

APPENDIX

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APPENDIX A

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

No. 15-2627

[Filed September 22, 2017]

GREGORY LUCE and	)
NICHOLAS NEWMAN,	)
<i>Plaintiffs-Appellants,</i>	)
	)
<i>v.</i>	)
	)
TOWN OF CAMPBELL,	)
WISCONSIN, and TIM	)
KELEMEN,	)
<i>Defendants-Appellees.</i>	)
	)

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 14-cv-046-wmc — **William M. Conley**, *Judge*.

ARGUED JANUARY 19, 2016 —
DECIDED SEPTEMBER 22, 2017

Before EASTERBROOK, ROVNER, and SYKES, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Interstate 90 runs through the Town of Campbell, Wisconsin. The speed

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limit on I-90 in the Town is 65 miles per hour. Two streets and one pedestrian overpass cross the highway within the Town. A traffic survey in 2008 found that between 23,000 and 29,000 trucks and cars pass through the Town on I-90 every day.

Gregory Luce and Nicholas Newman, two members of the local Tea Party, decided that the pedestrian overpass would be a good place to draw attention to their views. The group's placement of banners bearing messages such as "HONK TO IMPEACH OBAMA" led the Town's legislature to enact an ordinance forbidding all signs, flags, and banners (other than traffic-control information) on any of the three overpasses, or within 100 feet of the end of these structures. The ordinance is content-neutral; it does not matter what message any privately placed sign bears. *Reed v. Gilbert*, 135 S. Ct. 2218 (2015). The ordinance is a time, place, and manner limit, permitting messages to be conveyed anywhere else in Campbell. But in this suit under 42 U.S.C. §1983 Luce and Newman contend that the First Amendment (applied to the states by the Fourteenth) permits them to carry or place banners and signs *everywhere* in the Town. The district court disagreed with that contention and granted summary judgment to the Town. See 113 F. Supp. 3d 1002 (W.D. Wis. 2015). The court also dismissed a claim against Tim Kelemen, formerly the Town's chief of police. 116 F. Supp. 3d 915 (W.D. Wis. 2015). We start with the plaintiffs' claim against Kelemen, because his conduct may affect how to understand the genesis and enforcement of the ordinance.

When the Town's police force began to hand out citations and escort demonstrators off the pedestrian

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overpass, they responded by making video recordings and posting them on a website. Kelemen did not take kindly to these videos, especially because one of them showed people being removed for unfurling a large American flag. Viewers started complaining that the police were mistreating the Tea Party. Kelemen then decided to act as a vigilante—as he said in discovery, “It’s just like, you know, you want to mess with us ... we’ll mess with you.” Kelemen decided to “mess with” Luce by posting his name and email address on websites catering to gay men and consumers of pornography. That caused embarrassment to Luce and led to unwanted email and other attention. Kelemen also posted comments on the local newspaper’s website accusing Luce of failing to pay his property taxes and other debts and asserting that his car was about to be repossessed. Kelemen tried to hide his role—he signed the comments “Bill O’Reilly”—but his identity eventually came out, and Luce sued on a constitutional theory (that Kelemen was penalizing both the Tea Party’s speech on the bridge and its videos), plus state tort law.

Kelemen disgraced himself. When what he had done became known, he resigned as police chief. He was prosecuted for violating Wis. Stat. §947.0125(2)(e) (unlawful use of a computerized communication system), pleaded no contest, and received a diversionary disposition. The district court held, however, that Kelemen had not violated Luce’s rights under the First Amendment, and it relinquished supplemental jurisdiction over the state-law claims.

The court concluded that Kelemen was not engaged in state action when “messing with” Luce and that the

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First Amendment therefore did not apply (for it deals only with governmental conduct). Acting as a vigilante is not part of a police officer's job. Kelemen did some of the dirty work while on duty and used an office computer for some posts. But he did not use official information or privileged access to information. All of the facts he gathered and disclosed about Luce, such as his physical and email addresses, were available to the general public. Anyone else could have done exactly what Kelemen did. And that's why the district judge thought that he was acting in a private capacity, off on a lark and a frolic as some cases say, rather than as a police officer. The judge held that remedies under state law are the right response to Kelemen's misconduct.

A public employee's acts occur under color of state law when they relate to official duties. See, e.g., *Gibson v. Chicago*, 910 F.2d 1510, 1516 (7th Cir. 1990); *Hughes v. Meyer*, 880 F.2d 967, 971–72 (7th Cir. 1989). Defamation was not among Kelemen's duties. What he did was not even a misguided effort to perform an official function. His activities could be called "related" to official duties in the sense that they were designed to injure a person who criticized Kelemen's implementation of the Town's ordinance, but the same could be said about the misconduct at issue in *Honaker v. Smith*, 256 F.3d 477 (7th Cir. 2001). There we held that a fire chief was not acting under color of state law when he burned down the house of a disgruntled citizen whom the chief had come to regard as a pest. Arson is not among a fire chief's duties, just as defamation is not among a police chief's. So we agree with the district court that state law, not §1983, provides the appropriate remedy for Kelemen's misconduct. See also, e.g., *Latuszkin v. Chicago*, 250

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F.3d 502, 505–06 (7th Cir. 2001); *Pickrel v. Springfield*, 45 F.3d 1115, 1118–19 (7th Cir. 1995).

Kelemen’s behavior bears on this federal suit, however, by undermining his credibility. Much of the information presented to the Town’s legislature, and to the district court, about the reason for the ordinance’s enactment came from Kelemen. He told the legislature, and the judge, that the Tea Party’s banners caused drivers to pull off the road to take photographs, produced complaints from drivers about slow and snarled traffic, and so on. Given Kelemen’s misconduct, it is not possible (when acting on a motion for summary judgment) to accept his statements as truthful, even though there was no directly opposing evidence.

This gives plaintiffs an opening. They recognize that Campbell’s ordinance is similar to one that was enacted by the City of Madison, Wisconsin, and sustained against constitutional challenge in *Ovadal v. Madison*, 469 F.3d 625 (7th Cir. 2006) (holding that the adoption of an ordinance like Campbell’s made a constitutional challenge moot by implementing a nondiscriminatory system). See also *Ovadal v. Madison*, 416 F.3d 531, 536 (7th Cir. 2005) (remarking that constitutional problems in Madison’s initial approach to the subject could be solved if the City “prohibited not just Ovadal’s, but all protests and all signs on all Beltline overpasses”). But they insist that all time, place, and manner regulations require empirical support and contend that without Kelemen’s evidence the Town’s ordinance has none.

Plaintiffs offered some evidence of their own, in the form of a report from traffic engineer Paul Dorothy. He reached two principal conclusions: first, that 23,000 cars a day is light traffic, compared with the highway’s

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design limit; second, that the presentation of signs and banners on overpasses is unlikely to cause “long traffic back-ups”, contrary to Kelemen’s submission. (Kelemen subjectively rated Campbell’s portion of I-90 as unusually hazardous; Dorothy’s report shows that this assertion lacks empirical support.) For its part, the Town offered some evidence independent of Kelemen’s observation. Officer Casper testified that he observed a car that had pulled off the road to take pictures of signs on the overpass. The record contains a photograph of one car pulled over, with occupants taking pictures. The Town did not conduct a formal safety evaluation, however.

The paucity of evidence from anyone other than Kelemen leads us to ask whether record evidence supporting time, place, and manner restrictions is always essential. Plaintiffs say yes, relying on decisions such as *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), and *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). *McCullen* dealt with speech about abortion and *Renton* with the location of sexually oriented businesses. The jurisdictions that enacted those restrictions contended that those topics required distinctive regulations, and the Justices wanted some proof.

After *Reed v. Gilbert* a powerful reason is needed whenever a law classifies by speech’s content. See also, e.g., *Norton v. Springfield*, 806 F.3d 411 (7th Cir. 2015). Whether or not the sorts of rules at issue in *McCullen* and *Renton* amount to content discrimination, as *Reed* understood that phrase, the Court found each classification sufficiently problematic to require an extra degree of support. But the Justices have never

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suggested that empirical support is required for *all* time, place, and manner limits.

Consider, for example, a limit on loud speech or music. The Supreme Court dealt with such limits in *Kovacs v. Cooper*, 336 U.S. 77 (1949), and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Each time the Court sustained the regulation without requiring record evidence about how high decibel levels affect people subjected to noise. In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the Court rejected a challenge to the Park Service's ban on sleeping in Park Service units (such as the Mall) in Washington, D.C., because the ban did not distinguish by the message anyone proposed to convey. The Justices thought that the regulation likely reduced congestion and "wear and tear on park properties" (*id.* at 299) but relied on their own assessment rather than proof in the record. A dissenting opinion criticized the Court for not demanding proof, see *id.* at 311 (Marshall, J., dissenting), but the majority was unmoved. And it is easy to collect other decisions sustaining time, place, and manner regulations on the basis of the Justices' nonempirical assessments. See, e.g., *United States v. Kokinda*, 497 U.S. 720 (1990) (ban on solicitation on Post Office grounds); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (ban on literature dissemination outside designated areas of a state fair).

Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981), offers another illustration. San Diego forbade many billboards near its highways. A majority of Justices believed that a ban would be proper, given the ability of billboards to distract drivers (and the fact that many

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billboards are aesthetic disasters); they did not require proof of this effect in the record. See *id.* at 508–12 (opinion of White, J., joined by Stewart, Marshall & Powell, JJ.) (the Court “hesitate[s] to disagree with the accumulated, common-sense judgments of local lawmakers” and a ban would be valid for safety and aesthetic reasons), 541 (Stevens, J., agreeing with this conclusion but dissenting for other reasons), 559–61 (Burger, C.J., agreeing with this conclusion but dissenting on other grounds), 569–70 (Rehnquist, J., agreeing with the views expressed by Chief Justice Burger and Justice Stevens). A plurality of the Court found the particular statute unconstitutional because it allowed some billboards while forbidding others, discriminating by content and subject matter. But seven Justices deemed the rationale for an across-the-board ban adequate, despite the paucity of record evidence.

The cases we have been discussing do not excuse the absence of a good reason for regulating; *every* time, place, and manner regulation requires that. So if a law were to forbid the use of a megaphone near Times Square at noon on a weekday, a court would insist that the city or state have some evidence to overcome the common understanding that the din there (and then) is already so great that a megaphone may be needed for speech to be heard at all; but a limit on megaphones during concerts in Central Park requires no such empirical justification, because the potential benefits of the rule can be appreciated without one.

A regulation of the sort the Town has adopted rests on a belief that overhead signs and banners will cause at least some drivers to slow down in order to read

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what the banners say, and perhaps to react to them (say, by blowing the car's horn in response to "HONK TO IMPEACH OBAMA"). Stopping to take a picture is just an extreme version of slowing down. Reading an overhead banner requires some of each driver's attention, and diverting attention—whether to banners or to cell phones and texting—increases the risk of accidents. This effect is well established for cell phones and texting and is the basis for legislation by many jurisdictions, uncontested in court as far as we are aware, though talking and texting are speech.

It does not take a double-blind empirical study, or a linear regression analysis, to know that the presence of overhead signs and banners is bound to cause some drivers to slow down in order to read the sign before passing it. When one car slows suddenly, another may hit it unless the drivers of the following cars are alert—and, alas, not all drivers are alert all the time.

Advertising signs well off a freeway don't have the same effect. But novel signs directly overhead will affect some drivers who do not slow for billboards or hotel logos. And one common finding of empirical research is that when cars travel at different speeds—as when some slow down and others don't—the risk of accidents rises. A report issued by the Federal Highway Administration summarized this way: "There is evidence that crash risk is lowest near the average speed of traffic and increases for vehicles traveling much faster or slower than average. ... When the consequences of crashes are taken into account, the risk of being involved in an injury crash is lowest for vehicles that travel near the median speed[.]" *Synthesis of Safety Research Related to Speed and Speed*

Management (July 1998), available at <https://www.fhwa.dot.gov/publications/research/safety/98154/speed.cfm>. The report cites many sources for this conclusion. Plaintiffs' expert did not consider this source of risk; Dorothy's report principally addresses the likelihood that signs will lead to traffic jams. But collisions, not traffic jams, are the principal risk when cars move at different speeds.

The assessment in the agency's report has been subject to criticism, but it also has been supported by new data. Compare Kara M. Kockleman & Jianming Ma, *Freeway Speeds and Speed Variations Preceding Crashes, Within and Across Lanes*, 46 J. Transportation Research Forum 43 (Spring 2007) (not finding evidence that speed variations increase crashes), with Mohammed Quddus, *Exploring the Relationship between Average Speed, Speed Variation, and Accident Rates Using Spatial Statistical Models and GIS*, 5 J. Transportation Safety & Security 27 (2013) (finding such evidence). We do not try to resolve this controversy. It is enough to say that a state or local legislature that attempts to reduce the incidence of sudden braking on a superhighway cannot be thought to be acting irrationally or trying to suppress speech for no good reason.

