IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ThinkRight Strategies, LLC; Grant Strobl; and Jacob Chludzinski, Plaintiffs, v. City of Ann Arbor, Defendant.	Case No. 2:19-cv-12233-DML-RSW **Plaintiffs' Preliminary Injunction Motion** District Judge: David M. Lawson Magistrate Judge: R. Steven Whalen

Consistent with Federal Rule of Civil Procedure 65 and Eastern District of Michigan Local Rule 65.1, Plaintiffs Grant Strobl, Jacob Chludzinski, and ThinkRight Strategies, LLC (collectively "ThinkRight") request a preliminary injunction to stop Defendant Ann Arbor from violating the First and Fourteenth Amendments of the United States Constitution.

ThinkRight asks that the injunction enjoin Ann Arbor, its officers, agents, servants, employees, attorneys, and those persons in active concert or participation with Ann Arbor who receive actual notice of this order from enforcing the following:

1. Ann Arbor's Accommodation Clause (Ann Arbor Code § 9:153), Policy Clause (§ 9:155(1)), and Effects Clause (§ 9:156) to compel ThinkRight to provide any of its services to express or

promote political messages, views, beliefs, policies, platforms, or causes inconsistent with ThinkRight's political or religious beliefs.[1] *See, e.g.*, Decl. of Grant Strobl in Supp. of Pls.' Mot. for Prelim. Inj. ¶¶ 107-118, 121-130 (providing examples of advocacy work ThinkRight cannot perform).

2. Ann Arbor's Posting Clause (§ 9:155(1)) to prohibit ThinkRight from posting its desired statement (Verified Complaint Exhibit B) on its website and from making materially similar statements.
3. Ann Arbor's Policy Clause (§ 9:155(1)) to prohibit ThinkRight from adopting, enforcing, and employing its desired internal selection policy (Verified Complaint Exhibit C) and materially similar policies.
4. Ann Arbor's Effects Clause (§ 9:156) to prevent ThinkRight from adopting, enforcing, and employing its desired operating agreement (Verified Complaint Exhibit E).
5. Ann Arbor's Distribution Clause (§ 9:155(2)) to prevent ThinkRight from sending its informational letter (Verified Complaint Exhibit D) or materially similar literature only to

[1] For simplicity, ThinkRight assigned names to the challenged clauses. Attachment A to Plaintiffs' Brief in Support of Their Preliminary Injunction Motion provides the assigned name, code section, and relevant text of the challenged clauses.

ThinkRight's desired audience of those with conservative political beliefs (*see* Verified Complaint ¶ 166).

6. Ann Arbor's Distribution Clause (§ 9:155(2)) against anyone because it is facially overbroad.
7. Ann Arbor's Accommodation, Policy, Effects, Posting, or Distribution Clauses against anyone as those clauses relate to "political beliefs" because Ann Arbor's definition of "political beliefs" is facially vague and grants enforcement officials unbridled discretion.

In sum, ThinkRight seeks *as-applied* relief against the Accommodation, Policy, Effects, Posting, and Distribution Clauses; *facial* relief against the Distribution Clause because it is overbroad; and *facial* relief against the Accommodation, Policy, Effects, Posting, and Distribution Clauses to the extent they incorporate the ordinance's vague definition of "political beliefs."

Absent a preliminary injunction, ThinkRight will suffer irreparable harm: the continued violation of its rights guaranteed by the United States Constitution. In support of its motion, ThinkRight relies on any oral argument permitted and on the following documents:

- The Verified Complaint and the exhibits accompanying it;
- Plaintiffs' Brief in Support of Their Preliminary Injunction Motion;

- Exhibits 1 through 27 in Support of Plaintiffs' Preliminary Injunction Motion;
- Plaintiffs' Reply in Support of Their Preliminary Injunction Motion (if filed) and supporting documents (if any).

ThinkRight also asks this Court to waive any bond because this requested injunction serves the public interest by vindicating First and Fourteenth Amendment rights. *See Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1175-76 (6th Cir. 1995) (upholding district court's decision to waive bond requirement given the strength of the arguments and the public interest involved).

ThinkRight has not yet conferred with Ann Arbor as typically required by Local Rule 7.1 because this motion is being filed simultaneously with the complaint initiating the lawsuit, ThinkRight does not yet know who represents Ann Arbor in this matter, and this motion seeks relief to remedy ongoing irreparable harm. So meaningful conferral is currently impractical. But once Ann Arbor's attorneys appear in this matter, counsel for ThinkRight will quickly confer with them and notify the Court whether Ann Arbor opposes this motion.

ThinkRight also requests oral argument to be heard at a time and date set by the Court.

Respectfully submitted this 29th day of July, 2019.

By: s/ Jonathan A. Scruggs

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of July, 2019, I electronically filed the foregoing paper with the Clerk of Court using the ECF system, and I hereby certify that the foregoing paper will be served via private process server with the Summons and Verified Complaint to:

City of Ann Arbor, c/o City Clerk Jacqueline Beaudry
Larcom City Hall, Second Floor
301 E. Huron Street
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Issues Presented

Plaintiffs Grant Strobl and Jacob Chludzinski operate a political consulting firm called ThinkRight Strategies. ThinkRight offers advocacy services—like preparing campaign speeches and websites—that promote conservative politicians, policies, and causes. So ThinkRight wants to decline to provide services that promote contrary political beliefs; post a statement online about the advocacy work it will and will not do; adopt policies ensuring it will promote conservative messages; and mail letters to conservative groups about ThinkRight.

But an Ann Arbor law forbids these activities because it bans public accommodations from "discriminating" on the basis of "political beliefs"—defined as "[o]ne's opinion ... concerning the social, economic, and governmental structure of society and its institutions."

