." 133 S. Ct. at 1424. [Officer] De La Torre's attempt to visit with plaintiff was not a search because he did no more than what "all are invited" to do by attempting to contact plaintiff in a manner that did not deviate from the implied invitation.

Appellee's Resp. Br. at 26.

Relying on a new ground to affirm would be equally imprudent here.

* * *

I would address the reasons given by the city and district court for denying the existence of a search: the scope of the curtilage and the extent of an implied license. So I respectfully dissent from the majority's rejection of the Fourth Amendment claim. In my view, Mr. Clark overcame summary judgment on this claim.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

ERIC S. CLARK, **PLAINTIFF,** **v.** **THE CITY OF WILLIAMSBURG, KANSAS,** **DEFENDANT.**	**CASE NO. 2:17-CV-02002-HLT**

MEMORANDUM AND ORDER

(Filed May 9, 2019)

Plaintiff Eric Clark brings this action under 42 U.S.C. § 1983 alleging Defendant City of Williamsburg, Kansas ("City") violated his constitutional rights under the First and Fourth Amendments.[1] He also brings an inverse condemnation action under Kansas state law. Doc. 55 at 14. This case stems from a violation notice the City sent Clark regarding signs at the edge of Clark's property. Both parties have filed summary-judgment motions as to all claims. Doc. 78; Doc. 91.

As to Clark's First Amendment claim, the Court finds that Article 8, § 4.A.(6) is an unconstitutional content-based restriction and, therefore, grants Clark

[1] Clark mentions the Fifth and Fourteenth Amendments on the first page of his First Amended Complaint—the operative complaint—but the First Amended Complaint does not include a cause of action under the Fifth or Fourteenth Amendments. Doc. 55 at 1, 14.

summary judgment on that count. That provision is severable from the remainder of the City's sign ordinance, which the Court does not evaluate because Clark lacks standing to make that challenge. The Court grants summary judgment to the City on Clark's Fourth Amendment claim (because there was no search of Clark's property), and on Clark's inverse-condemnation claim (because Clark has not established any taking).

I. BACKGROUND

On February 23, 2015, the City's code enforcement officer, Tony De La Torre, sent Clark a "NOTICE OF VIOLATION" of the City's sign ordinance. Doc. 79 at 4; Doc. 92-22 at 2. The violation notice stated that Clark was in violation of the City's sign ordinance because he had "three large barrels, several signs, and other affixed objects" on the City's "right of way." Doc. 92 at 18. According to the violation notice, the items Clark needed to remove were located within the City's eighty-foot easement. *Id.* The violation notice requested Clark's voluntary cooperation, but it also informed him a citation could be issued and the items removed if he did not comply. Doc. 92 at 5-6; Doc. 100 at 4; Doc. 92-22 at 2. The violation notice directed Clark to immediately contact the City by phone if he had any questions or believed he received the notice in error; otherwise, "actions will continue toward resolution." Doc. 92-22 at 2. Clark did not call. Doc. 100 at 27.

On March 16, 2015, De La Torre went to Clark's property to discuss the matter. Doc. 79 at 10-11; Doc. 92 at 12. Clark's house sits back from the road and has a gravel driveway on one side that extends from the road to the back of the house, where it widens into a gravel apron or parking area. Doc. 92 at 14. On the day De La Torre went to Clark's property, there were no "No Trespass" signs posted. *Id.* Clark seldom uses the front door of his house and has trained his family members to go to the back door when they visit. *Id.* at 15. The front door, which has no doorbell, is accessed by a front porch with steps up the front. *Id.* at 15-16. There is no sidewalk or worn path to the front porch, and certain items on the porch partially blocked the entrance, or at least would have required a visitor to squeeze by them to get to the door. *Id.* A tarp was hung up along the north side of the porch. *Id.* at 15. Vegetation covered at least some of the entrance to the front porch. *Id.* At his deposition, Clark was asked, "Would you agree that it doesn't look like an invitation to the front door with those things sitting in front of it?" Clark answered, "I would hope so, but I can't really say that nobody would be deterred from going up there." *Id.*; Doc. 100 at 18.

On March 16, 2015, De La Torre parked near the road. He walked up the driveway and saw that there was no path to the front door and that the door itself was blocked by items on the porch. He then heard someone in the back and started walking that way on the driveway. Doc. 92 at 16-17; Doc. 100 at 19-20. De La Torre then encountered Clark, who got angry and

told De La Torre to leave several times in the span of less than a minute. Doc. 92 at 17. Clark then went back into the house and De La Torre left. Doc. 92 at 16; Doc. 100 at 19. De La Torre believes he only proceeded halfway to three-quarters up the driveway and did not leave the driveway or gravel apron/parking area near the back of the house. Doc. 92 at 17; Doc. 100 at 20-21. De La Torre estimates he was on Clark's property for 3-4 minutes; Clark claims it was 5-6 minutes. Doc. 92 at 16; Doc. 100 at 19.

Though Clark did not call the City or discuss the violation notice with De La Torre when he went to Clark's property, Clark did send the City some letters in response. Doc. 100 at 22; Doc. 92 at 18-19. Clark disputed that he was in violation of any sign ordinance provision and asserted that the sign ordinance was unconstitutional. Doc. 100 at 22; Doc. 92 at 18-19. In one of those letters, which was labeled a litigation notice, Clark stated that he was fearful of putting up any new objects until the enforcement threat was removed. Doc. 79 at 5; Doc. 92 at 18-19.

The City has never affirmatively retracted the violation notice. Doc. 79 at 4; Doc. 92 at 10. But after receiving the litigation notice, the mayor spoke with the City's attorney, who advised the City to not continue investigating Clark's alleged violations of the sign ordinance "further." Doc. 92 at 19; Doc. 100 at 22. The mayor discussed the issue with the city council, and the city council agreed to that course. Doc. 92 at 19; Doc. 100 at 22. De La Torre's notes state that the City decided not to take any action on the violation notice

"at this time." Doc. 100 at 22; Doc. 79-2 at 23. Four months later, the City suspended its code enforcement officer position due to budget constraints and has had no code enforcement officer since that time. Doc. 79 at 6; Doc. 92 at 19. Clark was aware that the City suspended the position. Doc. 92 at 17. The City also did not reappoint a judge for the City's municipal court and no judge has held a municipal judicial proceeding in the City since May 2016. Doc. 92 at 19; Doc. 100 at 23. The City has indicated that it will not enforce the sign ordinance against Clark or any one else "during the pendency of this case." Doc. 92 at 19.

II. STANDARD

Both parties have filed separate motions for summary judgment. Summary judgment is appropriate if the record establishes 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 moving party bears the initial burden of establishing the absence of a genuine issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the nonmovant to demonstrate that genuine issues remain for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). To carry this burden, the nonmovant "may not rely merely on . . . its own pleadings." *Nahno-Lopez v. Houser*, 625 F.3d 1279, 1283 (10th Cir. 2010) (internal quotations and citations omitted). "Rather, it must come forward with facts supported by competent

evidence." *Id.* The inquiry turns on "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Liberty Lobby*, 477 U.S. at 251-52. In applying this standard, courts must view the evidence and all reasonable inferences from it in the light most favorable to the nonmovant. *Matsushita*, 475 U.S. at 587.