This is enough to support the district court's rejection of plaintiffs' challenge to the no-signs-on-overpasses rule. But it does not speak to the 100-foot addition, which the Town has not even *tried* to justify, despite the fact that one plaintiff has filed an affidavit stating that he wants to demonstrate off the overpass but within the 100-foot limit and has refrained from doing so only because of the threat of prosecution.

The ordinance forbids a small “For Sale” sign on the front lawn of any house near the ends of the overpasses. (The parties tell us that two homes are within the 100-foot limits.) It bans every political sign on a home’s lawn, every balloon emblazoned “Happy Birthday” for a party in the back yard, every “Merry Christmas” banner draped over the front door in December, and every “Open” sign in the door of any shop near an overpass. These prohibitions apply whether or not the sign is large enough to attract drivers’ attention.

Time, place, and manner restrictions must serve a “significant governmental interest” and be no more extensive than necessary. See, e.g., *Community for Creative Non-Violence*, 468 U.S. at 293. It is hard to see why signs off the highway, and too small to cause drivers to react, should be banned. Cf. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (ban on handbills distributed through newsracks was not justified); *Ladue v. Gilleo*, 512 U.S. 43 (1994) (ban on signs on front lawns was not justified). Perhaps the Town has some justification for the 100-foot rule, but unless it produces one the district court should ensure that political demonstrations and other speech that does not jeopardize safety can proceed.

The judgment of the district court is affirmed, except to the extent that it rejects plaintiffs’ challenge to the 100-foot buffer zone. With respect to that issue the judgment is vacated, and the case is remanded for further proceedings.

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APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WISCONSIN**

Case No. 14-cv-46-wmc

[Filed July 6, 2015]

GREGORY LUCE and	)
NICHOLAS NEWMAN,	)
	)
Plaintiffs,	)
	)
v.	)
	)
TOWN OF CAMPBELL,	)
WISCONSIN and	)
TIM KELEMEN,	)
	)
Defendants,	)
	)
and	)
	)
COMMUNITY INSURANCE	)
CORPORATION,	)
	)
Intervening Defendant.	)
	)

JUDGMENT IN A CIVIL CASE

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This action came for consideration before the court with District Judge William M. Conley presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that summary judgment is granted in favor of all defendants on the federal claims.

The court declines to exercise its supplemental jurisdiction over plaintiff Gregory Luce's state law claims. Those claims are DISMISSED WITHOUT PREJUDICE.

s/ J. Titak, Deputy Clerk
Peter Oppeneer, Clerk of Court

7/6/2015
Date

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WISCONSIN**

14-cv-046-wmc

[Filed July 2, 2015]

GREGORY LUCE and	)
NICHOLAS NEWMAN,	)
	)
Plaintiffs,	)
	)
v.	)
	)
TOWN OF CAMPBELL,	)
WISCONSIN and TIM KELEMEN,	)
	)
Defendants,	)
	)
and	)
	)
COMMUNITY INSURANCE	)
CORPORATION,	)
	)
Intervening Defendant.	)
	)
v.	)
	)
TOWN OF CAMPBELL,	)

WISCONSIN and TIM KELEMEN,)
)
 Third-Party Defendants.)
)

OPINION AND ORDER

In a prior opinion granting summary judgment in favor of defendants on all but one of plaintiff Gregory Luce's federal claims, the court also explained its inclination to grant summary judgment as to Luce's remaining First Amendment retaliation claim on the grounds that defendant Tim Kelemen did not appear to be acting under color of state law with respect to the events giving rise to that claim. (6/16/2015 Op. & Order (dkt. #127) 23-28.) Before granting summary judgment, however, the court provided plaintiff an opportunity to respond as required by Federal Rule of Civil Procedure 56(f). (*Id.* at 27.) Having reviewed plaintiff's response (dkt. #130), the court now finds as a matter of law that Kelemen was not acting under color of state law within the meaning of 42 U.S.C. § 1983. Therefore, the court will grant judgment to Kelemen as to Luce's First Amendment retaliation claim as well. Having disposed of plaintiffs' federal claims, the court will also decline to exercise its supplemental jurisdiction over Luce's two claims alleged against Kelemen under state law. *See Groce v. Eli Lilly & Co.*, 193 F.3d 496, 501 (7th Cir. 1999).

OPINION

In his response, Luce asserts arguments that the court already considered and rejected. Only two merit

additional comment.¹ *First*, Luce contends that Kelemen was acting under color of state law because he was “on duty” and “used police department computers and Internet access.” (Pl.’s Rule 56(f) Resp. (dkt. #130) 2.) As the Seventh Circuit has repeatedly instructed, however, the determination of whether an officer is acting under color of state law does not turn on whether he is on or off duty at the time of the alleged violation. “[A]cts committed by a police officer even while on duty and in uniform are not under color of state law unless they are in some way related to the performance of police duties.” *Gibson v. City of Chi.*, 910 F.2d 1510, 1516 (7th Cir. 1990) (quoting *Briscoe v. LaHue*, 663 F.2d 713, 721 n.4 (7th Cir. 1981) (internal citation and quotation marks omitted)). That is why the alleged act of a fire chief in burning down the dilapidated, out-of-code house of a disgruntled citizen was found not to have been effectuated under the color of state law. *See Honaker v. Smith*, 256 F.3d 477, 484-85 (7th Cir. 2001) (“[N]ot every action by a state official or employee is deemed as occurring “under color” of state law’ Acts by a state officer are not made under color of state law unless they are related in some way to the performance of the duties of the state

¹ Luce also points to evidence that Kelemen’s actions were at least motivated in part by Luce’s exercise of his First Amendment rights in opposing a town Ordinance. (Pl.’s Rule 56(f) Resp. (dkt. #130) 6-9.) While this may well be so, it is *not* material to the threshold question of whether Kelemen was acting under color of state law for reasons explained below. Moreover, plaintiff’s reference to Kelemen’s actions in researching overpass ordinances and proposing that the Town Board adopt the ordinance at issue (*id.* at 3) are also not material since these actions are not the conduct on which Luce relies in alleging a First Amendment retaliation claim.

office.”) (quoting *Hughes v. Meyer*, 880 F.2d 967, 971 (7th Cir. 1989)).

In determining whether Kelemen was acting under color of state law, the court instead considers “the nature of the specific acts” performed. *Latuszkin v. City of Chi.*, 250 F.3d 502, 505-06 (7th Cir. 2001) (“The important consideration, however, in determining whether an officer is acting under color of state law is the nature of the specific acts performed.”); *see also Pickrel v. City of Springfield, Ill.*, 45 F.3d 1115, 1118 (7th Cir. 1995) (“Deciding whether a police officer acted under color of state law should turn largely on the nature of the specific acts the police officer performed, rather than on merely whether he was actively assigned at the moment to the performance of police duties.”). As the court previously explained -- and to which plaintiff fails to offer any meaningful response -- the evidence does not support a finding, or even an inference, that Kelemen used or displayed his police powers, or otherwise invoked his authority as sheriff, to carry out any of the alleged retaliatory acts. (See 6/16/15 Op. & Order (dkt. #127) 25.) Quite to the contrary, Kelemen was actively hiding his identity. This included not using his authority or position in order to gather the necessary personal information to sign Luce up for websites or to comment on online forums without a trace back to the Town, Police Department or him. (*Id.*) Of course, this does not mean that what Kelemen did was legal, simply that what he did is not actionable under § 1983.

Finally, Kelemen did not act under color of state law by use of a police department computer or internet access. As this court previously explained, courts that

found the defendant acted under color of law by his or her use of public resources focused on access to information *peculiar to the defendant's position*. (*Id.*) Absent a leveraging of one's public position, there is no state action. Indeed, the *Haines* case cited in the court's prior opinion and order provides an extreme example of use of police department resources for acts outside of the scope of § 1983. (*Id.* at 26 (citing *Haines v. Fisher*, 82 F.3d 1503, 1505-06 (10th Cir. 1996)).) Here, too, there is no dispute that Kelemen used the police department's computer and internet access to review publically-available information. However far he fell short of the expectations of a professional police officer, much less the standards of a supervising officer, he did not act under color of state law.

Second, Luce contends that Kelemen was acting under color of state law because his retaliatory conduct "related in some way to the performance of a police duty." (Pl.'s Rule 56(f) Resp. (dkt. #130) 4 (quoting *Gibson*, 910 F.2d at 1516-17).) Even inferring that Kelemen's *motivation* in engaging in the retaliatory acts was somehow job-related -- in other words, he sought to distract Luce from his efforts to harass police officers or to rally opposition to the Ordinance, rather than a juvenile attempt at revenge -- the court's focus in determining whether Kelemen acted under color of state law must be on the nature of Kelemen's *actions*, just as it was the focus of the Seventh Circuit in considering the actions of a fire chief who set fire to a house in *Honaker*.

That Kelemen may have believed he was acting in his employer's interest -- misguided as that belief would have been -- is not enough to find that his

actions fall under the color of state law. *See Ector v. Powell*, No. IP-00-20-C-B/S, 2002 WL 356704, at *4 (S.D. Ind. Mar. 1, 2002) (“The color of law analysis does not turn on the desires or motivating factors, but on the means by which the constitutional injuries are carried out.”); *cf. Walker v. Taylorville Corr. Ctr.*, 129 F.3d 410, 414 (7th Cir. 1997) (relying on the fact that defendant was able to take certain actions “solely because of the position of authority she enjoyed,” and disregarding defendant’s argument that actions were taken “in pursuit of her own interest”); *Simmons v. City of Evanston*, No. 89 C 9421, 1992 WL 25712, at *8 (N.D. Ill. Jan. 31, 1992) (concluding that officer acted under color of state law “even though motivation was personal,” because “in order to accomplish his desired result, he invoked the authority of his office”); *Grimball v. New Orleans City*, No. 10-3657, 2012 WL 1397678, at *10 (E.D. La. Apr. 23, 2012) (“Although a private pursuit by a police officer does not constitute state action, the reasons motivating an officer’s actions are generally irrelevant. Therefore, the Court focuses not on the subjective intent of [defendant] in allegedly plotting the confrontation with [plaintiff], but rather focuses upon the content of [defendant’s] actions and their context in relation to [plaintiff].” (internal citation omitted)).

For all of these reasons, the court concludes that no reasonable jury could find that Kelemen’s actions fall under color of state law. Therefore, the court will grant judgment to Kelemen on Luce’s First Amendment retaliation claim.

This leaves only plaintiff’s request that the court exercise supplemental jurisdiction over his state law

claims. The court will decline that request for at least two reasons. First, the focus of the court's opinions to date have been on the legal merits of plaintiffs' First Amendment claims. While this court is now familiar with the facts surrounding plaintiff Luce's state law claims, the record is largely undisputed and not at all complex. Accordingly, a state court should have no problem becoming familiar with those facts. Second, the state law claims appear to turn on questions peculiar to state law. For example, a state court is in the best position to apply the notice requirement of Wis. Stat. § 893.80, as well as define the scope of the privacy interests covered by Wis. Stat. § 995.50(2)(a). Consequently, the state court system is in a better position than this court in deciding the merits of those claims.

ORDER

IT IS ORDERED that:

- 1) Defendant Tim Kelemen's motion for summary judgment (dkt. #65) is GRANTED as to (a) plaintiff Gregory Luce and Nicholas Newman's First Amendment free speech and freedom of assembly claims (first and second causes of action in the amended complaint) and (b) plaintiff Gregory Luce's First Amendment retaliation claim, and DENIED AS MOOT in all other respects.
- 2) Plaintiffs Gregory Luce and Nicholas Newman's motion for summary judgment (dkt. #75) is DENIED as to (a) plaintiffs' First Amendment free speech and freedom of assembly claims (first and second causes of action in the amended

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complaint) and (b) plaintiff Gregory Luce's First Amendment retaliation claim, and DENIED AS MOOT in all other respects.

- 3) The court declines to exercise its supplemental jurisdiction over plaintiff Gregory Luce's state law claims. Those claims are DISMISSED WITHOUT PREJUDICE.

Entered this 2nd day of July, 2015.

BY THE COURT:

/s/

William M. Conley
District Judge

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APPENDIX D

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WISCONSIN**

14-cv-046-wmc

[Filed June 16, 2015]

GREGORY LUCE and	)
NICHOLAS NEWMAN,	)
	)
Plaintiffs,	)
	)
v.	)
	)
TOWN OF CAMPBELL,	)
WISCONSIN and TIM KELEMEN,	)
	)
Defendants,	)
	)
and	)
	)
COMMUNITY INSURANCE	)
CORPORATION,	)
	)
Intervening Defendant.	)
	)
v.	)
	)
TOWN OF CAMPBELL,	)

WISCONSIN and TIM KELEMEN,)
)
 Third-Party Defendants.)
)

In this suit under 42 U.S.C. § 1983, plaintiffs Gregory Luce and Nicholas Newman challenge a Town of Campbell ordinance prohibiting signs, banners and other items from overpasses on Interstate 90 within the town limits. Plaintiffs contend that this new ordinance, which was adopted in October 2013, violates their First Amendment rights. In addition, Luce claims that defendant Tim Kelemen, then Chief of Police for the Town of Campbell, violated his right to petition without retaliation, invaded his privacy and committed civil identity theft. The Town's insurer, Community Insurance Corporation, subsequently intervened, seeking a declaratory judgment that it has no duty to defend or cover the claims asserted against defendant Kelemen alone.

Each party has moved for summary judgment. For the reasons explained more fully below, the court will grant the Town's and Kelemen's motions for summary judgment on plaintiffs' claims for violation of their rights to free speech and assemble under the First Amendment (dkt. ##60, 65), finding no genuine issue of material fact that the challenged ordinance constitutes a reasonable time, place and manner restriction. As explained more fully below, the court will also grant intervening defendant CIC's motion for summary judgment (dkt. #70), finding that the claims asserted against Kelemen alone were all premised on his posting of internet comments about Luce and using Luce's personal identifying information to sign him up for

unwanted websites. Because these actions plainly fall outside the scope of Kelemen's employment, CIC has no duty to defend or cover them.

Finally, the court is inclined to grant judgment on Luce's remaining retaliation claim under the First Amendment asserted against Kelemen on the grounds that Kelemen was not acting under color of state law when he retaliated against Luce. Because defendant did not directly assert this defense, however, the court will provide Luce with an opportunity to explain why judgment should not be entered in Kelemen's favor on this last federal claim.¹ Fed. R. Civ. P. 56(f).

UNDISPUTED FACTS²

I. The Parties

Plaintiff Gregory Luce is a resident of La Crosse County, Wisconsin. For some time, Luce has been involved with the La Crosse Tea Party -- a group of individuals who share common political beliefs, including a desire for lower taxes and limited

¹ If the court grants judgment to defendant Kelemen on the First Amendment retaliation claim asserted against him, the court will likely decline supplemental jurisdiction over plaintiff's remaining state law claims, and dismiss those claims without prejudice, although plaintiff is free to address why it should not do so as well. *See Groce v. Eli Lilly & Co.*, 193 F.3d 496, 501 (7th Cir. 1999) (explaining that it is "the well-established law of this circuit that the usual practice is to dismiss without prejudice state supplemental claims whenever all federal claims have been dismissed prior to trial").

² For purposes of summary judgment, the court finds the following facts to be material and undisputed except as otherwise noted.

government. In keeping with his religious beliefs as a practicing Catholic, Luce also actively opposes abortion, including President Obama's position on abortion. Particularly relevant to this lawsuit, Luce participates in protests against abortion and President Obama's policies on the pedestrian overpass that spans Interstate 90 in the Town of Campbell. Plaintiff Nicholas Newman is also a resident of La Crosse County and involved with the La Crosse Tea Party. Like Luce, Newman protested with signs and banners on the pedestrian overpass, and wishes to do so in the future.

The Town of Campbell is located in western Wisconsin near the Mississippi River, just north of La Crosse. Defendant Tim Kelemen was the Chief of Police for the Town when it passed Ordinance 9.12 and during all times relevant to this action. Kelemen has since resigned from his position as Chief of Police and is no longer employed by the Town.

Intervenor defendant Community Insurance Corporation ("CIC") issued a public entity liability insurance policy to the Town of Campbell covering the time relevant to this lawsuit. The Town and Kelemen tendered their defense of the claims asserted in plaintiffs' complaint to CIC, seeking insurance coverage. CIC accepted the defense for both defendants, but now seeks a declaratory judgment that it has no duty to defend or cover Kelemen for any of the claims asserted against him.

II. Facts Relevant to Plaintiffs' First Amendment Claim

A. Interstate 90 and Overpasses in the Town of Campbell

Interstate 90 passes through the Town of Campbell just east of the Wisconsin-Minnesota state line. There are two vehicular overpasses and one pedestrian overpass above Interstate 90 within the town's limits. The pedestrian overpass connects Bainbridge Street and stretches over I-90, as illustrated below:



(Declaration of Scott Johnson, Ex. 1 (dkt. #62-1) 1.) As reflected in the picture, this overpass is located near traffic lanes exiting and merging from Dawson Avenue, as shown by the third lane in both directions of traffic. The two vehicular overpasses are similarly located in areas where traffic is merging onto and/or off of Interstate 90.

A 2008 traffic study shows that between 23,100 and 29,500 vehicles travel on Interstate 90 running through Campbell on a daily basis. During his employment with the Town, Kelemen responded to numerous traffic accidents on this stretch of I-90, and classified it as a significant risk area given the volume of traffic and frequency of accidents. For their part, plaintiffs view this same traffic flow below the overpasses as a “unique opportunity to share their message to both a local audience and an out-of-state audience.” (Pls.’ Reply to Pls.’ PFOFs (dkt. #101) ¶ 24.) Plaintiffs also dispute the assertion that this stretch of interstate has a “high accident rate.” (Pls.’ Resp. to Campbell’s PFOFs (dkt. #89) ¶ 33.)

The Town of Campbell has never permitted advertisements to be displayed from an overpass, though plaintiffs point out that there is a Days Inn sign located 101.5 feet from the Bainbridge pedestrian overpass.³

B. Protest Activities

On August 6, August 17, September 11, and September 24, 2013, protests occurred on the pedestrian overpass.⁴ Defendants submitted photographs and a video of one of the protests. (Declaration of Justin H. Lessner, Exs. 1-5. (dkt. ##63-1 to 63-5).) These exhibits show people standing on the

³ The Town also bars billboards in the Town of Campbell, including flashing signs or signs with moving parts. (Campbell’s PFOFs (dkt. #64) ¶ 121.)

⁴ Kelemen also mentions a protest on December 7, 2013, which post-dates the enactment of Ordinance 9.12.

overpass holding or otherwise affixing large “IMPEACH OBAMA” signs, other small signs stating “HONK TO IMPEACH OBAMA,” and American flags. In the video taken from the La Crosse Tea Party website, vehicles can be heard honking their horn as they pass under the signs and other displays. (Pls.’ Resp. to Campbell’s PFOFs (dkt. #89) ¶¶ 130, 149.)

C. Justification for Sign Ordinance

As Chief of Police at that time, Kelemen personally witnessed these protests and observed traffic slowing and braking in response to the signs, banners, and other items displayed on the overpass. He also observed vehicles pulling over onto the shoulder of Interstate 90 to take photographs and observe the signs. In addition, Kelemen received several phone calls from residents and travelling motorists complaining about traffic safety issues caused by these protests.⁵ In particular, individuals complained that drivers had to slam on their brakes at or near the overpass.

At some point, Kelemen advised Scott Johnson, the Chairperson of the Town’s Board, of the need to take action to prevent traffic accidents caused by the signs, as well as other items displayed during the protests on the pedestrian overpass. Kelemen believed the

⁵ Plaintiffs dispute that the Town’s Police Department received phone calls expressing concerns for traffic safety because “[t]here is no record to support this statement.” (Pls.’ Resp. to Campbell’s PFOFs (dkt. #89) ¶¶ 74-75.) Plaintiffs, however, fail to point to any records requirement. Moreover, there is no dispute that Kelemen reported receiving such complaints to Johnson and other town officials.

overpass sign ordinance was needed to protect traffic safety based on his training, experience, and his personal observations of the overpass protests. Kelemen also discussed traffic conditions on Interstate 90 in Campbell with several Wisconsin State Patrol officers, who informed him that it is a dangerous area. Kelemen further researched sign ordinances passed by other municipalities, including the City of Madison, Wisconsin's ordinance that was previously challenged in court.⁶

In addition, Kelemen learned of traffic incidents caused by similar overpass protests in other parts of the country. According to Plaintiffs, however, "[t]hese incidents occurred in significantly different traffic environments than what is present in the Town of Campbell." (Pls.' Resp. to Campbell's PFOFs (dkt. #89) ¶ 89.) Still, there is no dispute that these other traffic incidents were caused by similar overpass protests.

In evaluating the need for an overpass sign ordinance, Chairperson Johnson relied on the history of the overpass, Kelemen's concern about safety issues created by overpass signs, the number of accidents that had occurred on Interstate 90 in Campbell, and personal experiences in driving Interstate 90. Johnson personally drives Interstate 90 on nearly a daily basis. Moreover, Johnson received traffic safety training

⁶ See *Ovadal v. City of Madison*, 469 F.3d 625 (7th Cir. 2006). Plaintiffs dispute that Ordinance 9.12 and the ordinance adopted by the City of Madison are similar because "each addresses different overpasses and traffic patterns." (Pls.' Resp. to Campbell's PFOFs (dkt. #89) ¶¶ 85-86.) It is undisputed, however, that both Ordinance 9.12 and the City of Madison's ordinance prohibit individuals from displaying signs on overpasses.

through his employer, Waste Management, which included information on the risks of distracted driving. While plaintiffs dispute whether Johnson's training experience qualifies him as an "expert in traffic safety," (Pls.' Resp. to Campbell's PFOFs (dkt. #89) ¶¶ 31, 90), it is not disputed that Johnson had training in traffic safety, nor that he relied on that and other personal experience in evaluating the necessity for an overpass sign ordinance.

D. Ordinance 9.12

On September 10, 2013, a proposed ordinance was read into the record at a Town of Campbell Board of Supervisors' meeting and opened for public comment. After the Board introduced the proposed ordinance, members of the public were allowed to speak at the September 10th meeting. Among others, Luce spoke against enactment of the overpass sign ordinance. After the meeting, each member of the Town's Board individually spoke with the Town's attorney regarding the overpass sign ordinance. Then, on October 8, 2013, the Town's Board again discussed the proposed ordinance. At that meeting, the Town's Board voted 4 to 1 to approve the Ordinance.

The Ordinance provides in pertinent part:

No person shall display, place, erect, post, maintain, install, affix, or carry any sign, flags, banners, pennants, streamers, balloons or any other similar item:

(1) on any portion of a vehicular or pedestrian bridge or overpass that passes over a freeway or expressway as defined in WIS. STAT. § 346.57, or a controlled

access highway as defined in WIS. STAT. § 990.01, when such highway has a speed limit of more than 40 miles per hour, whether the highway is under the jurisdiction of the federal, state or local government, provided that such sign is visible from such freeway, expressway or controlled access highway.

(2) within one hundred (100) feet of any portion of a vehicular or pedestrian bridge or overpass that passes over a freeway or expressway as defined in WIS. STAT. § 346.57, or a controlled access highway as defined in WIS. STAT. § 990.01, when such highway has speed limit of more than 40 miles per hour, whether the highway is under the jurisdiction of the federal, state or local government, provided that such sign is visible from such freeway, expressway or controlled access highway.

(Campbell's PFOFs (dkt. #64) ¶ 113.) As written, Ordinance 9.12 currently only applies to Interstate 90, as the only highway in Campbell that has a speed limit over 40 miles per hour.

E. Impact of Ordinance on Plaintiffs' Protest Activities

On October 24, 2013, Luce and other protestors assembled at one of the overpasses on Interstate 90 in Campbell with t-shirts that collectively spelled out "IMPEACH" on the front and "OBAMA" on the back. Officer Zachary Fronk responded to the overpass and

advised the group that their t-shirts violated Ordinance 9.12. When asked why t-shirts posed a problem, Fronk responded that the shirts collectively formed a sign. Rather than receive a citation, Luce and the others left the protest area. The demonstrators videotaped this encounter with Campbell police. (Declaration of Erin Kuenzig (“Kuenzig Decl.”), Ex. 2 (dkt. #78-2).)

On October 27, 2013, plaintiff Newman became the first individual to receive a citation for violating Ordinance 9.12. On the overpass that day, Newman unfurled a United States flag, making it visible to traffic below. Kelemen then issued Newman a citation for displaying the flag on the overpass. The encounter between Newman and Kelemen also was videotaped by Newman and uploaded to YouTube. (Kuenzig Decl., Ex. 9 (dkt. #78-9).)