III. ANALYSIS

Clark has asserted three claims in this case. Count I and Count II arise under the Constitution and are brought pursuant to 42 U.S.C. § 1983. They allege, respectively, violations of the First and Fourth Amendments. The third count—for inverse condemnation—is brought under Kansas state law. Doc. 55 at 14-15. Each is discussed in turn.[2]

A. Clark's First Amendment Allegations (Count I)

A complicating factor in analyzing Clark's First Amendment claim is that the parties disagree on the

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[2] On the last page of Clark's motion, he states, "The need for a permanent injunction can be found in that the City's policy (zoning regulations) was the moving force (causation) of a chilling effect on Clark's First Amendment right of free speech through credible threat of enforcement and a credible threat of enforcement remains." Doc. 79 at 79. To the extent Clark intends that brief statement to be a request to the Court for an injunction, it is wholly without support and is denied. Based on the ruling in this order, it is also largely moot.

scope of this case. Clark asserts a broad challenge to several provisions of the City's sign ordinance, rather than focusing on the February 23, 2015 violation notice. Doc. 79 at 44-79. By contrast, the City disputes that Clark has standing to challenge any provisions of the City's sign ordinance. Doc. 92 at 27-32. But to the extent Clark does have standing, the City limits its analysis to whether the City is entitled to prohibit signs on public property.[3] According to the City, the "February 23, 2015 Notice of Violation addressed only Article 8, § 5 of the City sign regulations." Doc. 92 at 33.

The Court agrees with the City that Clark lacks standing to challenge most provisions in the sign ordinance, as discussed below. But the Court disagrees with the City about what provision is at issue. The violation notice does not cite any specific provision in the sign ordinance by number, let alone Article 8, § 5. But it did allege that, "[u]nder the City of Williamsburg's Ordinance, political signs shall not be placed on or otherwise affixed to any public building or sign, right of way, sidewalks, utility pole, street lamp post, tree, or other vegetative matter, Public Park, or other public property." Doc. 99-22 at 2. That recites nearly verbatim Article 8, § 4.A.(6). Article 8, § 5 is not quoted, paraphrased, or mentioned. Accordingly, to the extent a

[3] The City frequently refers to both a prohibition of signs on City right-of-ways and on public property in general. But it does not appear that the City is drawing a distinction between the two, as right-of-ways are just a subset of public property; nor does the City's sign ordinance make that distinction.

specific provision is at issue, it is Article 8, § 4.A.(6)—not Article 8, § 5.[4]

Clark's reply clarifies that his standing for a First Amendment challenge is based both on the threatened enforcement action, "as well as the

[4] Not only does the Court disagree that Clark was cited for violating Article 8, § 5, but the Court also disagrees with the City's contention that the sign ordinance flatly prohibits signs on public property. Article 8, § 5 is titled "Prohibited Signs." Doc. 38-1 at 64. Subsection A of that provision reads, in part: "Signs on Public Property: Any sign installed or placed on public property, except in conformance with the requirements, shall be forfeited to the public and subject to confiscation." *Id.* Article 8, § S.A. does not say that all signs are prohibited on public property. It says that signs "placed on public property, except in conformance with the requirements, shall be forfeited and subject to confiscation. . . ." *Id.* (emphasis added). An obvious reading of Article 8, § 5 is that signs on public property are simply subject to the general regulations of Article 8 (which includes rules about sign types, zoning district requirements, and size, number, and setback restrictions), and where they are not "in conformance with the requirements," they are subject to confiscation. Clark points this out. The City's only response is that Clark misreads the sign ordinance and that "Article 8, § 5 precludes any sign on public right of way." Doc. 92 at 33. Putting aside this unfortunate failure to elaborate, the City's interpretation is unconvincing. Nothing in Article 8, § 5 flatly suggests that all signs on public property are prohibited, even though other provisions of that section specifically do prohibit certain signs under other circumstances. Doc. 38-1 at 64-65 (stating that "[n]o person shall display upon any sign or other advertising structure any obscene, indecent or immoral matter" and that "Flashing signs . . . shall not be permitted"). If the regulation was meant to prohibit signs on public property, it likely would have just said so. But it does not. Nor does it make sense that Article 8, § 4.A.(6) would carve out a special rule prohibiting political signs on public property (under a heading of "Exemptions" no less), *Id.* at 63-64, if Article 8, § S.A. simply banned all signs on public property.

ordinance's prohibitions which stand as prior restraints." Doc. 100 at 37-38. Accordingly, the Court must evaluate Clark's standing to challenge the enforcement action (involving Article 8, § 4.A.(6)), and his broader challenge to other provisions in the sign ordinance. Those are two different claims, and each must be analyzed for standing separately.

1. Clark suffered an injury-in-fact through issuance of the of the violation notice and may challenge the constitutionality of Article 8, § 4.A.(6).

Under Article III of the Constitution, there must be a case or controversy before federal courts have jurisdiction. *Ward v. Utah*, 321 F.3d 1263, 1266 (10th Cir. 2003). "To meet this standing requirement, a plaintiff must demonstrate 'that (1) he or she has suffered an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is likely that the injury will be redressed by a favorable decision.'" *Id.* (quoting *Phelps v. Hamilton*, 122 F.3d 1309, 1326 (10th Cir. 1997)); *see also Nat'l Council for Improved Health v. Shalala*, 122 F.3d 878, 881 (10th Cir. 1997) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

To show an injury-in-fact, a plaintiff must demonstrate "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1087 (10th

Cir. 2006) (quoting *Lujan*, 504 U.S. at 560). "Although 'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is 'certainly impending.'" *Lujan*, 504 U.S. at 564 n.2 (internal quotations omitted).[5]

On February 23, 2015, the City sent a "NOTICE OF VIOLATION" to Clark, which stated that the City's code enforcement officer had observed "three large barrels, several signs, and other affixed objects located on the City's right of way" in front of Clark's house. It recited nearly verbatim the language of Article 8, § 4.A.(6) and asked for Clark's "cooperation in correcting all the violations." The violation notice indicated a re-inspection would occur at a later date, and "[i]f the violations are not corrected a citation may be issued and objects removed from the City easement." Doc. 92-22 at 2. Clark never removed the items, and instead sent some letters to the City threatening legal action. As a result, the City opted to not pursue the matter further, or at least "at this time." The City has never affirmatively retracted the violation notice. Doc. 79 at 4; Doc. 92 at 10. In its summary-judgment motion, the City has stated that it has no plans to enforce its sign ordinance against Clark or any other citizens "during the pendency of this case." Doc. 92 at 19.

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[5] The City does not challenge the other two elements of standing, nor do the parties even address them. The Court finds that if Clark suffered an injury-in-fact, the other standing elements would be met.

Under these standards, the Court concludes that Clark has suffered an injury-in-fact concrete enough to confer standing to challenge Article 8, § 4.A.(6). Clark was sent a letter titled "NOTICE OF VIOLATION." The City is correct that the letter did ask for Clark's voluntary compliance. But compliance was voluntary only to the extent that, if Clark did not comply, "a citation may be issued and objects removed from the City easement." Doc. 92-22 at 2. Although the City has stopped pursuing the matter at least for the time being (after Clark threatened litigation), Doc. 92 at 18-19, that decision is not permanent, nor has the City rescinded the violation notice. Doc. 79 at 4-5; Doc. 92 at 10; Doc. 100 at 22; Doc. 79-2 at 23 (stating that the matter would not be pursued "at this time").