On November 3, 2013, Luce was planning to demonstrate his anti-abortion views at a potential site within 100 feet of a Campbell Overpass, which could be seen by those driving on Interstate 90. Ultimately, he did not protest at this site because of the threat of enforcement of Ordinance 9.12.

Officers Casper and Kelemen responded to another overpass protest on December 7, 2013. This time, Casper and Kelemen issued a total of four citations, though they found “numerous people violating the overpass sign ordinance with multiple signs, banners, flags, pennants and balloons being displayed from the overpass.” (Pls.’ Resp. to Campbell’s PFOFs (dkt. #89) ¶ 136.) Luce was among the protestors on the overpass on December 7, and he received a citation.

III. Facts Relevant to Luce's Claims against Kelemen

Beginning on or about January 12, 2014, plaintiff Luce received approximately fifteen phone calls from individuals regarding profiles and accounts created in his name on various dating websites for gay men, gay pornography websites, and the federal government's healthcare website, among others.⁷ (Pls.' PFOF (dkt. #76) ¶ 123.) Luce contacted the La Crosse Police Department, fearing that he was a victim of identity theft.

Kelemen eventually admitted to officers from the La Crosse Police Department and the Monroe Police Department that *he* had signed Luce up for online memberships and solicitations on three different occasions in early 2014 -- January 12, January 16, and March 5.⁸ In short, Kelemen admits that his actions were motivated by revenge against Luce for the upsetting emails and phone calls the Campbell Police Department had received regarding Ordinance 9.12, citing Luce's videotaping of their interactions and

⁷ Examples of some of these unwanted websites are: Match.com, Menschatlive.com, Gaybeardating.com, ABC's The Bachelor, Simplygaydvd.com, Simplygaydvd.com, Cybersocket.com, Dirty Deeds Newsletter, Gaygourney.com, Xhamster.com, Imagefap.com, Justwatchporn.com. (CIC's PFOFs (dkt. #72) ¶ 37.)

⁸ The first two dates precede the filing of this lawsuit; the last date, however, does not. Kelemen acknowledges that he became aware of this lawsuit by mid-February. The proof of service represents that Kelemen was served on February 4, 2014, a full month before his last admitted malicious impersonation of Luce online. (Dkt. #17.)

posting of the same videos on YouTube. As Kelemen stated to officers, “It’s just like, you know, you want to mess with us, because we were getting messed with, we’ll mess with you.” (Pls.’ Reply to Def. Kelemen’s Resp. to Pls.’ PFOF (dkt. #103) ¶ 139.)⁹

In signing up Luce for internet solicitations, memberships, and dating websites, Kelemen used a computer owned by the Town of Campbell. Creating these accounts required Kelemen to input Luce’s name, email address, and phone number. According to Kelemen, he obtained all of this information, through publicly-available websites, including the Tea Party website, La Crosse County Land Records and the Wisconsin Circuit Court Access. “Kelemen did not use any confidential or law enforcement means to obtain Luce’s email addresses.” (Kelemen’s PFOFs (dkt. #68) ¶ 23 (citing Affidavit of Timothy Kelemen (“Kelemen Aff.”) (dkt. #67) ¶ 15).) On the other hand, Kelemen was on duty during at least some of the occasions when he acquired and used Luce’s personal information to sign him up for unwanted websites.

Kelemen also posted several comments under the name “Bill O’Reilly” on the La Crosse Tribune’s website, mentioning Luce by name in each post. On January 14, 2014, Kelemen posted Luce’s home address

⁹ Not that it justifies or otherwise diminishes Kelemen’s outrageous response to these emails and calls, Kelemen represents that the calls inundated the police department to the point that it impacted call forwarding to the 24-hour emergency dispatch center. (Kelemen’s PFOFs (dkt. #106) ¶ 20.) The police department also received an email stating that Officer Nathan Casper should be shot in the head or face because he issued citations for the violation of the Ordinance. (City’s PFOFs (dkt. #64) ¶ 159.)

and stated that Luce had not paid his property taxes. On January 23, Kelemen also posted a comment that Luce may have been “Tea Partying” too much. (Pls.’ Reply to Def. Kelemen’s Resp. to Pls.’ PFOF (dkt. #103) ¶ 154.) Kelemen again posted on January 23, stating that “Greggie disrespected the wrong” person. (*Id.* at ¶ 155.) Finally, on January 24, Kelemen posted a comment stating that Luce’s car would be repossessed because Luce’s payments “bounced.” (*Id.* at ¶ 156.)

After the Monroe County Sheriff’s department concluded its investigation, Kelemen was charged with Unlawful Use of a Computerized Communication System in violation of Wis. Stat. § 947.0125(2)(e), to which he pled no contest and entered into a diversion agreement. After Kelemen’s conduct came to light, he was placed on administrative leave and eventually resigned.

IV. Additional Facts Relevant to Intervenor CIC’s Declaratory Judgment Claim

A. Insurance Policy

CIC issued a policy of insurance to the Town of Campbell, covering bodily injury and property damage, personal injury, and errors and omissions. (Affidavit of David G. Bisek (“Bisek Aff.”), Ex. A (dkt. #36-1) p.14.) The policy defines “insured” in relevant part as

Your past or present employees or elected or appointed officials while acting within the scope of their employment or authority, and authorized volunteers while acting for *you* or on *your* behalf, including all commissions, agencies boards, districts, authorities or similar

entities when *you* retain the right to control the details of the work of these individuals or entities

(*Id.* at p.15.)

Coverage under the personal injury and errors or omissions policy excludes coverage for “intentional or knowing violation of a penal statute.” (*Id.* at p.5 (listing exclusions under “personal injury” coverage; *id.* at p.6 (listing exclusion of “willful violation of penal code” under “errors and omissions coverage”).)

B. Scope of Kelemen’s Employment

Kelemen described his duties as police chief to include responsibilities involving writing the budget for the police department, maintaining the budget throughout the year, supervising four officers, and upholding the laws and ordinances of the States of Wisconsin and any municipal ordinances that were on file within his jurisdiction.

The Town’s Employee Policy and Procedure Manual provides in pertinent part that the Town “expects its employees to conduct business in accordance with the letter, spirit and intent of all relevant laws and should refrain from any illegal, dishonest or unethical conduct.” (Affidavit of Michelle M. Ford (“Ford Aff.”), Ex. A (dkt. #73-1) p.8.) Moreover, the manual provides that “[e]mployees of the town shall use . . . equipment [and] property . . . to transact or perform the business of the town exclusively and for no other purpose.” (*Id.*) Specific to computers, the manual further provides that “the town prohibits the use of computers and email in ways that are disruptive, offensive to others, or harmful to moral.” (*Id.* at p.9.) The Town’s Ethics

Ordinance No. 8-98 further provides that “covered personnel must act impartially and responsibly, in obedience of all applicable laws, rules and regulations, in a manner that will promote public confidence and within their scope of authority.” (*Id.* at p.7.)

At his deposition, Kelemen admitted the obvious -- that in signing Luce up for websites he was not enforcing any laws or otherwise engaging in legitimate law enforcement activity. (CIC’s PFOFs (dkt. #72) ¶¶ 41-42 (citing 12/19/14 Deposition of Timothy R. Kelemen (“12/19/14 Kelemen Depo.”) 202-03).)

OPINION

Summary judgment is appropriate if the moving party “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). In ruling on a motion for summary judgment, the court views all facts and draws all inferences in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Factual disputes preclude summary judgment only if the “facts might affect the outcome of the suit under the governing law.” *Id.* at 248.

The party moving for summary judgment bears the initial burden of showing that there is no genuine issue of material fact and that it is entitled to relief. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). For any issue on which the nonmoving party will bear the burden of proof at trial, the nonmoving party must then “go beyond the pleadings” and “designate ‘specific facts showing that there is a genuine issue for trial.’” *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). In that situation, it

is not enough for the nonmoving party to “simply show some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Nor may the nonmoving party “merely rely on conclusory pleadings” to withstand the motion. *Colan v. Cutler-Hammer, Inc.*, 812 F.2d 357, 361 (7th Cir. 1987). Instead, the nonmoving party must produce “evidence . . . such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. If he fails to do so, “[t]he moving party is ‘entitled to a judgment as a matter of law.’” *Celotex*, 477 U.S. at 323 (quoting Fed. R. Civ. P. 56(c)).

I. Plaintiffs’ First Amendment Claims

Plaintiffs contend, and defendants do not dispute, that their protests and other activities on the overpass constitute expressive activity. *See, e.g., United States v. Grace*, 461 U.S. 171, 176 (1983) (“There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving ‘speech’ protected by the First Amendment.”). There is also no dispute that the overpass is a traditional public forum. *Ovadal v. City of Madison, Wis.*, 416 F.3d 531, 536 (7th Cir. 2005) (holding that a pedestrian overpass constitutes a traditional public forum). Accordingly, plaintiffs’ First Amendment claims turn on whether Ordinance 9.12 is a constitutional time, place and manner restriction.¹⁰

¹⁰ Plaintiffs’ right to assemble claim similarly turns on whether the ordinance is a permissible time, place and manner restriction. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577-78, (1980) (recognizing the right to assemble in public places, including

A municipality may enforce regulations of the time, place, and manner of expression which (1) are content-neutral, (2) are narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels of communication. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The Town bears the burden of establishing that the time, place and manner restrictions set forth in Ordinance 9.12 meet these three requirements. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000). The court will consider each requirement in turn.¹¹

A. Content Neutral

Plaintiffs acknowledge that Ordinance 9.12 is content-neutral; and for good reason, the ordinance “makes no reference to the content of speech” and “is wholly indifferent to any specific message or viewpoint.” *Weinberg v. City of Chi.*, 310 F.3d 1029,

“streets, sidewalks, and parks,” is “[s]ubject to the traditional time, place, and manner restrictions”).

¹¹ Defendant Kelemen adopts the arguments made by the Town, although plaintiffs fail to explain how Kelemen should be liable for the Town’s enactment of the ordinance. While it is undisputed that Kelemen proposed the ordinance, plaintiffs fail to develop any argument or cite to any case law in support of their presumed theory that an individual without the authority to enact legislation nonetheless should be liable for that enactment. To the extent that plaintiffs’ claim is premised on some theory that the Town Board was under Kelemen’s control under a “cat’s paw” theory, the Seventh Circuit has questioned the application of this theory in the § 1983 context. *See Waters v. City of Chi.*, 580 F.3d 575, 586 (7th Cir. 2009).

1038 (7th Cir. 2002); *see also Ovadal*, 416 F.3d at 537 (“If the city had a policy that prohibited not just Ovadal’s, but all protests and all signs on all Beltline overpasses, this could certainly be a legitimate place and manner restriction because it would be clearly content-neutral.”).¹² “A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it had an incidental effect on some speakers or messages but not others.” *Ward*, 491 U.S. at 791; *see also DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 829 (7th Cir. 1999) (“[I]n analyzing whether Hallie’s ordinance violates the First Amendment, we do not ask whether the motives of the Board can be justified as content-neutral time, place, and manner restrictions, but rather whether the ordinance itself can be so justified.”). Here, Ordinance 9.12 is content-neutral.¹³

¹² Plaintiffs assert that Ordinance 9.12 has only been enforced against Tea Party members seeking to express their views on overpasses. (Pls.’ Reply to Def. Kelemen’s Resp. to Pls.’ PFOF (dkt. #103) ¶ 113.) However, plaintiffs fail to submit any evidence that other individuals or groups have violated the Ordinance, much less done so without consequence. Without this evidence, an as applied challenge lacks merit. To the extent plaintiffs are hinting at a claim premised on the Town’s adoption of the Ordinance based on an improper motive, the court must reject this argument “rather easily” as well. *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 828 (7th Cir. 1999). At least in the First Amendment context, the court will “not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.” *United States v. O’Brien*, 391 U.S. 367, 383 (1968). As such, “[t]he actual motives of those who enacted the ordinance are irrelevant to [the court’s] First Amendment analysis.” *DiMa Corp.*, 185 F.3d at 828.

¹³ Not only is there no claim by plaintiffs that then-Chief Kelemen manipulated the Town Board into his “cat’s paw” for some

B. Narrowly Tailored to Serve a Significant Government Interest

Plaintiffs do not dispute that traffic safety constitutes a significant government interest, nor could they do so now at this late date. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981) (describing “traffic safety” as a “substantial governmental goal[]”). Thus, this second requirement is met if Ordinance 9.12 is narrowly tailored to further that interest.