The Court concludes that Clark has asserted sufficient grounds to confer standing. He was effectively cited for violating Article 8, § 4.A.(6), and his only option was to acquiesce or face further action. To the extent the City does not intend to ever follow up on the violation notice or pursue the matter, it has been somewhat vague as to the duration of that resolve, leaving Clark in limbo regarding his posting of signs—and in particular, political signs—on his property. *See* Doc. 79 at 4-5; Doc. 92 at 10, 19; Doc. 100 at 22; Doc. 79-2 at 23.[6] The Tenth Circuit has stated that, though an

[6] Both parties include facts about the current staffing—or lack thereof—of the City's zoning enforcement and municipal court staff. At some point after Clark responded to the violation notice, the City suspended its code enforcement program and did not reappoint its municipal court judge. Doc. 92 at 18-19. The Court concludes these facts do not demonstrate that Clark is fully

injury must be impending, a plaintiff "need not 'await the consummation of threatened injury.'" *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1282 (10th Cir. 2002) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). Here, Clark has been threatened with enforcement under the sign ordinance. A "chilling effect on the exercise of a plaintiffs First Amendment rights may amount to a judicially cognizable injury in fact, as long as it 'arise[s] from an objectively justified fear of real consequences.'" *Initiative & Referendum Inst.*, 450 F.3d at 1088 (quoting *D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004)). The "mere threat of prosecution under the allegedly unlawful statute" can establish that chilling effect. *See Phelps*, 122 F.3d at 1326. Clark does assert a chilling effect as to Article 8, § 4.A.(6), Doc. 79 at 3, and given the violation notice, that chilling is at the very least "objectively justified." Accordingly, Clark has standing to challenge the provision at issue in the violation notice—Article 8, § 4.A.(6).

2. Clark lacks standing to challenge other provisions.

Although Clark has standing to challenge the provision of the sign ordinance whose language was recited nearly verbatim in the violation notice (Article 8, § 4.A.(6)), that does not mean Clark has standing to

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out from under the threat of enforcement given the City's other statements hedging that it does not plan to pursue this matter "at this time" or "for the duration of this case." The lack of City staff is similarly temporary in nature.

challenge the entirety of the City's sign ordinance, as he attempts to do. As explained above, the City sent Clark a violation notice that recited the language in Article 8, § 4.A.(6). Doc. 92-22 at 2. The City never sent any notice regarding other provisions. Accordingly, Clark only has standing to challenge Article 8, § 4.A.(6). *See Quinly v. City of Prairie Village*, 446 F. Supp. 2d 1233, 1235 n.1 (D. Kan. 2006) (concluding that the plaintiff lacked standing to challenge other provisions of sign ordinance where plaintiff did not demonstrate any injury resulting from those other provisions); *see also Essence*, 285 F.3d at 1281-82.

Perhaps recognizing this shortcoming in his case, Clark categorizes his other challenges as "prior restraint" claims and suggests that he is raising an overbreadth challenge to essentially all of the provisions in Article 8. Doc. 79 at 52-53; Doc. 100 at 38-39.[7] But being "prospectively inhibited" is just a "hypothetical injury and not a concrete injury." *Essence*, 285 F.3d at 1281. Similarly, merely couching the challenge of those other provisions in terms of an overbreadth challenge does not in of itself confer standing. *Nat'l Council*, 122 F.3d at 882 ("Although the overbreadth doctrine permits a party to challenge a statute or regulation that has not been unconstitutionally applied to that party, it does not dispense with the requirement that the party itself suffer a justiciable injury."). An overbreadth challenger

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[7] Clark also suggests he has standing under a "class-of-one" theory. But that is an equal-protection claim, *Jicarilla Apache Nation v. Rio Arriba Cty.*, 440 F.3d 1202, 1209 (10th Cir. 2006), and it is analyzed separately below.

must still "show its own concrete injury resulting from the challenged statute or regulation." *Id.* at 881. Requiring a plaintiff to assert his own legal rights in an overbreadth challenge "prevents a court from 'premature interpretations of statutes in areas where their constitutional application might be cloudy, and it assures the court that the issues before it will be concrete and sharply presented.'" *Id.* at 883 n.7 (quoting *Sec'y of State v. Munson*, 467 U.S. 947, 955 (1984)).

Clark also alleges an injury-in-fact as to the other provisions based on a chilling of his First Amendment expression. Doc. 79 at 53 (stating that "the City's regulations prohibit, through a chilling effect, the ability of Clark to express himself freely on certain topics at certain times, in certain manners, and in certain places"). As noted above, First Amendment standing may be demonstrated by a showing that a statute has had a chilling effect on a person's speech. *See Ward*, 321 F.3d at 1267. But the only chilling Clark has alleged is in regard to prohibitions and regulations of political signs found in Article 8, § 4.A.(6). *See* Doc. 79 at 3 (¶ 10 and ¶ 12, both challenging Article 8, § 4.A.(6)).[8] Accordingly, Clark has not alleged any chilling that could serve as an injury-in-fact to grant him standing to challenge other provisions.

Even if he did allege a chilling as to those other regulations, subjective chilling is not enough. *Ward*,

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[8] Statement of Fact 10 also references Article 8, § 9.B. But the conduct Clark alleges has been "chilled" is prohibited by Article 8, § 4.A.(6).

321 F.3d at 1267. Rather, the "chilling effect on the exercise of a plaintiffs First Amendment rights may amount to a judicially cognizable injury in fact, as long as it 'arise[s] from an objectively justified fear of real consequences.'" *Initiative & Referendum Inst.*, 450 F.3d at 1088 (quoting *D.L.S.*, 374 F.3d at 975). Although Clark can meet that standard as to Article 8, § 4.A.(6) because of the violation notice, all Clark has to challenge the other provisions of the sign ordinance is a conclusory claim that he has been chilled. This is insufficient to raise a judicially cognizable injury-in-fact. *See Nat'l Council*, 122 F.3d at 884 n.9 ("An allegation of inhibition of speech, without more, will not support standing.").

Accordingly, although Clark has standing to challenge Article 8, § 4.A.(6), he lacks standing to challenge other provisions in the sign ordinance. The Court will therefore only evaluate the constitutionality of that provision.

3. Article 8, § 4.A.(6) is a content-based regulation that does not pass strict scrutiny.

As explained above, Article 8, § 4.A.(6) is the provision referenced in the violation notice. That provision states:

> Political signs, not exceeding a total of 20 square feet in area on a lot of record zoned for non-residential purposes, or which is vacant and unplatted, regardless of the zoning

> district classification; and not exceeding a total of ten (10) square feet on a lot of record in a residential zone district. Political signs shall be displayed for no more than a four-week period preceding and a one-week period following an election. Political signs shall not be placed on or otherwise affixed to any public building or sign, right-of-way, sidewalk, utility pole, street lamp post, tree or other vegetative matter, or any public park or other public property.

Doc. 38-1 at 63-64. Under this provision, "political signs"—which is a term not specifically defined—are treated differently than other signs. They are subject to different size restrictions, have unique time restrictions, and—as discussed above in note 4—are prohibited from being placed on public property, unlike other signs. The question is whether these special rules for political signs pass constitutional muster.