“A regulation is narrowly tailored if it ‘promotes a substantial government interest that would be achieved less effectively absent the regulation.’” *Weinberg*, 310 F.3d at 1040 (quoting *Ward*, 491 U.S. at 799). “To satisfy the narrowly tailored test, an ordinance need not be the least restrictive method for achieving the government’s goal.” *Id.* While the Town cannot “blindly invoke safety and congestion concerns without more,” *Weinberg*, 310 F.3d at 1038, the burden to put forth evidence supporting a speech restriction is “not overwhelming,” *DiMa Corp.*, 185 F.3d at 829. Accordingly, “[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.” *Id.*

sanctionable reason, but there is *no evidence*. First, as set forth above, the board members relied on their own, separately gathered evidence and observations. Second, even Kelemen’s desire to lash out came later, and was essentially content neutral.

(quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986)).

Plaintiffs assert that the Town's claim of traffic safety concerns is "merely conjectural." *Turner Broad.*, 512 U.S. at 665 ("When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, . . . [i]t must demonstrate that the recited harms are real, not merely conjectural."). Specifically, plaintiffs argue that the Town "provides only speculation and personal opinion to support" Ordinance 9.12, which is insufficient to justify the necessity for it. (Pls.' Opp'n to Campbell's Mot. (dkt. #88) 5.) Plaintiffs also cite testimony from their expert, Dr. Paul Dorothy, who investigated traffic flow and the overpasses in Campbell. While plaintiffs claim this evidence proves that the Town's representatives wrongly concluded that protests on the overpasses created traffic concerns, whether the Town was right or wrong in its conclusion is not the proper question.

The Town "may rely upon any evidence that is 'reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent government interest." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-39 (2002) (quoting *City of Renton*, 475 U.S. at 51-52) (emphasis added). Indeed, the Town may justify Ordinance 9.12 "based solely on history, consensus, and simple common sense." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001).

The Town has presented evidence that it relied on shared experiences driving on Interstate 90, conversations with Wisconsin State Patrol officers, reports of complaints from drivers who were on the

Interstate during plaintiffs' protests, and traffic incidents caused by similar overpass protests in other parts of the country. Moreover, the Town had information from a prior study that estimated between 23,100 and 29,500 vehicles drive daily on Interstate 90 through Campbell, where the speed limit is 65 miles per hour.

Whether or not this is a high volume of traffic compared to other sections of Interstate 90, the Town's representatives were entitled to rely on their personal experience and common sense to determine that protesting on overpasses above the Interstate was potentially distracting to drivers. The decision to enact Ordinance 9.12 is further supported by the evidence of cars braking near the overpass during protests, horns honking at protestors, complaints of drivers, the presence of on and off ramps at or near the overpasses, and evidence of drivers pulling over to the side of the Interstate to photograph the protests.¹⁴ At minimum, this evidence demonstrates that the Town has done more than "blindly invoke safety . . . concerns without more." *Weinberg*, 310 F.3d at 1038.

Whatever plaintiff's expert Dr. Dorothy's after-the-fact testimony may be on the safety risks, it is "irrelevant to the question of whether there is some evidence that does support the [Town's] conclusions." *Dima Corp.*, 185 F.3d at 831. Certainly, this "contradictory evidence would be highly probative if

¹⁴ Indeed, plaintiffs' video recordings of the protests showing passing cars honking their horns in reaction bolster the Town's concern that drivers were being distracted at the time of the Ordinance's passage.

[the court's] task were to discover the objective truth about the effect of [plaintiffs' protests on traffic in Campbell]." *Id.* As already explained, however, the court's inquiry under the First Amendment is "far different." *Id.*

Plaintiffs also argue that Ordinance 9.12 is not narrowly tailored because it prohibits speech within 100 feet of overpasses. To support their argument, plaintiffs point to a Days Inn sign that is 101.5 feet from the pedestrian overpass. Further, plaintiffs again call upon their expert, Dr. Dorothy, who determined that the 100 foot restriction was "arbitrary and capricious" due to a lack of "engineering justification" for the distance. (Pls.' Opp'n to Campbell's Mot. (dkt. #88) 12.)

While it is somewhat concerning that the Town and its board members cannot articulate a basis for imposing a 100-foot restriction, as opposed to, say, a 30-foot restriction. In general, however, some distance needed to be adopted to realize the traffic safety goals underlying Ordinance 9.12. The fact that this distance treated the protesters as it did Days Inn is both content neutral and imminently reasonable.¹⁵

Moreover, under the standard of review governing this case, the Ordinance "need not be the least restrictive" means of serving the Town's interests. *Ward*, 491 U.S. at 798-99 ("So long as the means chosen are not substantially broader than necessary to

¹⁵ Of course, the Days Inn sign is likely elevated and, therefore, more visible from the highway. At the same time, a simple hotel sign is likely less distracting than a protest.

achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."). The Town sought to limit traffic safety concerns associated with protesting above fast-moving traffic. There is a "reasonable fit" between the Town's goal and the 100-foot limitation. *See Lorillard*, 533 U.S. at 554 (holding that restrictions on speech withstand scrutiny where there is a "reasonable fit" between the regulation and stated goals).

C. Ample Alternative Means of Communication

Finally, plaintiffs contend that the Ordinance leaves them "with no reasonable alternative means to reach their intended audience." (Pls.' Resp. Br. (dkt. #88) 15.) The court credits plaintiffs' contention that the pedestrian overpass provides access to a high-traffic area of individuals travelling through Campbell, but just as the content-neutral regulation of speech need not be the least restrictive possible, "an adequate alternative does not have to be the speaker's first or best choice, or one that provides the same audience or impact for the speech."¹⁶ *Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir. 2000). Rather, the regulation will stand unless an entire medium of public expression across a particular community has been foreclosed. *See Hill*, 530 U.S. at 726.

¹⁶ Curiously, at his deposition, Luce disclaimed that he was attempting to attract the attention of motorists when he displayed signs from the overpass. (Campbell's PFOFs (dkt. #64) ¶ 61 (citing Deposition of Gregory Luce ("Luce Depo.") (dkt. #50) 44.)

Here, Ordinance 9.12 does not ban plaintiffs' protests or speech. It only prevents them from protesting on or within 100 feet of overpasses with items visible to high speed drivers below. For example, plaintiffs may "go door-to-door to proselytize their views [and] may distribute literature in this manner . . . or through the mails." *Frisby v. Schultz*, 487 U.S. 474, 484 (1988). Additionally, they may contact their intended audience by telephone, speak at public meetings, place messages on cars, or use local media. *Id.* Perhaps an even more intriguing alternative channel to plaintiffs is the continued use of YouTube to broadcast their speech to Internet users around the world. (Kuenzig Decl., Exs. 2, 9 (dkt. ##78-2, 78-9)).¹⁷ In short, Ordinance 9.12 "permits the more general dissemination of [plaintiffs'] message" in Campbell. *Id.*

In addition to using other modes of communication, plaintiffs can also display signs and banners in public parks, near other roadways, and other property outside of the 100-foot area surrounding Interstate 90, including one would suppose at the end of the on and off ramps, where traffic would have slowed. While these options may be less desirable for plaintiffs because of their more limited access to an audience, "[s]o long as the amount of speech left open is ample, it is not fatal that the regulation diminishes the total quantity of speech." *City of Watseka v. Ill. Public Action Council*, 796 F.2d 1547, 1553 (7th Cir. 1986).

¹⁷ See also "Town of Campbell WI Police Write Citations For Displaying US Flag," available at <https://www.youtube.com/watch?v=DPmSgMTXiQo>; "Town of Campbell WI Police Issue Citation For Holding A Cross!," available at <https://www.youtube.com/watch?v=zUVEEIFpYwE>.

For all of these reasons, the court finds as a matter of law that Ordinance 9.12 is a constitutional time, place, and manner regulation of speech. Therefore, the court will grant the Town's and Kelemen's respective motions for summary judgment on plaintiffs' first and second causes of action, and in turn deny plaintiffs' motion on those same claims

II. Luce's Claims against Kelemen

Luce asserts three claims against Kelemen, all relating to his admitted posting of comments about Luce on the internet and using Luce's personal identifying information on the internet to enroll him in various web-sites. (Am. Compl. (dkt. #28) ¶ 89 (First Amendment retaliation claim); ¶¶ 94-95 (Wis. Stat. § 995.50(2)(a) claim); ¶ 103 (Wis. Stat. §§ 932.201, 895.446 claim).) Luce's First Amendment retaliation claim is pursued under 42 U.S.C. § 1983, while the other two state law claims are before the court on pendent jurisdiction. To state a claim under § 1983, a plaintiff must establish that the defendant acted under color of state law, among other requirements. *Cruz v. Safford*, 579 F.3d 840, 843 (7th Cir. 2009).

The parties failed to address this threshold issue, though the parties' discussion of whether Luce was required to abide by the notice requirement in Wis. Stat. § 893.80 before bringing certain claim against government bodies or officials highlights a closely related issue of whether Kelemen was acting under color of state law at all. Whether an individual acts under color of state law turns on another question: whether "the official was exercising state or local authority, or acting only as a private individual." 1A

Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* § 5/05[A] (4th ed. 2014).

Importantly, one can abuse his or her authority, but still act under color of state law: “Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color of’ state law.” *Monroe v. Pape*, 365 U.S. 167, 184 (1961); *see also West v. Atkins*, 487 U.S. 42, 49-50 (1988) (“It is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State”); *Honaker v. Smith*, 256 F.3d 477, 484-85 (7th Cir. 2001) (explaining that action is taken under color of state law “when it involves a misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law”).

Even so, a misuse of power necessarily involves *use* of power possessed by virtue of state law, and the facts before this court on summary judgment demonstrate that Kelemen was not using his power as the police chief in allegedly taking retaliatory actions against Luce in response to his vigorous opposition of Ordinance 9.12. Cases in which courts have found that the § 1983 defendant acted under color of state law involve either: (1) the defendant’s express or implied invocation of state authority; or (2) instances where the defendant could not have acted in violation of the plaintiff’s constitutional rights but for his state authority. Neither of these two instances is at play here.

First, Kelemen’s acts of enrolling Luce in the above-described websites and posting comments about him

online were done anonymously. There is no evidence Kelemen used or displayed his police power or otherwise invoked his authority in carrying out these actions. In *Latuszkin v. City of Chicago*, 250 F.3d 502, 503, 505-06 (7th Cir. 2001), the Seventh Circuit affirmed a dismissal of a § 1983 lawsuit against an off-duty police officer driving under the influence of alcohol, who struck and killed the plaintiff's wife. The court explained that in determining whether the officer acted under color of state law "[t]he important consideration . . . is the nature of the specific acts performed." *Id.* at 505-06. In that case, the defendant officer "was not engaged in police activity," had not "displayed any police power," nor had he "possessed any indicia of his office at the time of the accident." *Id.* at 506. Instead, the officer was "engaged in entirely private behavior at the time of the accident." *Id.* So, too, here. Kelemen in no way displayed his police power -- either expressly or implicitly -- in engaging in the alleged retaliatory acts. To the contrary, Kelemen attempted to *hide* his identity as the police chief.

Second, there is no evidence Kelemen used his authority, either to gain the necessary personal information to sign Luce up for websites or to comment on online forums. Instead, the evidence shows that Kelemen accessed Luce's personal information from publicly available websites, or at least plaintiff has failed to raise a genuine issue of material fact even suggesting otherwise. Importantly, this is not a case where the defendant was only able to violate the plaintiff's rights because of his state authority. *See, e.g., Wudtke v. Duvel*, 128 F.3d 1057, 1064 (7th Cir. 1997) (finding school superintendent who sexually assaulted teacher and threatened to disapprove her

renewal of her teacher's license if she did not engage in sexual acts with him, acted under color of state law by "explicit invocation of his state-granted powers"). Put another way, any private citizen could have engaged in Kelemen's admitted acts. *Carlos v. Santos*, 123 F.3d 61, 65 (2d Cir. 1997) ("Any citizen may perform these acts: they were not made possible only because" the town board members were clothed with official authority.).

On this record, plaintiff can only point to Kelemen's use of a police department computer in sending certain of his electronic messages. That is not enough. Cases in which courts have relied on the defendant's use of public resources involve access to information peculiar to that position. *See, e.g., McDade v. West*, 223 F.3d 1135, 1140 (9th Cir. 2000) (holding that an employee of the district attorney's office acted under color of state law when the employee illegally used the district attorney's office's computer database to access information); *Haines v. Fisher*, 82 F.3d 1503, 1505-06 (10th Cir. 1996) (finding officers acted outside of the scope of § 1983 when they staged a robbery as a prank, even though the officers used the town's M16 automatic rifle and drove to the 7-Eleven in a police car belonging to the town). Indeed, the *Haines* case presents a much closer fact pattern than the case at issue here.