In evaluating restrictions on speech, like Article 8, § 4.A.(6), the first question is whether the provision is content-neutral or content-based. *Quinly*, 446 F. Supp. 2d at 1238 (citing *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1258 (11th Cir. 2005)). "In the context of evaluating the constitutionality of a sign ordinance, the ordinance will be deemed content based if a violation of the ordinance may be determined only by examining the content of the sign." *Id.* Content-neutral signs are subject to only intermediate scrutiny, while content-based signs are subject to strict scrutiny. *Id.* Content-based laws "are

presumptively unconstitutional." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

Based on these standards, the Court finds as a matter of law that Article 8, § 4.A.(6) is a content-based regulation. *See id.* at 2227 ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."); *see also Menotti v. City of Seattle*, 409 F.3d 1113, 1128-29 (9th Cir. 2005) (evaluating content neutrality as a question of law); *Pahls v. Thomas*, 718 F.3d 1210, 1234 (10th Cir. 2013) (citing *Menotti*). On its face, Article 8, § 4.A.(6) applies only to "political signs," meaning that the content of a particular sign must be evaluated to determine whether the provision applies.[9] *Reed*, 135 S. Ct. at 2227 (finding that a sign code that set different restrictions for "political," "temporary directional," and "ideological" signs "is content based on its face"). For example, if a sign was posted that was nine square feet in area, one would have to read the sign to know whether it was a permissible political sign (under Article 8, § 4.A.(6)), or an oversized and therefore impermissible garage sale sign (which are limited to five square feet under Article 8, § 4.A.(7)). Likewise, if a sign was still posted more than a week after an election, it might be okay if it directs

[9] The City suggests that Article 8, § 4.A.(6) says "political signs," but it actually means "election signs." Doc. 92 at 6-7. Although the provision does discuss posting political signs in relation to an election, the actual text clearly says it applies to "political signs." Even if it did only intend to apply to "election signs," the Court is not convinced this would make it any less content-based.

customers to parking in the back of a store, which would be allowed at any time under Article 8, § 4.A.(4), but it would be impermissible if it advocated for a certain candidate or political issue, as Article 8, § 4.A.(6) imposes a temporal limit on political signs.[10] And if a sign was posted on a City right-of- way, it would only be prohibited outright if it had a political message, as the sign ordinance only bans the placement of political signs on public property and City right-of-ways. *See supra* note 4.

These distinctions are based solely on the content of the sign at issue. Where the restrictions that apply depend on the "communicative content" of the sign, like here, the provision is content-based. *Reed*, 135 S. Ct. at 2227; *see also Outdoor Sys., Inc. v. City of Lenexa*, 67 F. Supp. 2d 1231, 1240 (D. Kan. 1999) (noting that a durational restriction on political signs is content based and citing cases holding the same). And when a sign ordinance is content-based, strict scrutiny applies. *Quinly*, 446 F. Supp. 2d at 1238.

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[10] State law prohibits a city or county from regulating "the placement of or the number of political signs on private property or the unpaved right-of-way for city streets or county roads on private property during the 45-day period prior to any election and the two-day period following any such election." K.S.A. § 25-2711. The City concedes that its sign ordinance would preclude it from "prohibiting the placement or number of political signs on the unpaved right-of-way for City streets for 45 days prior to and two days following an election." Doc. 92 at 6. Article 8, § 4.A.(6) would presumably be in effect all other times. But other than for this 48-day period in election years, that does not obviate the need to evaluate its constitutionality for the remainder of the time it is in effect.

As explained above, the City does not analyze whether Article 8, § 4.A.(6) as a content-based regulation because of its position that the regulation at issue is Article 8, § 5, which it asserts neutrally bans all signs on public property. But as discussed above, the Court disagrees that that provision is at issue, or that it bans all signs on City property. *See supra* note 4. This is why the Court concludes that the City's reliance on *Members of City Council of City of Los Angeles v. Taxpayers for Vincent* is misplaced.

In *Vincent*, the Supreme Court upheld a ban of temporary signs on public property. *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). But that ordinance was not content-based—it barred all signs on public property. *Id.* at 817; *see also Reed*, 135 S. Ct. at 2232 (describing ban in *Vincent* as "content-neutral").[11] By contrast, Article 8, § 4.A.(6) does not neutrally ban all signs on public property—only political signs. That prohibition

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[11] For similar reasons, the other cases cited by the City are distinguishable. *See Johnson v. City and Cty. of Philadelphia*, 665 F.3d 486, 488 (3d Cir. 2011) (discussing ordinance that prohibits the posting of signs on public right-of-ways); *Davidson v. City of Culver City*, 2004 WL 5361378, at *3 (C.D. Cal. July 28, 2004) (discussing ordinance that barred all private signs on city right-of-ways); *Sokolove v. City of Rehoboth Beach*, 2005 WL 1800007, at *4 (D. Del. July 28, 2005) (discussing an ordinance that permits governmental signs on city right-of-ways but not private signs); *Constr. & Gen. Laborer's Local Union No. 330 v. Town of Grand Chute*, 2014 WL 1689720, at *1 (E.D. Wis. Apr. 29, 2014) (discussing ordinance that forbids all signs on public right-of-ways except traffic signs and rejecting argument that traffic-sign distinction is content-based).

of "public discussion of an entire topic" is why Article 8, § 4.A.(6) faces stricter scrutiny under the First Amendment. *Reed*, 135 S. Ct. at 2230 ("But it is well established that '[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.'" (quoting *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980))).

This is not to say that the City could not, in a content-neutral fashion, actually ban all signs on public property, assuming it could meet the requisite intermediate level of scrutiny. *Id.* 2232 ("And on public property, the Town may go a long way toward entirely forbidding the posting of signs, so long as it does so in an evenhanded, content-neutral manner ") But it cannot, as it does here, just prohibit one type of sign based on content—political signs—without coming under strict scrutiny. *Quinly*, 446 F. Supp. 2d at 1238.

The City also argues that the different categories of signs listed in the "Exemptions" section (which includes Article 8, § 4.A.(6)) "are reasonably limited and do not address viewpoint or expressive content." Doc. 92 at 33.[12] This argument is not persuasive. First, it

[12] The "Exemptions" section, Article 8, § 4, states that "[t]he following signs shall be exempt from the requirements of this article, except for the provisions of Sections 3(A) through 3(H) above." Doc. 38-1 at 63. Section 3 includes certain definitions and prohibits signs that flash, signs that block accessways or windows, signs placed on trees or utility poles, and signs that interfere with traffic safety. *Id.* at 62-63. Besides political signs, Article 8, § 4 includes exemptions for "[f]lags or emblems of a

strains credulity that a political sign somehow does not touch on "expressive content" protected by the First Amendment. Second, reasonableness is not the standard. *Reed*, 135 S. Ct. at 2228 ("[A]n innocuous justification cannot transform a facially content-based law into one that is content neutral."). Third, that Article 8, § 4.A.(6) operates equally without regard to any particular viewpoint does not speak to whether it is content neutral. *See Quinly*, 446 F. Supp. 2d at 1238 n.5 (noting that sign ordinance that does not distinguish based on promotion of any particular political party or candidate may be "viewpoint" neutral, but the wholesale prohibition of the topic altogether makes it content-based). The Supreme Court has clarified that regulations that are not based on any disagreement with the message conveyed will still be subject to strict scrutiny where the regulation is content-based on its face. *Reed*, 135 S. Ct. at 2228 ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 429 (1993))).

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government or of a political, civic, philanthropic, educational or religious organization, displayed on private property," governmental signs, "memorial signs and tables" on public or private property, small signs on private property for the convenience of the public (entrance/exit, parking, restroom signs, etc.), scoreboards in athletic stadiums, and temporary garage sale signs "for a period not to exceed five (5) days." *Id.* at 63-64. The placement of garage sale signs on public right-of-ways is neither explicitly permitted or prohibited.

Accordingly, strict scrutiny applies to Article 8, § 4.A.(6) because it is content-based. Strict scrutiny measures whether the ordinance serves a compelling governmental interest and is narrowly tailored to serve that end. *Reed*; 135 S. Ct. at 2231; *Quinly*, 446 F. Supp. 2d at 1238; *see also Outdoor Sys.*, 67 F. Supp. 2d at 1240. "Whether something qualifies as a compelling interest is a question of law." *United States v. Hardman*, 297 F.3d 1116, 1127 (10th Cir. 2002). The burden is on the City to show a compelling interest underlies Article 8, § 4.A.(6). *Reed*, 135 S. Ct. at 2231.