Nor is it enough that the purported reasoning or motivation for taking certain actions (however misguided) comes from the defendant's public employment. For example, in *Wilson v. Price*, 624 F.3d 389 (7th Cir. 2010), after receiving several complaints about cars parked illegally in front of a repair shop, the defendant alderperson drove to the shop, demanded that the cars be moved, and after an employee refused

his order, beat the plaintiff employee until he was unconscious. *Id.* at 390. The Seventh Circuit determined that while he was arguably acting under color of state law when he went to the repair shop to investigate the complaints, “it is indisputable that Price crossed that line and entered the realm of law enforcement—which is wholly unrelated to the duties of a legislator—the moment he demanded that Wilson move the cars.” *Id.* at 393.

On the undisputed record, therefore, defendant Kelemen appears entitled to summary judgment in his favor on plaintiffs’ § 1983 claim, which requires that he be acting under color of state law. Because this issue was not raised expressly by defendant, however, the court will provide plaintiff ten days to identify any facts of record supporting a finding that Kelemen was acting under color of state law.

The court will also reserve on the parties’ cross motions for summary judgment on Luce’s state law claims against defendant Kelemen. If the court, as anticipated, grants summary judgment to Kelemen on plaintiff’s First Amendment retaliation claim -- on an issue not material to plaintiff’s state law claims -- the court will likely decline to exercise its supplemental jurisdiction over the state law claims and will dismiss them without prejudice. *See Groce v. Eli Lilly & Co.*, 193 F.3d 496, 501 (7th Cir. 1999) (explaining that it is “the well-established law of this circuit that the usual practice is to dismiss without prejudice state supplemental claims whenever all federal claims have been dismissed prior to trial”); *see also* 28 U.S.C. § 1367(c)(3) (“The district courts may decline to exercise supplemental jurisdiction over a claim under

subsection (a) if the district court has dismissed all claims over which it has original jurisdiction.”). Plaintiffs are free to address this question as well within the next ten days. No further briefing on these issues will be allowed unless expressly invited by the court.

III. Intervenor’s Declaratory Judgment Claim

Finally, the court addresses CIC’s motion. The court could decline to exercise its supplemental jurisdiction over this claim as well, but as already explained above, the record establishes that Kelemen was acting outside of the scope of his employment, and therefore also outside the definition of “insured” under the policy. *See Groce*, 193 F.3d at 502 (explaining that a court may depart from the “usual practice” and continue to exercise supplemental jurisdiction over “doomed litigation’ that will only be dismissed once it gets there” for lack of merit); *see also In re Repository Tech., Inc.*, 601 F.3d 710, 725 (7th Cir. 2010) (noting that the district court retains supplemental jurisdiction “because it invades no state interest—on the contrary, it spares overburdened state courts additional work that they do not want or need—for the federal court to dismiss the claim on the merits, rather than invite a further, and futile, round of litigation in the state courts”).

To determine whether a duty to defend and cover exists, the court first determines whether the insurance policy “makes an initial grant of coverage -- i.e., whether the insurer has a duty to indemnify its insured -- for the claims asserted.” *Estate of Sustache v. Am. Family Mut. Ins. Co.*, 2008 WI 87, ¶ 22, 311 Wis. 2d 548, 751 N.W.2d 845. If the court finds an initial

grant of coverage, the court then “examine[s] the policy’s exclusions to determine whether they preclude coverage.” *Id.* at ¶ 23. If an exclusion is found to apply, the court then “look[s] to see whether any exception to that exclusion reinstates coverage.” *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 2004 WI 2, ¶ 24, 268 Wis. 2d 16, 673 N.W.2d 65.

CIC asserts two bases in support of its argument that it has no duty to defend or cover the claims asserted against Kelemen. As already discussed, CIC contends that the acts giving rise to Luce’s First Amendment retaliation and state law claims, Kelemen must have been acting within the scope of his employment or authority. Since the court has found he was not, Kelemen was not an “insured” as defined by the policy. Even if Kelemen were to qualify as an insured under the policy, his alleged acts constitute willful violation of penal statutes, and therefore fall within a Policy exclusion. The court need not take up CIC’s second argument, because the record establishes as a matter of law that Kelemen was acting outside of the scope of his employment when he signed Luce up for various websites and posted comments about him online.

In pertinent part, the policy limits “insured” to employees “acting within the scope of their employment or authority.” (Bisek Aff., Ex. A (dkt. #36-1) p.15.) Relying on the Restatement (Second) of Agency, the Wisconsin Supreme Court has defined scope of employment as

- (1) Conduct of a servant is within the scope of employment if, but only if:

- (a) it is of the kind he is employed to perform;
- (b) it occurs substantially within the authorized time and space limits; [and]
- (c) it is actuated, at least in part, by a purpose to serve the master

...

Olson v. Connerly, 156 Wis. 2d 488, 499, 457 N.W.2d 479, 483 (1990). Similarly, “[c]onduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.” *Id.*

At least at times when he was gathering Luce’s information and signing him up for websites, it is undisputed that Kelemen was on the clock. Kelemen has also raised a genuine issue of material fact, if barely, by contending that he engaged in these acts, at least in part, to serve the Town, supposedly in an attempt to “distract” Luce. Still, Kelemen has failed to raise a genuine issue of material fact as to whether his conduct is “the kind he is employed to perform.” Indeed, as mentioned already, Kelemen admitted at his deposition that the actions he took were his own and not in his capacity as a law enforcement officer. (12/19/14 Kelemen Depo. (dkt. #56) 202-206 (Question: “Is it your contention that you were acting as the Chief of Police for the Town of Campbell when you posted insults about Mr. Luce on the La Crosse Tribune website?” Answer: “I would say that I was acting on my own.”; admitting that signing Luce up for websites was inconsistent “with the rules [his] employer expected

[Kelemen] to abide by” and was not done “to enforce any law”). To the contrary, Kelemen’s misconduct falls woefully short of the minimum professionalism and detachment one should reasonably expect of a police officer, much less a Chief of Police.

Kelemen’s response to CIC’s argument is flimsy at best. First, Kelemen points to his belief that the conduct was not a violation of any criminal statute. (Kelemen’s Opp’n (dkt. #82) 6.) Even assuming this belief was reasonable, it utterly fails to support a finding that he was acting with the scope of his employment -- not all *non*-criminal actions are within the scope of his employment and authority -- especially in light of his admissions to the contrary. Second, Kelemen argues that he was acting in his employer’s interest in engaging in these acts. (*Id.* at 7.) Once again, this argument misses the mark. Kelemen could have “occup[ied]” Luce’s time in any number of ways which would have fallen outside of the scope of his employment (e.g., by holding him hostage). It is not enough for an employee to believe he was acting in the interest of his employer for his conduct to fall within the scope of his employment.

Based on Kelemen’s own admissions, the conduct underlying Luce’s First Amendment retaliation and state law claims is not the kind Kelemen was employed or authorized to perform. As such, the court will grant CIC’s motion for summary judgment, and enter a declaratory judgment that CIC has no duty to defend or cover Luce’s claims specific to Kelemen.

ORDER

IT IS ORDERED that:

- 1) Defendant the Town of Campbell, Wisconsin's motion for summary judgment (dkt. #60) is GRANTED.
- 2) Defendant Tim Kelemen's motion for summary judgment (dkt. #65) is GRANTED as to plaintiffs Gregory Luce and Nicholas Newman's First Amendment free speech and freedom of assembly claims (first and second causes of action in the amended complaint) and RESERVED in all other respects.
- 3) Intervening defendant Community Insurance Corporation's motion for summary judgment (dkt. #70) is GRANTED and judgment shall be entered DECLARING that CIC has no duty to defend or cover claims asserted by Luce against defendant Kelemen.
- 4) Plaintiffs Gregory Luce and Nicholas Newman's motion for summary judgment (dkt. #75) is DENIED with respect to plaintiffs' First Amendment free speech and freedom of assembly claims (first and second causes of action in the amended complaint) and RESERVED in all other respects.
- 5) On or before June 26, 2015, plaintiff Luce should submit a proffer as to why the court should not grant judgment in favor of defendant Kelemen on plaintiff's First Amendment retaliation claim because Kelemen is not acting under color of state law as required under 42 U.S.C. § 1983.

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Entered this 16th day of June, 2015.

BY THE COURT:

/s/

William M. Conley
District Judge

APPENDIX E

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604**

No. 15-2627

[Filed November 21, 2017]

GREGORY LUCE and	)
NICHOLAS NEWMAN,	)
<i>Plaintiffs-Appellants,</i>	)
	)
<i>v.</i>	)
	)
TOWN OF CAMPBELL,	)
WISCONSIN, and TIM	)
KELEMEN,	)
<i>Defendants-Appellees.</i>	)
	)

Before

FRANK H. EASTERBROOK, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

Appeal from the United States District Court for
the Western District of Wisconsin.

No. 14-cv-046-wmc
William M. Conley, *Judge*.

Order

Plaintiffs-appellants filed a petition for rehearing and rehearing en banc on October 6, 2017. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX F

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

15-2627

[Filed October 28, 2015]

GREGORY LUCE and	)
NICHOLAS NEWMAN,	)
	)
<i>Plaintiffs-Appellants,</i>	)
	)
v.	)
	)
TOWN OF CAMPBELL, WISCONSIN	)
and TIM KELEMEN, Individually and	)
in his official capacity as Chief of Police	)
for Town of Campbell,	)
	)
<i>Defendants-Appellees.</i>	)

**APPELLANTS' MOTION FOR
JUDICIAL NOTICE**

Plaintiffs-Appellants Gregory Luce and Nicholas Newman ("Plaintiffs") ask the Court to take judicial notice that the State of Wisconsin Department of Transportation installed signs on the Lakeshore Drive Overpass crossing over Interstate-90 in the Town of Campbell. The signs are carved into each side of the

overpass bridge stating: “Welcome to Wisconsin” and “Thanks for Visiting.” *See* Exhibit 1.

I. Judicial Notice is Proper Because the Existence of the Signs on the Lakeshore Drive Overpass in the Town of Campbell Is Easily Verifiable and Beyond Dispute.

Federal Rule of Evidence 201 provides that the court “may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). The Rule requires this Court to take judicial notice “if a party requests it and the court is supplied with the necessary information.” Fed. R. Evid. 201(c). “Judicial notice may be taken at any time, including on appeal.” *Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003) (citations omitted).

The Court should take judicial notice of the fact that an I-90 overpass in the Town of Campbell bearing the signs “Welcome to Wisconsin” and “Thanks for Visiting” exists with the approval of the Wisconsin Department of Transportation. Exhibit 1; *see generally*, Department of Transportation, 511 Wisconsin Construction Projects, <http://projects.511wi.gov/i-90reconstruction/> (last visited October 28, 2015). The permanent sign display on the Lakeshore Drive I-90 overpass is beyond reasonable dispute, is easily verifiable, and injustice would result if this fact is not considered. Exhibit 1. The signs are displayed to all who travel on the Lakeshore Drive I-90 overpass and are generally known. The signs are in plain view on I-90, and are open and obvious to the public.

Additionally, the signs are a matter of public record and are easily verified through the State of Wisconsin Department of Transportation. *Id.*¹

Furthermore, appellate courts have equitable discretion to consider evidence that was not before the District Court when the failure to do so would result in injustice. *See Colbert v. Potter*, 471 F.3d 158, 165-67 (D.C. Cir. 2006) (ruling that an appellate court could supplement the appellate record where “injustice might otherwise result,” and that pretending the record did not exist would be “inconsistent with [the] court’s own equitable obligations.” (internal citations omitted)).

This appeal concerns the unconstitutional restrictions that the Town of Campbell Ordinance 9.12 (“Ordinance”) imposes on Plaintiffs’ First Amendment rights. The Ordinance bans the display of all signs on the I-90 overpasses in the Town of Campbell, with the exception of traffic control signs. The District Court below erred by ruling that Defendant-Appellee’s concern for public safety justified the Ordinance. The

¹ As this Court is aware, the Court has the power to “take judicial notice of matters of public record” including information available on the Internet or otherwise within the public domain. *Laborers’ Pension Fund v. Blackmore Sewer Constr., Inc.*, 298 F.3d 600, 607 (7th Cir. 2002) (taking judicial notice regarding the ownership of a bank, noting that the information could be obtained through “a simple phone call or a quick search of the internet.”); *Owens v. Duncan*, 781 F.3d 360, 362 (7th Cir. 2015) (taking judicial notice regarding weather conditions on a certain night gleaned from a public website); *LaBella Winnetka, Inc. v. Vill. Of Winnetka*, 628 F.3d 937, 944 n. 3 (7th Cir. 2010) (taking judicial notice of information on a city’s website); *Fornalik v. Perryman*, 223 F.3d 523, 529 (7th Cir. 2000) (taking judicial notice of action taken by a government agency).

fact that the State of Wisconsin Department of Transportation currently allows these signs on the Lakeshore Drive I-90 overpass in the Town of Campbell supports Plaintiffs' claim, and it would be unjust to ignore this evidence. *See* Exhibit 1. The signs are newly constructed and, therefore, could not be introduced as evidence before the District Court. These signs were constructed despite the Town of Campbell's Ordinance that prohibits the installation or display of signs and similar items on any portion of a bridge or overpass that passes over a highway with a speed limit of more than 40 miles per hour. The State of Wisconsin Department of Transportation's creation, approval, and display of these signs on the sides of the Lakeshore Drive I-90 overpass in the Town of Campbell demonstrates that the Town of Campbell's purported safety justification for its constitutionally unsound Ordinance is unfounded.

The evidence attached as Exhibit 1 supports the conclusion that the Town of Campbell has failed to sufficiently justify its restriction of free speech in a traditional public forum. Supplementation of the record best serves the interest of justice. Accordingly, Plaintiffs request that the Court take judicial notice that the State of Wisconsin Department of Transportation installed signs on the Lakeshore Drive Overpass that crosses over Interstate-90 in the Town of Campbell.

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Respectfully submitted,

THOMAS MORE LAW CENTER

/s/Erin Kuenzig

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Erin Mersino

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* * *

*[Certificate of Service Omitted in the
Printing of this Appendix]*

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

GREGORY LUCE and
NICHOLAS NEWMAN,

Plaintiffs-Appellants,

v.

TOWN OF CAMPBELL, WISCONSIN
and TIM KELEMEN, Individually and
in his official capacity as Chief of Police
for the Town of Campbell,

Defendants-Appellees.

DECLARATION OF TONY CURTIS

I, Tony Curtis, declare as follows:

1. I am an adult resident of the State of Wisconsin and of legal age.
2. I have personal knowledge of the matters stated herein.
3. If called upon to testify in a court of law, I could and would competently do so.
4. I personally took the pictures of the Lakeshore Drive Overpass attached as Exhibits A, B, and C to my declaration.

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5. I took the photograph marked Exhibit A on October 13, 2015, while standing next to I-90 West on the eastern side of Lakeshore Drive.
6. I took the photograph marked Exhibit B on October 13, 2015, while standing on the sloping grass surface from the eastern side of Lakeshore Drive.
7. I took the photograph marked Exhibit C on October 13, 2015, while standing next to the temporarily closed lane that merges from the Wisconsin rest area into I-90 East.
8. The pictures attached as Exhibits A, B, and C to my declaration fairly and accurately depict the signs carved into the Lakeshore Drive I-90 Overpass in the Town of Campbell as of October 13, 2015.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States and the State of Wisconsin that the foregoing is true and correct.

Executed this 21st day of October, 2015.

/s/Tony Curtis
Tony Curtis

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EXHIBIT A



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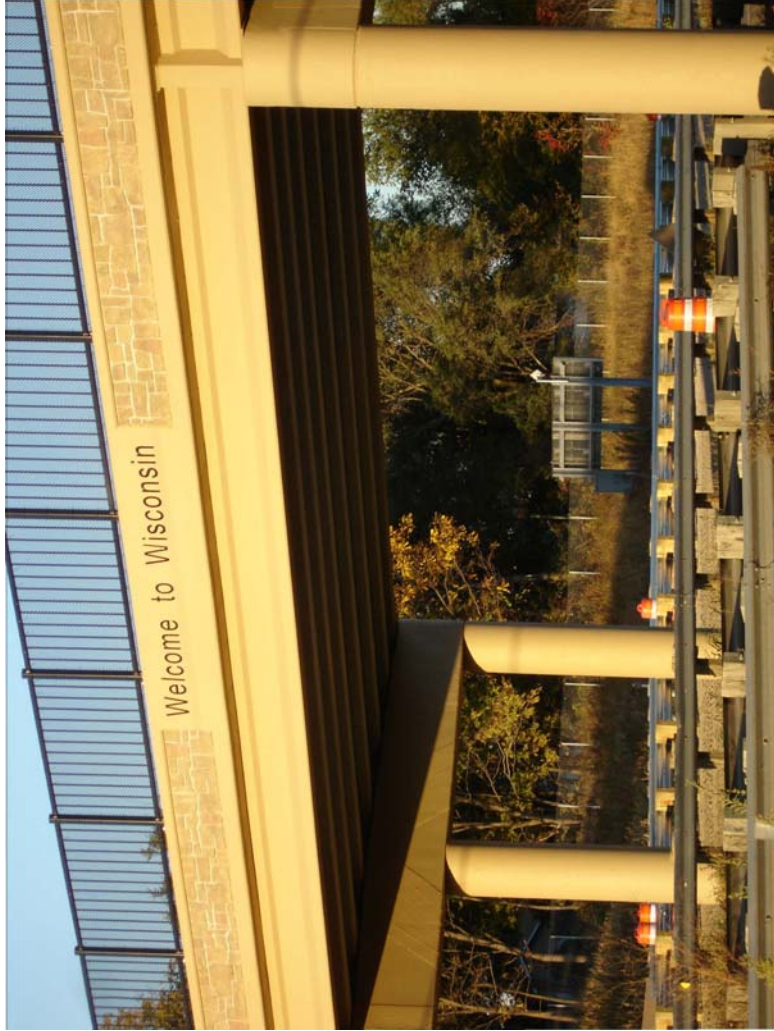
EXHIBIT B

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EXHIBIT C



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APPENDIX G

EXHIBIT 17

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**S-E-A PROJECT
NO. 160408**

**ISSUE DATE:
JULY 11, 2014**

**THOMAS MORE LAW CENTER
Case No. 14-CV-46
Attention: Erin Mersino, Esq.
24 Frank Lloyd Wright Drive, Suite J 3200
Ann Arbor, Michigan 48106**

SITE REVIEW

**Pedestrian Overpass
Over I-90
Town of Campbell, Wisconsin**



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I. PROJECT SUMMARY

PROJECT ASSIGNMENT

On March 27, 2014, Erin Mersino, Esq., of the Thomas More Law Center, Ann Arbor, Michigan, contacted S-E-A, Ltd. (S-E-A) regarding an evaluation of a pedestrian overpass located in the Town of Campbell, Wisconsin, along the I-90 alignment. This project was assigned to S-E-A Technical Consultant Paul W. Dorothy, Ph.D., PMP, AICP, PTP, CXLT, as S-E-A Project No. 160408.

SCOPE OF PROJECT

Specifically, S-E-A, was asked to evaluate the site of the pedestrian overpass in question over the I-90 corridor in the Town of Campbell, Wisconsin, to determine the potential safety impacts of protesters holding signs, flags, banners, or similar items, while standing on the pedestrian overpass, or within 100' of the overpass. Further, S-E-A was asked to evaluate safety claims raised by the Town of Campbell and its representatives regarding this practice.

CONCLUSIONS

- **The average annual daily traffic (AADT) for the segment of I-90 in question between Lakeshore Drive and Dawson Avenue is to be 23,100 vehicles.**
- **Traffic demand has remained flat (within 2.5% of the average) for the past 10 years.**
- **Traffic demand for the subject highway segment is roughly one-half of the average**

AADT for the I-90 corridor and is only 27% of the highest AADT reported.

- **The subject highway segment is a lightly traveled segment of I-90, which provides a fully limited access, four-lane cross-section highway built to Interstate design standards (the highest classification of roadway design standards).**
- **The Level of Service (LOS) for the highway segment in question is LOS-A. Based on the *Highway Capacity Manual* definition, conditions operating at LOS-A are considered to be operating in free-flow conditions, with vehicles almost completely unimpeded in their ability to maneuver within the traffic stream.**
- **Interstate traffic crashes occurring along the entire length of I-90 within the county of La Crosse in the state of Wisconsin for the year 2012 were 1.8%.**
- **The crash exposure along the I-90 corridor in the county of La Crosse is average when compared with the crash exposure of the entire state.**
- **In order to bring the I-90 highway segment in question from its current daily operation of LOS-A to a LOS-E, would require the AADT to increase from 23,100 vehicles to 68,000 vehicles – an increase of nearly three times.**
- **The comparison of the operational and safety characteristics of a segment of heavily**

congested I-5 in San Diego County in the state of California to the free-flow conditions of the highway segment in question is not valid.

- **Viewing the activity on the overpass does not require a driver diverting attention to a point where vital roadway information would be compromised.**
- **With changes to billboard design, including both crawler messaging and full-motion video, and the location of said billboards being as much as 150' from the edge of the traveled way requiring motorists to turn the their head from the direction of travel to process complicated messaging, these “regulated billboards” are a substantially greater risk to motorist safety.**
- **The ordinance bans displays “...within one hundred (100) feet of any portion of a vehicular or pedestrian bridge or overpass that passes over a freeway or expressway.” This selected distance appears arbitrary and capricious.**
- **Claims that permitting the display of signage on the overpasses will result in the public being forced to “sit in long traffic back-ups with their safety at risk” are simply not borne out by the conditions found at the subject location.**

II. PROCEDURES

1. **On April 22, 2014, Dr. Dorothy drove the length of the I-90 corridor from the Illinois border to the Minnesota border, and then returned along the same route.**
2. **A site visit was conducted by Dr. Dorothy on April 22, 2014.** During this time, the following investigative tasks were completed:
 - A visual and photographic survey of the subject pedestrian overpass and vicinity was conducted.
 - Measurements of key elements of the subject pedestrian overpass were taken.
3. **Dr. Dorothy reviewed the following:**
 - Complaint for Case No. 14-CV-46, filed on January 31, 2014.
 - Motion for Preliminary Injunction for Case No. 14-CV-46, filed on February 3, 2014.
 - Brief in Support of Motion for Preliminary Injunction for Case No. 14-CV-46, filed on February 3, 2014.
 - Brief in Opposition of Motion for Preliminary Injunction for Case No. 14-CV-46, filed on March 7, 2014.
 - Declaration of Chief of Police Timothy Kelemen, filed March 7, 2014.
 - Declaration of Mr. Scott Johnson, filed March 7, 2014.

- City of La Crosse, La Crosse County, Annual Average Daily Traffic Count Map, dated 2008.
- Wisconsin Department of Transportation Southwest Region Continuous Count Site Data for Years 2003 through 2012.
- Interstate 5 California AADT.
- California Department of Transportation Peak Hour Volume Data for 2012.
- Transportation Research Board, *Highway Capacity Manual*, National Academy of Sciences, Washington, D.C., 2000.
- *2012 Wisconsin Traffic Crash Facts*, Wisconsin Department of Transportation, 2014.
- 2012 Statewide Average Crash Rates Memo dated November 6, 2013.

III. DISCUSSION

BACKGROUND

The Town of Campbell, Wisconsin, has enacted an ordinance that prohibits any person from displaying, placing, erecting, posting, maintaining, installing, affixing, or carrying a sign, flag, banner, pennant, streamers, balloons, or other similar item, on any portion of a vehicular or pedestrian bridge or overpass that passes over a freeway or expressway, or within 100' of said facility, allegedly “to prevent traffic accidents and further public safety” and, allegedly, based on the Town of Campbell’s “well founded concern for public safety.” Messrs. Gregory Luce and Nicholas

Newman have filed a lawsuit seeking to enjoin the Town of Campbell from applying and enforcing this ordinance.

The Town of Campbell is located in western Wisconsin, near the Mississippi River in the county of La Crosse. The alignment of I-90 passes through the town as it traverses the state between the Minnesota and Illinois state lines. In and around the Town of Campbell, the alignment of I-90 runs generally in an east-west direction. Travelling eastbound along I-90 through the Town of Campbell, one first encounters a vehicular overpass at Lakeshore Drive, then a pedestrian overpass that connects Bainbridge Street across I-90, and finally, a vehicular overpass at Dawson Avenue.

TRAFFIC VOLUMES

A 2008 traffic count study focused on this area shows that the **AADT for the segment of I-90 in question between Lakeshore Drive and Dawson Avenue to be 23,100 vehicles.**

The Wisconsin Department of Transportation (WisDOT) maintains permanent count stations at key locations along the I-90 corridor throughout the state. One of these permanent counting stations is located just east of the highway segment in question, near State Highway 16. This nearby count station, called West Salem, has data available for 10 years from 2003 to 2012 (see **Table 1**). The average AADT for the 10-year period is 23,311, which shows that **traffic demand has remained flat (within 2.5% of the average) for the past 10 years.** In fact, traffic demand in 2012 is actually less than that of both 2003 and 2004.