But this analysis again is complicated because the City focuses on a provision that was not referenced in the violation notice, and that frankly does not say what the City says it says. *See supra* note 4. Here, the City states that the "restriction on signing on City property, including rights-of-way, serves a significant governmental interest" in improving "aesthetics and traffic safety." Doc. 92 at 35. The City notes that such interests are generally accepted for purposes of showing a significant governmental interest. But because Article 8, § 4.A.(6) is content-based, strict scrutiny requires a compelling governmental interest. *Quinly*, 446 F. Supp. 2d at 1238. And many courts have concluded that aesthetics and traffic safety are not compelling reasons to impose content-based restrictions on signs. *See id.* at 1243-44 (noting that traffic safety and aesthetic interests are not compelling); *Outdoor Sys., Inc. v. City of Merriam*, 67 F. Supp. 2d 1258, 1269 (D. Kan. 1999); *see also Solantic*, 410 F.3d at 1268 (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981)). The

lack of a compelling governmental interest means Article 8, § 4.A.(6) fails strict scrutiny.

Although the City states in its motion that the reason for the restriction is aesthetics and traffic safety, Article 8, § 4.A.(6) singles out political signs for a different reason:

> The City recognizes that the expression of political speech is an important and constitutionally protected right; that political signs have certain characteristics that distinguish them from many of the other types of signs permitted and regulated by the City, including the fact that these signs generally do not meet the regular structural design of permanent signs, given their temporary nature; that political signs therefore present a potential hazard to persons and property; and that the City must impose reasonable time limits on the display of political signs for these reasons.

Doc. 38-1 at 64. This language suggests that the reason for the special treatment of political signs is the "potential hazard to persons and property" due to the temporary nature of most political signs. Assuming this is the interest served, the question is whether it is compelling and whether Article 8, § 4.A.(6) is narrowly tailored to serve that interest.

Limiting "potential hazard to persons and property" is very broad. Given that "traffic safety" is generally not viewed as a compelling governmental interest, *see Quinly*, 446 F. Supp. 2d at 1240, the City's generalized concern about limiting "potential hazard[s]" is

likely as equally uncompelling. Although preventing or abating specific hazards may in some instances present a compelling governmental interest, no such justification is apparent or asserted by the City in this case.

Even assuming limiting "potential hazard[s]" was a compelling governmental interest, an additional problem here is that the City has attempted to serve that interest in a way that targets an entire topic of discussion while leaving others untouched entirely, and while only marginally addressing the stated governmental interest. As the Supreme Court noted in *Reed*, the ordinance's "distinctions fail as hopelessly underinclusive." *Reed*, 135 S. Ct. at 2231.

Article 8, § 4.A.(6) singles out only one type of temporary sign as potentially hazardous—those with political content. But other temporary signs, like garage sale signs or real estate signs, are not subject to the same size or durational limitations. *See Quinly*, 446 F. Supp. 2d at 1240 ("[W]hile the City's asserted interest in traffic safety is legitimate, the ordinance, as currently written, does not address that interest because the size limitations applicable to informational signs are not applicable to other signs which present identical concerns ") Likewise, only political signs are flatly prohibited on public property, while other temporary signs could presumably be placed on public property if they meet the other requirements of Article 8.[13] But it

[13] As discussed above, the Court reads Article 8 as only prohibiting political signs from being placed on any City property,

is unclear why signs with political messages would be more hazardous on public property than other temporary signs in that same area. *See Reed*, 135 S. Ct. at 2231-32; *see also Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1570 (11th Cir. 1993) (finding that aesthetics and traffic safety interests are not served by restricting speech based on the content of the message expressed). This "underinclusiveness" is what fails strict scrutiny: "a law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.'" *Reed.* 135 S. Ct. at 2232 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002)).[14]

Accordingly, as a matter of law, the City's content-based provision regarding political signs does not pass strict scrutiny and is therefore unconstitutional. *See United States v. Friday*, 525 F.3d 938, 949 (10th Cir.

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which is one reason Article 8, § 4.A.(6) is an impermissible content-based limitation. The Court does not reach the question of what signs the City could or could not prohibit on its own property, or under what terms, as long as it did so in a content-neutral manner. *See Reed*, 135 S. Ct. at 2232.

[14] The Court also notes that Article 8 contains a separate provision that allows the City to remove any sign that "is unsafe or insecure, or is a menace to the public." Doc. 38-1 at 70 (Article 8, § 10). That content-neutral provision would seemingly suffice to address the City's concerns about potentially hazardous temporary signs without needing to single out political signs for special rules. *See Quinly*, 446 F. Supp. 2d at 1245 ("To the extent the City is concerned about deteriorating signs creating an aesthetic eyesore, the City could enact other provisions mandating the removal of any sign in a state of disrepair.").

2008) ("In First Amendment cases, application of the least-restrictive-means (or 'narrow tailoring') test to a given set of facts is well understood to be a question of law."). The Court bases this ruling solely on the fact that the City's sign ordinance singles out political signs for different rules in a manner that does not narrowly tailor the restriction to serve a compelling governmental interest. The Court does not decide whether the restrictions applied to political signs would be constitutional if applied to all signs in a content-neutral manner, *see, e.g.*, *Reed*, 135 S. Ct. at 2232, as it need not make that decision to resolve the current dispute between the parties.

4. Article 8, § 4.A.(6) can be severed from the remainder of the City's sign ordinance.

Having determined that Article 8, § 4.A.(6) is unconstitutional, the next question is whether it can be severed from the rest of the City's sign ordinance. Severability is determined using state law. In Kansas, the question is whether "the act would have been passed without the objectional portion and if the statute would operate effectively to carry out the intention of the legislature with such portion stricken. . . ." *Outdoor Sys.*, 67 F. Supp. 2d at 1241 (quoting *Thompson v. K.F.B. Ins. Co.*, 850 P.2d 773, 782 (Kan. 1993)). Severability will be assumed "if the unconstitutional part can be severed without doing violence to legislative intent." *Quinly*, 446 F. Supp. 2d at 1246 (quoting *Thompson*, 850 P.2d at 782). Where a portion of a statute is

severable, the Court "should and need not decide whether the rest of the statute is unconstitutional." *Williams Natural Gas Co. v. Supra Energy, Inc.*, 931 P.2d 7, 13 (Kan. 1997). "[W]here unconstitutional parts of a statute can be readily separated from the remainder of the statute without affecting the meaning of what remains, the unconstitutional language will be stricken and the constitutional portion will stand." *Id.* (quoting *State v. Rupert*, 802 P.2d 511, 514 (Kan. 1990)).

The City argues that "if any of the exemptions were considered to be content-based, such an exemption should be severed from the regulations to uphold the remainder," noting that the City's zoning ordinance (of which the sign ordinance is a part) contains a severability clause in Article 3, § 2. Doc. 92 at 34. Although the Kansas Supreme Court has stated that the existence of a severability clause is not significant, *Thompson*, 850 P.2d at 782, the Court concludes that other concerns weigh in favor of severing Article 8, § 4.A.(6). Specifically, Article 8, § 4.A.(6) is a self-contained exemption to the sign ordinance. It can be easily separated without affecting the meaning of the other provisions. *Quinly*, 446 F. Supp. 2d at 1247 ("[E]ven without these four provisions, the ordinance remains a comprehensive and coherent system of sign regulation."); *Outdoor Sys.*, 67 F. Supp. 2d. at 1242 ("The restriction on political campaign signs is not intertwined with the remaining provisions of the ordinance. . . .").

Although Article 8, § 4.A.(6) is listed as an "Exemption" to the sign ordinance, it actually sets more restrictive rules for political signs. Removing it would simply put political signs back on par with other signs. *See Quinly*, 446 F. Supp. 2d at 1247. ("[T]here is no basis to believe that the City council would have preferred having no sign ordinance at all to one that contains all the current provisions other than the four isolated provisions discussed above."). Based on that, the Court cannot conclude that the City would not have passed the sign ordinance but for the inclusion of Article 8, § 4.A.(6).