Table 1: AADT for West Salem Permanent Count Station on I-90, near State Highway 16.

Year	AADT
2012	23,549
2011	23,419
2010	23,624
2009	22,564
2008	22,523
2007	23,374
2006	23,255
2005	23,267
2004	23,647
2003	23,887

It is also instructive to examine how the level of traffic demand for this segment of I-90 compares to the rest of the corridor contained within the boundaries of the State of Wisconsin (see **Table 2**). The location identifier is developed by WisDOT and typically refers to the nearby town or major roadway. Data from 2012 is presented as it was available for all permanent count stations along the corridor, and is presented in the Table from west (Minnesota border) to east (Illinois border) along the I-90 corridor. The average AADT for the corridor is 44,768, with all except two stations reporting AADT in excess of 30,000 vehicles. **Traffic demand for the subject highway segment is roughly one-half of the average AADT for the I-90 corridor and is only 27% of the highest AADT reported.**

Table 2: AADT for 2012 for Permanent Count Stations along I-90 Corridor.

Location	AADT (2012)
West Salem	23,549
Sparta	15,764
Mauston	30,757
Delton Township	35,774
Dekorra	50,574
Vienna Township	52,858
Hoepker Road	58,450
Cottage Grove	84,486
I-39-90	49,535
Newville	45,610
La Prairie Township	45,094

Chief of Police Tim Kelemen, in his Declaration filed March 7, 2014, states that, “Interstate 90 is a heavily traveled highway.” While this statement is true for much of the I-90 corridor within the State of Wisconsin, **the subject highway segment is a lightly traveled segment of I-90, which provides a fully limited access, four-lane cross-section highway built to Interstate design standards (the highest classification of roadway design standards).**

LEVEL OF SERVICE

A measure of the operational impact on a highway from traffic demand is expressed through LOS. The Federal Highway Administration (FHWA) defines LOS as “... a qualitative assessment of a road’s operating conditions.

For local government comprehensive planning purposes, level of service [LOS] means an indicator of the extent or degree of service provided by, or proposed to be provided by, a facility based on and related to the operational characteristics of the facility. Level of service indicates the capacity per unit of demand for each public facility. This term refers to a standard measurement used by transportation officials which reflects the relative ease of traffic flow on a scale of A to F, with free-flow being rated LOS-A and congested conditions rated as LOS-F.”

Based on an AADT of 23,100 vehicles, and assuming that the peak hour factors associated with the nearby permanent count location are representative, a LOS calculation can be made using the procedures found in the *Highway Capacity Manual*. **The LOS for the highway segment in question is LOS-A. Based on the *Highway Capacity Manual* definition, conditions operating at LOS-A, are considered to be operating in free-flow conditions, with vehicles almost completely unimpeded in their ability to maneuver within the traffic stream.**

SAFETY

In the Brief in Opposition to Plaintiffs’ Motion for Preliminary Judgment it is stated that “[The Town of] Campbell’s Chief of Police, Timothy Kelemen, has responded to numerous traffic accidents on this stretch of Interstate 90 and classifies it as a significant risk area given the volume of traffic and frequency of accidents.” However, no substantive statistics are presented to support Chief of Police Kelemen’s anecdotal statement regarding the frequency of accidents.

WisDOT produces an annual summary of traffic crash facts, with the most current publication being for the year 2012. In the year 2012 in La Crosse County, 128 crashes occurred on the Interstate system. The I-90 corridor is the only Interstate facility within La Crosse County. In the state of Wisconsin as a whole, 7,144 crashes occurred in 2012 on Interstate facilities. As such, **1.8% of Interstate traffic crashes in the state of Wisconsin for the year 2012 occurred along the entire length of I-90 within the county of La Crosse.**

Approximately 20.5 miles of the I-90 corridor fall within the boundaries of La Crosse County. Using the count data from the West Salem permanent count station for the year 2012, an approximate crash rate for I-90 within La Crosse County can be established as 72.6. The crash rate for the peer group of large urban (greater than 25,000 population) freeways determined by WisDOT is 73. As such, **the crash exposure along the I-90 corridor in the county of La Crosse is average when compared with the crash exposure of the entire state.**

OTHER TRAFFIC INCIDENTS

Chief of Police Kelemen, in his Declaration filed March 7, 2014, states that he has “...also learned of other traffic incidents caused by similar overpass protests in other parts of the country. In particular, [he] learned of a large 10-mile traffic jam caused by overpass protestors using signs and other displays in California in June of 2013.” He further states that he believes that “...traffic back-ups and slowdowns pose a risk to highway safety and should be prevented whenever possible.”

Traffic jams occur when the LOS of a highway falls to LOS-F. The incident in question occurred on a segment of southbound I-5 as it approaches the Tamarack Avenue overpass. The AADT for the segment of roadway between Tamarack Avenue and Carlsbad Village Drive is 203,000 vehicles, carried on an eight-lane cross-section. Utilizing 2012 count data taken by CalTrans at this location, the LOS along this section of highway is typically LOS-E on an average day. In fact, recurrent traffic congestion along the I-5 North Coast Corridor is so problematic that a planned reconstruction of the corridor is underway and is expected to cost \$3.5 billion (2011 dollars) before completion. While operating at LOS-E, minor disruptions to the traffic flow can cause operation to fall to LOS-F, resulting in jam density.

By way of comparison, **in order to bring the I-90 highway segment in question from its current daily operation of LOS-A to a LOS-E, would require the AADT to increase from 23,100 vehicles to 68,000 vehicles – an increase of nearly three times.**

Chief of Police Kelemen's comparison of the operational and safety characteristics of a segment of heavily congested I-5 in San Diego County to the free-flow conditions of the highway segment in question is not valid.

VISIBILITY

Chief of Police Kelemen, in his Declaration filed March 7, 2014, states that, “The natural reaction of drivers is to look directly up and be distracted from the highway with the different types of signs, banners, and other items on display throughout the overpass above.” However, this overstates the case. As can be seen in **Figure 1**, which is a photograph purported to have been taken during a protest at the subject location by Chief of Police Kelemen, the location of protesters and signage on the overpass is at an upward angle of only approximately 30° from the vanishing point. The average driver has a useful field of view between 40° to 60°; thus, **viewing the activity on the overpass does not require a driver diverting attention to a point where vital roadway information would be compromised.**



FIGURE 1: Photo No. 2 from Exhibit 5 of Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction filed March 7, 2014.

Further, a short drive to the east along the I-90 corridor brings one to another pedestrian overpass servicing the Elroy-Sparta/La Crosse River State Trails, which displays the trail name on the concrete formwork of the center portion of the overpass on both sides (**Figure 2**). The display of this signage is sanctioned by the State of Wisconsin.



FIGURE 2: Pedestrian overpass for Elroy-Sparta/La Crosse River State Trails.

Chief of Police Kelemen, in his Declaration filed, March 7, 2014, states that he believes, “The risk posed by these overpass signs are substantially different than the risk posed by regulated billboards and other approved highway signs because they are dispersed in different locations throughout the overpass, where these are directly above the Interstate and the signs are much more difficult to read. All of these factors can cause a driver’s eyes to be diverted from the roadway for an extended period of time when compared to a billboard or other approved highway sign.”

Chief of Police Kelemen’s point that, “The risk posed by these overpass signs are substantially different than the risk posed by regulated billboards...” is correct. **With changes to billboard design, including both crawler messaging and full-motion video, and the**

location of said billboards being as much as 150' from the edge of the traveled way requiring motorists to turn their head from the direction of travel to process complicated messaging, these “regulated billboards” are a substantially greater risk to motorist safety.

Several examples of this type of billboard signage are present along the I-90 corridor within the state of Wisconsin and within a one hour drive of the subject location. **Figure 3** shows an example of a crawler sign that displays changing messages along a reader panel at the bottom of the billboard. **Figure 4** shows an example of a simple video display advertising “Job Opportunities Local Drivers.” **Figures 5 through 8** show the implementation of a video billboard utilized to display multiple advertisements. **Figure 9** shows the implementation of a crawler sign well back from the edge of the traveled way. **Figure 10** shows the implementation of a crawler sign on the opposite side of the roadway. And finally, **Figures 11 and 12** show video billboards displaying multiple advertisements. Furthermore, as one gets close to the attractions found in Wisconsin Dells, the video billboards display full-motion video programming.



FIGURE 3: Example of a crawler message sign.



FIGURE 4: Example of simple video billboard.



FIGURE 5: Video billboard displaying Advertisement 1.

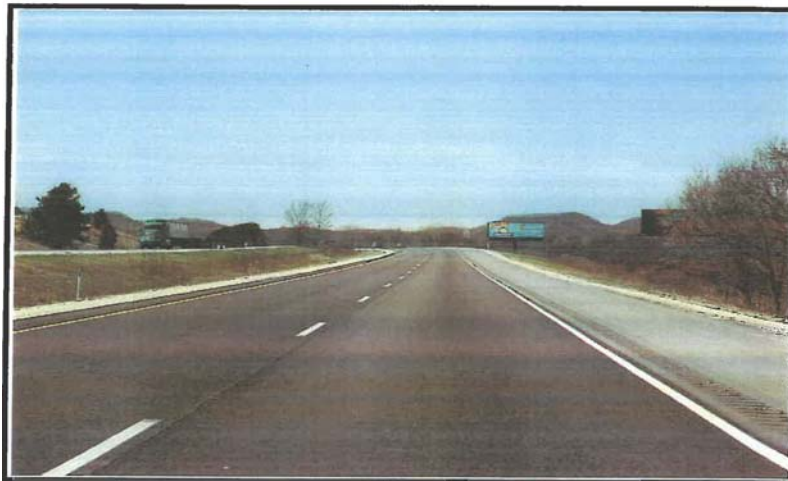


FIGURE 6: Video billboard displaying Advertisement 2.



FIGURE 7: Video billboard displaying Advertisement 3.



FIGURE 8: Video billboard displaying Advertisement 4.



FIGURE 9: Crawler sign well back from edge of traveled way.



FIGURE 10: Crawler sign on opposite side of roadway.



FIGURE 11: Video billboard displaying multiple advertisements.

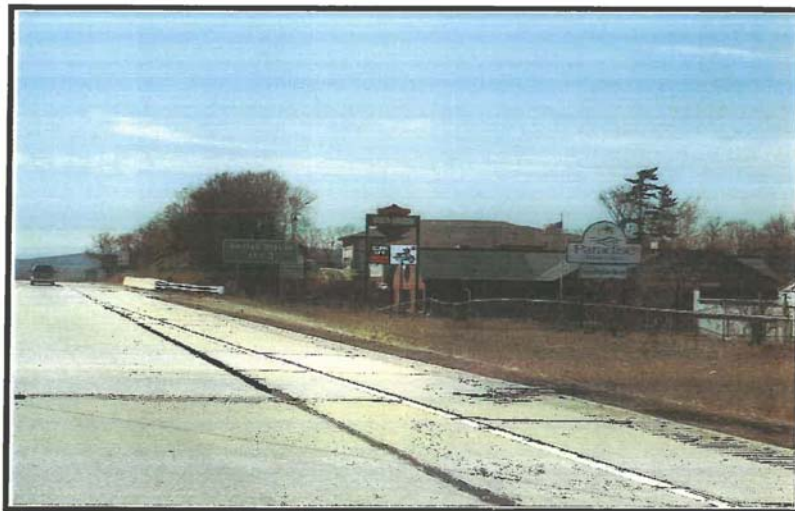


FIGURE 12: Video billboard displaying multiple advertisements.

ORDINANCE DISTANCE

The ordinance bans displays “...within one hundred (100) feet of any portion of a vehicular or pedestrian bridge or overpass that passes over a freeway or expressway” This selected distance appears arbitrary and capricious.

By way of example:

- The houses at 2425 and 2427 Bainbridge Street could not post any display within the front yards of the property, which could include a for sale sign, garage sale sign, American flag, State of Wisconsin flag, party balloons, etc.
- The Days Inn sign located in the southwest quadrant of the pedestrian overpass, a large lighted structure with one permanent and one temporary supplemental sign attached, is 101.5' from the overpass.

SUMMARY

Claims that permitting the display of signage on the overpasses will result in the public being forced to “sit in long traffic back-ups with their safety at risk” are simply not borne out by the conditions found at the subject location.

IV. SIGNATURES

S-E-A hereby certifies the opinions and conclusions expressed herein have been formulated within a reasonable degree of professional certainty. They are based upon the application of reliable principles and scientific methodologies to all of the facts known by S-E-A when this report was issued, as well as knowledge, skill, experience, training, and/or education. Should additional information be discovered, S-E-A reserves the right to appropriately amend or augment these findings.

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