Accordingly, Article 8, § 4.A.(6) is severed from the City's sign ordinance.

5. Clark's "class of one" claim fails.

Clark purports to bring a "class of one" Equal Protection claim.[15] Doc. 79 at 65-66. Although Clark raises this claim in his motion, he does little to explain it, other than suggesting that his property "appears to be the first and only property against which the City has ever enforced it's [sic] sign regulations which were enacted around 2003 even though numerous residences have had signs in the right of way of their road frontage." Doc. 79 at 65 (citing to statement of facts ¶¶ 14-17). But the facts he states to support that contention

[15] As noted above, the parties analyze Clark's class-of-one claim under his First Amendment claim, though it is generally described in terms of Equal Protection. *See Jicarilla Apache Nation*, 440 F.3d at 1209.

fail to support it or are controverted. *See* Doc. 79 at 4; Doc. 92 at 9-10. Only one of the cited facts even alleges that Clark was singled out for disparate treatment, and the City controverts that there were other residents with signs comparable to Clark's. Doc. 79 at 4; Doc. 92 at 9-10.

The Tenth Circuit has taken a cautious approach in "class of one" cases, wary of "turning even quotidian exercises of government discretion into constitutional causes." *Jicarilla Apache Nation*, 440 F.3d at 1209. In *Jicarilla Apache Nation*, the Tenth Circuit explained that the "paradigmatic class of one case" involves "a public official inflict[ing] a cost or burden on one person without imposing it on those who are similarly situated in material respects, and does so without any conceivable basis other than a wholly illegitimate motive." *Id.* Although it is not settled that a plaintiff must demonstrate a "subjective ill will" on the part of the government official, *id.* at 1209-10, the existence of an objectively reasonable basis for the disputed action will generally defeat a claim that the decision of the government official was "irrational and wholly arbitrary." *Id.* at 1210-11. "This standard is objective—if there is a reasonable justification for the challenged action, we do not inquire into the government actor's actual motivations." *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1216 (10th Cir. 2011).

Clark's claim fails on this point. There is no dispute that there was an objectively reasonable justification for the action—Clark had signs on his property that were at least presumably not in conformance with

the City's sign ordinance. Even though Clark disputes whether the City has a valid right-of-way at the edge of his property, he has set forth no facts showing that De La Torre acted irrationally or in a wholly arbitrary manner.

Further, to prevail on this theory, Clark must point to others who are similarly situated in "every material aspect." *Jicarilla Apache Nation*, 440 F.3d at 1210; *Kansas Penn Gaming*, 656 F.3d at 1216 ("To prevail on this theory, a plaintiff must first establish that others, 'similarly situated in every material respect' were treated differently."). This is an "exacting burden[]" because "it is exceedingly difficult to demonstrate that any difference in treatment is not attributable to a quirk of the plaintiff or even to the fallibility of administrators whose inconsistency is as random as it is inevitable" *Jicarilla Apache Nation*, 440 F.3d at 1213.

Here, Clark has not met that burden. All Clark has stated is his case "appears" to be the first case of enforcement "even though numerous residences have had signs in the right of way of their road frontage." Doc. 79 at 65. But the only evidence cited for that assertion is Clark's own affidavit stating he has observed residences with political signs and mailboxes in the right-of-way, as well as an auto repair sign in the right-of-way "in place for about a year or maybe longer a few years ago but I cannot recall the exact timeframe." Doc. 79-2 at 3. This falls far short of showing similarity "in every material respect." Indeed, in response to the City's assertion that the signs on Clark's property were unique in quantity and placement, Doc. 92 at 17, Clark

responded by stating that no facts cited or offered by the City can prove that. Doc. 100 at 21. But notably, it is Clark's burden to prove others were similarly situated in every material respect, not the City's burden to disprove. *See Jicarilla*, 440 F.3d at 1212. Accordingly, even if Clark could meet the first prong of the class-of-one test and show irrational and arbitrary action on the part of a City official, Clark has not met his burden under the summary-judgment standard to point to sufficient evidence that a jury could rely on to find that he was treated differently than others who are similarly situated in every material respect. *See Matsushita Elec. Indus.*, 475 U.S. at 586-87; *see also Liberty Lobby*, 477 U.S. at 251-52. Accordingly, the City is entitled to summary judgment on Clark's class-of-one theory.

B. Clark's Fourth Amendment Allegations (Count II)

In his Fourth Amendment claim, Clark alleges that De La Torre performed an unlawful search of his property on March 16, 2015. Clark attributes this to the City's zoning ordinance or else the City's failure to train its code enforcement officers, either of which he contends make the City liable for De La Torre's actions. Clark also challenges portions of the City's zoning ordinance, which he says permitted the search, as facially unconstitutional under the Fourth Amendment. Doc. 84 at 14-15.

1. Clark has not established that an unlawful search occurred.

Although Clark asserts that the search of his property was the result of either the City's zoning regulations or a failure to train, that question is only important if there was a Fourth Amendment violation to begin with. This is because the City can only be liable for De La Torre's actions if De La Torre's actions were unconstitutional. *See Wilson v. Meeks*, 98 F.3d 1247, 1255 (10th Cir. 1996) ("A municipality may not be held liable where there was no underlying constitutional violation by any of its officers." (quoting *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir.1993))).

Clark argues that De La Torre entered his property seeking information about whether Clark would remove the signs at issue and did so in a manner that "exceeded the implied license of *Florida v. Jardines*." Doc. 79 at 34-35. Specifically, Clark takes issue with the fact that De La Torre did not knock on his front door but instead walked down the driveway after hearing noises toward the back. This, Clark contends, was an unlawful search of the curtilage of his house. Doc. 79 at 38. Defendants counter that De La Torre never entered the curtilage of Clark's property, and even if he did, he did so in taking the most common path available to visitors in an attempt to contact Clark. Doc. 92 at 41-45.

A "search" happens under the Fourth Amendment when a person's reasonable expectation of privacy "is infringed." *Soldal v. Cook Cty., Ill.*, 506 U.S. 56, 63

(1992). Courts acknowledge that an individual has a reasonable expectation of privacy in the curtilage of his home. *Lundstrom v. Romero*, 616 F.3d 1108, 1128 (10th Cir. 2010). The curtilage of the home—the area "immediately surrounding and associated with the home"—is "as 'part of the home itself for Fourth Amendment purposes.'" *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)).

Even given these protected areas, the Supreme Court has explained that an implicit license exists that allows visitors to "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Jardines*, 569 U.S. at 8. The same license is extended to law enforcement officers, who may approach a home to talk to the owner without a warrant and without disrupting any Fourth Amendment protections. *Id.*; *see also United States v. Shuck*, 713 F.3d 563, 567 (2013) ("[A] 'knock and talk' is a consensual encounter and therefore does not contravene the Fourth Amendment, even absent reasonable suspicion." (quoting *United States v. Cruz-Mendez*, 467 F.3d 1260, 1264 (10th Cir. 2006))).

Clark argues that *Jardines* drew an explicit line about what is allowed for a knock-and-talk, namely, that the officer may only "approach the home by the font path, knock promptly, wait briefly to be received, and then (absent an invitation to linger longer) leave." Doc. 79 at 38 (quoting *Jardines*, 569 U.S. at 8). But Clark misconstrues the holding of *Jardines*. It did not hold that was the only permissible way to approach a

house. In *Jardines*, the issue was whether the typical license to approach a house extended to bringing a drug-sniffing dog onto the front porch to do an investigation. *Jardines*, 569 U.S. at 9. The Supreme Court concluded it did not extend that far because, while it may be routine to have someone knock on the front door, "that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police." *Id.* The scope of any license, therefore, is limited in both area and purpose. *Id.*

But other courts have held that the license to approach a house extends to the normal path taken by visitors. In *United States v. Shuck*, the defendant argued that a knock-and-talk at his trailer home was unconstitutional because officers conducted it at the back door of the home without knocking on the front door first. *Shuck*, 713 F.3d at 567.[16] The Tenth Circuit rejected that argument, even assuming the officers went into the home's curtilage, because the "'portion of the curtilage' that is 'the normal route of access for anyone

[16] Clark argues that *Jardines* changed the law and left the cases cited by the City—many of which are also cited here—no longer good law. But the Court notes that *Shuck* was issued after *Jardines*, and even cites to it. *Shuck*, 713 F.3d at 567. Further, *Jardines* did not address the propriety of approaching a back door versus a front door. In *Jardines*, the problem was that officers came onto a front porch with a drug-sniffing dog. It was the presence of the dog that made the encounter problematic. *Jardines*, 569 U.S. at 9; *see also United States v. Carloss*, 818 F.3d 988, 993 (10th Cir. 2016) ("*Jardines* left our preexisting knock-and-talk precedent undisturbed.").

visiting the premises' is only a 'semiprivate area' on which police may set foot if they 'restrict their movements to places visitors could be expected to go (e.g., walkways, driveways, porches).'" *Id.* (quoting 1 Wayne R. LaFave et al., Search & Seizure § 2.3(f) (5th ed., 2012 update)). When officers in *Shuck* first approached the house, there was a fence enclosing the front yard and part of the driveway. The gate was locked and appeared that it had not been used in some time. The officers then went around the fence to the back door because it "appeared persons entering the trailer entered through the back door." *Id.* at 565. Because "the evidence showed that by approaching the back door as they did, the officers used the normal route of access . . . [they] did not violate the Fourth Amendment when they approached the trailer's back door with an intent to speak to its occupants regarding the reported odor of marijuana." *Id.* at 568 (also noting in a footnote that this holding "is consistent with findings of other circuits"); *see also United States v. Thomas*, 430 F.3d 274, 276-80 (6th Cir. 2005) (rejecting argument that officers violated the Fourth Amendment when they knocked on the back door, "which served as the primary entrance to the home"); *United States v. Garcia*, 997 F.2d 1273, 1279-80 (9th Cir. 1993) ("If the front and back of a residence are readily accessible from a public place, like the driveway and parking area here, the Fourth Amendment is not implicated when officers go to the back door reasonably believing it is used as a principal entrance to the dwelling."); *United States v. Daoust*, 916 F.2d 757, 758 (1st Cir. 1990) ("[A policeman] obviously can go up to the door . . . and, it seems to us, if

that door is inaccessible there is nothing unlawful or unreasonable about going to the back of the house to look for another door, all as part of a legitimate attempt to interview a person.").

The facts in *Shuck* are similar to the facts in this case. Here, it is undisputed that there was no path to the front porch from the driveway, the steps were partially blocked with vegetation, and items on the porch at least partially blocked the front door. Clark admits that he had "trained" at least some of his visitors to come to the back entrance, and that he hoped the state of the front entrance would deter visitors. These undisputed facts, coupled with De La Torre hearing someone towards the back of the house, made his decision to walk that way in an attempt to contact Clark entirely reasonable; no reasonable jury could find otherwise. *See United States v. Raines*, 243 F.3d 419, 421 (8th Cir. 2001) (stating that "law enforcement officers must sometimes move away from the front door when attempting to contact the occupants of a residence"); *United States v. Anderson*, 552 F.2d 1296, 1300 (8th Cir. 1977) (finding that agents' actions in going toward the back of the house after getting no answer at the front to see if a person was in the back with a barking dog was not "incompatible with the scope of their original purpose . . . "); *United States v. Diaz*, 2009 WL 3675006, at *2 (N.D. Fla. Oct. 30, 2009) ("If it appears that someone is in or around a house, officers may take reasonable steps to initiate contact by going to other areas of the property."). The fact that the front door was partially visible, as Clark contends, *see* Doc. 100 at 55, does

not change the fact that De La Torre reasonably assumed that the front door was not the primary entrance.[17] The fact that De La Torre did not first knock on Clark's front door does not make his approach inappropriate. *See Alvarez v. Montgomery Cty.*, 147 F.3d 354, 358 (4th Cir. 1998) ("Other circuits likewise have found that the Fourth Amendment does not invariably forbid an officer's warrantless entry into the area surrounding a residential dwelling even when the officer has not first knocked at the front door."). Nor is the Court convinced that De La Torre exceeded the scope of the license. When Clark asked him to leave, he did so. It is undisputed that De La Torre was at the property no more than a few minutes and left within a minute of being asked to leave. Doc. 92 at 16-17; Doc. 100 at 19; *see Carloss*, 818 F.3d at 998 (finding license not exceeded when officers knocked for several minutes); *Ysasi v. Brown*, 3 F. Supp. 3d 1088, 1158 (D.N.M. 2014) ("[O]nce a person revokes the consent that permitted officers to enter the home or conduct a search, the officers should promptly leave, unless the officers have independent legal authority to remain.").

Accordingly, the Court does not need to determine whether De La Torre entered the curtilage of Clark's

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[17] In his reply, Clark argues that police officers who came to his property in 2018 knocked on the front door, presumably in an attempt to show that the front door is the commonly used entrance for visitors. Doc. 100 at 56. But these unsupported factual allegations that occurred more than three years after the events of this case have no bearing on the issues currently before this Court and do no establish a factual dispute sufficient to defeat summary judgment. *See* Fed. R. Civ. P. 56.

home, because even if he did, his actions in trying to find Clark on the property were taken in accordance with the implied license to approach the house. No reasonable jury could conclude there was a search of Clark's property under these facts. And if there was no search, there was certainly no unconstitutional search. Given that, the Court does not need to reach the question of whether De La Torre's actions were attributable to the City's zoning regulations or the City's failure to train its code enforcement officers. Doc. 79 at 36-37; Doc. 92 at 48-50 This is because "[a] municipality may not be held liable where there was no underlying constitutional violation by any of its officers." *Hinton*, 997 F.2d at 782.

Accordingly, the City is entitled to summary judgment on Clark's Fourth Amendment claim.

2. Clark lacks standing to challenge other provisions regarding under the Fourth Amendment.

Clark's summary-judgment motion also argues that the City's zoning ordinance is void for vagueness because it unconstitutionally allows code enforcement officers to abate (or seize) nonconforming signs without a warrant. Doc. 79 at 40-43 (citing *Mathews v. Eldridge*, 425 U.S. 319 (1976)). The City does not directly address this claim but does seem to suggest that there is an extensive administrative process that must play out before any signs are ever seized. Doc. 92 at 46-48.

Neither party's argument on this point is exceedingly clear, but to the extent Clark is facially challenging the section of the zoning ordinance that permits code enforcement officers to enter property and seize non-conforming signs, the Court finds that he lacks standing. There are no factual allegations that any signs or any other items were ever seized from Clark's property, nor any facts that such a seizure was imminent. There was never even a search of or unlawful entry onto Clark's property.

As discussed above, standing requires that a plaintiff show an injury-in-fact. *Ward*, 321 F.3d at 1266. That injury must be concrete and particularized, as well as actual or imminent. *Initiative & Referendum Inst.*, 450 F.3d at 1087. Here, like with other provisions of the sign ordinance he attempts to challenge, Clark was never subject to any search or seizure. No one entered his property unlawfully or seized any of his property. This distinguishes him from the defendant in *Camara v. Municipal Court of City and Cty. of San Francisco*, which Clark relies on. There, Camara was actually arrested and charged with refusing to allow a warrantless search of his home. *Camara v. Municipal Court of City and Cnty. of San Francisco*, 387 U.S. 523, 525-27 (1967). As the Court has already found, although the violation notice created a sufficient injury-in-fact to permit Clark to challenge Article 8, § 4.A.(6), it did not create an injury sufficient for Clark to challenge the other provisions of the City's zoning ordinance.

C. Clark's Inverse-Condemnation Claim (Count III)

Clark also asserts an inverse-condemnation claim under Kansas state law. This stems from the dispute between the parties about whether or to what extent there is an easement or City right-of-way on the portion of Clark's property that abuts the highway. Clark contends that the City, in sending the violation notice, effected a "regulatory taking" because the violation notice "substantially burdens Clark's First Amendment rights." Doc. 84 at 15; *see also* Doc. 79 at 29-30 (stating that violation notice restricted placement of signs in violation of his First Amendment right and "convert[ed] private property that is free and clear of burden to being property that is burdened by right-of-way restrictions (an effective easement).").

An inverse-condemnation claim is essentially the reverse of an eminent-domain claim. In an eminent-domain action, the governmental authority institutes the action to take property. *Estate of Kirkpatrick v. City of Olathe*, 215 P.3d 561, 565 (Kan. 2009).[18] By contrast,

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[18] Although related, an inverse-condemnation claim is distinct from a "just compensation" or takings claim under the Fifth Amendment. The Fifth Amendment does not prohibit takings—only takings without just compensation. *Olson v. AT & T Corp.*, 431 F. App'x 689, 691-92 (10th Cir. 2011). A property owner cannot bring a Fifth Amendment claim until an inverse-condemnation claim has been adjudicated and just compensation denied. *Id.*; *see also Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-97 (1985). Here, Clark's claim is for inverse condemnation under Kansas law, not under the Fifth Amendment. Doc. 55 at 14.

inverse-condemnation proceedings are bought by the party who owns property to allege that the property was taken for public use without the initiation of condemnation proceedings by the government. *Id.* "To succeed on a claim for inverse condemnation, a party must establish that he or she has an interest in real property affected by a public improvement project and that a taking has occurred. The question of whether there has been a compensable taking is one of law." *Id.*

The parties dedicate considerable portions of their briefs debating who owns the strip of land that is between 30-40 feet from the centerline of the highway that runs adjacent to Clark's property, as well as the nature of that ownership interest (an easement or fee simple). Doc. 79 at 15-29; Doc. 92 at 21-26. But the parties spend very little time on the more obvious question here, namely, whether any "taking" even occurred. That is essential to this claim.

Regulatory takings in Kansas can take three forms: physical, title, or economic. *Garrett v. City of Topeka*, 916 P.2d 21, 30-31 (Kan. 1996). A physical regulatory taking occurs when a regulation literally produces a physical intrusion, such as authorizing "low and frequent overflights for military airplanes." *Id.* A title regulatory taking occurs where a regulation "significantly interferes with the incidents of ownership." *Id.* (emphasis added). An economic regulatory taking "is a taking only if the economic impact on the landowner outweighs the public purpose of the regulation." *Id.*

The only taking Clark alleges is that the sign ordinance interferes with what he wants to do with his own property. But to the extent that is true, it is no more than can be said for every law or zoning ordinance, and it does not represent a significant interference with his ownership. Nor does the violation notice somehow create a cloud on Clark's title, as he suggests. Doc. 79 at 29-30. Under these facts, the Court finds that here has been no compensable taking as a matter of law. *See Estate of Kirkpatrick*, 215 P.3d at 565 ("The question of whether there has been a compensable taking is one of law."). Accordingly, the City is entitled to summary judgment on this claim.

IV. CONCLUSION

THE COURT THEREFORE ORDERS that Plaintiff's Motion for Partial Summary Judgment (Doc. 78) is GRANTED IN PART AND DENIED IN PART.

THE COURT FURTHER ORDERS that Defendant's Motion for Summary Judgment (Doc. 91) is GRANTED IN PART AND DENIED IN PART.

THE COURT FURTHER ORDERS that Clark is granted summary judgment on his claim in Count I of his First Amended Complaint that Article 8, § 4.A.(6) is an unconstitutional content-based restriction under the First Amendment.

THE COURT FURTHER ORDERS that the City is granted summary judgment on Clark's Fourth

Amendment claim (Count II) and Inverse Condemnation claim (Count III).

THE COURT FURTHER ORDERS that Clark's other challenges to the City's sign and zoning ordinances are dismissed without prejudice for lack of standing.

IT IS SO ORDERED

DATED: May 9, 2019

/s/ Holly L. Teeter
HOLLY L. TEETER
UNITED STATES
DISTRICT JUDGE

United States District Court

----------DISTRICT OF KANSAS----------

ERIC S. CLARK,

Plaintiff,

v. Case No: 2:17-cv-02002-HLT

CITY OF WILLIAMSBURG, KANSAS,

Defendant,

JUDGMENT IN A CIVIL CASE

(Filed Jul. 18, 2019)

☒ Jury Verdict. This action came before the Court for a jury trial. The issues have been tried and the jury has rendered its verdict.

☐ Decision by the Court. This action came before the Court. The issues have been considered and a decision has been rendered.

Pursuant to the Memorandum and Order (Doc. 114) and Verdict returned by a jury on July 18, 2019, judgment is awarded to the Plaintiff Eric S. Clark against Defendant City of Williamsburg, Kansas as to Count 1 in the amount of $1.00.

Pursuant to the Memorandum and Order (Doc. 114), judgment is awarded to the Defendant City of Williamsburg, Kansas against Plaintiff Eric S. Clark as to Count 2 and 3.

IT IS SO ORDERED.

TIMOTHY O'BRIEN
CLERK OF THE COURT

Dated: July 18, 2019

/s/ Misty D. Deaton
By Deputy Clerk

/s/ Holly L. Teeter
HOLLY L. TEETER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ERIC S. CLARK,	)	
Plaintiff,	)	
v.	)	Case No.
THE CITY OF	)	2:17-cv-02002-HLT
WILLIAMSBURG, KANSAS,	)	
Defendant.	)	

NOTICE OF APPEAL

(Filed Oct. 16, 2019)

Plaintiff appeals, to the **Court of Appeals for the Tenth Circuit,**

the **(summary judgment) Order** [ECF 114] dated May 9, 2019 and;

the **(denial of reconsideration) Order** [ECF 135] dated June 19, 2019

(ORDERING 'that Clark's motions for reconsideration (Docs. 117, 119, and 121) are DENIED') and;

the **final Judgment** [ECF 156] dated July 18, 2019 and;

the **(denial of motion to amend) Order** [ECF 164] dated September 25, 2019

(ORDERING 'that Clark's motion to amend judgment and for new trial (Doc. 157) is DENIED.')

Respectfully submitted,

/s/ Eric S. Clark

Eric S. Clark, 1430 Dane Ave, Williamsburg, Kansas [66095] 785-214-8904

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ERIC S. CLARK, Plaintiff - Appellant, v. CITY OF WILLIAMSBURG, KANSAS, Defendant - Appellee.	No. 19-3237 (D.C. No. 2:17-CV-02002-HLT) (D. Kan.)

ORDER

(Filed Feb. 11, 2021)

Before **TYMKOVICH**, Chief Judge, **BRISCOE**, and **BACHARACH**, Circuit Judges.

Appellant's petition for rehearing is denied. Judge Bacharach voted to grant rehearing.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court

requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT,
Clerk