The issues presented are:

I. Does this law violate the First Amendment when it compels ThinkRight to provide advocacy services that promote political beliefs it opposes?

II. Does this law violate the First Amendment when it restricts ThinkRight from posting and mailing statements about the advocacy services it provides?

III. Does this law violate the First Amendment when it forces speakers (including ThinkRight) to distribute promotional material to audiences those speakers do not want to address?

IV. Does this law violate the First and Fourteenth Amendments through a vague definition of "political beliefs"?

Introduction and Summary of Facts

For our democracy to function, citizens must be free to choose which political causes to praise and which to protest. But Ann Arbor's public accommodations law is suffocating that freedom by banning "discrimination" based on "political beliefs." While this law may not harm some businesses, here the law forces a *conservative* political consulting firm to create everything from speeches to flyers to advance *progressive* causes. But the law also requires Democrats to write campaign speeches for Donald Trump, abortion proponents to design ads encouraging abortion bans, and gun-control advocates to craft a website promoting NRA membership. So, in the name of stopping "discrimination," Ann Arbor has stomped out both side's editorial discretion. The First Amendment will not have it.

Plaintiffs are ThinkRight Strategies, a political consulting and marketing firm in Ann Arbor, and its owners, Grant Strobl and Jacob Chludzinski.[1] Verified Complaint (VC) ¶¶ 7-9, 56. Grant and Jacob recently launched ThinkRight to help promote their conservative principles: free enterprise, limited government, individual freedom, traditional values, and a strong national defense. *Id.* ¶¶ 50-58, 60.

[1] All Plaintiffs are referenced collectively as "ThinkRight" or "Grant and Jacob" unless context indicates otherwise.

ThinkRight's services all involve political communications. *Id.* ¶ 65. These services include designing websites, social-media posts, and flyers; drafting speeches, press releases, and slogans; coaching for debates, speeches, and media appearances; and helping guide canvassing efforts. *Id.* ¶¶ 64-67. When ThinkRight provides these services to likeminded non-profits and politicians, ThinkRight advances its own conservative goals. *Id.* ¶¶ 60-65.

To achieve these goals better, ThinkRight wants to: (1) post a statement on its website explaining what ThinkRight believes and what it can and cannot express, *id.* ¶¶ 135-137; (2) decline requests for services promoting causes contrary to Grant and Jacob's beliefs, *id.* ¶¶ 14-16, 145-159, 198; (3) adopt an internal selection policy institutionalizing its political beliefs and the advocacy work it will do, *id.* ¶¶ 138-144; (4) adopt an operating agreement memorializing ThinkRight's purpose, *id.* ¶¶ 210-219; and (5) mail an informational letter to conservative groups about ThinkRight, *id.* ¶¶ 163-166.

But Ann Arbor's law forbids all these activities. It defines public accommodations to include businesses like ThinkRight that offer services to the public. *Id.* ¶¶ 167-176. And five clauses in the law impair ThinkRight's ability to associate and to speak its desired message.

Three of these provisions (the Accommodation, Policy, and Effects Clauses) forbid businesses from "discriminat[ing]" and from adopting policies that "discriminate[]" or have the "effect of creating unequal

opportunities."[2] These force ThinkRight to provide advocacy services to promote progressive political causes because it will promote conservative causes. *Id.* ¶¶ 181-187. The Policy and Effects Clauses even ban ThinkRight from adopting its internal selection policy and its operating agreement which institutionalize ThinkRight's conservative goals. *Id.* ¶¶ 204-219.

Meanwhile, the Posting Clause prevents businesses from "discriminating" in what they post publicly. This bans ThinkRight's desired website statement that explains the purpose of its advocacy services. *Id.* ¶¶ 221-226. And the Distribution Clause forbids businesses from "discriminating" when distributing information. This stops ThinkRight from mailing an informational letter about its services only to those advancing conservative beliefs. *Id.* ¶¶ 229-246. Beyond all that, each of the five clauses uses a vague definition of "political beliefs." *Id.* ¶ 171. That prevents speakers from knowing what they can say and allows officials to punish disfavored views. *Id.* ¶¶ 283-285, 292-294.

In all these ways, Ann Arbor's law infringes ThinkRight's editorial discretion and violates the First and Fourteenth Amendments. ThinkRight therefore seeks a preliminary injunction to stop this

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[2] For simplicity, ThinkRight named each challenged clause and explains below how each clause functions. Attachment A provides the name, code section, and relevant text of each challenged clause. And Attachment B provides relevant statutory definitions. The full text of Ann Arbor's law is available at https://bit.ly/2JMinH1.

ongoing harm and to restore its freedom to associate and speak to advance its political ideals.[3]

Argument

When evaluating preliminary injunction requests, courts typically evaluate (1) the likelihood of success on the merits, (2) irreparable harm to plaintiffs absent an injunction, (3) whether an injunction will cause substantial third-party harm, and (4) whether an injunction will serve the public interest. *Miller v. City of Cincinnati*, 622 F.3d 524, 533 (6th Cir. 2010). But in this case, ThinkRight's likelihood of success is the "crucial inquiry" because First Amendment violations always cause irreparable harm and stopping these violations benefits everyone. *Bays v. City of Fairborn*, 668 F.3d 814, 819, 825 (6th Cir. 2012) (citation omitted); *Miller*, 622 F.3d at 540. And, as explained below, ThinkRight will likely succeed.

I. Ann Arbor's Accommodation, Policy, and Effects Clauses violate the First Amendment by infringing ThinkRight's editorial judgment.

The "fundamental rule" of the First Amendment is "that a speaker has the autonomy to choose the content of his own message." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995). This autonomy means individual speakers—not the

[3] Plaintiffs incorporate their verified complaint and declarations, which contain additional facts.

government—get to exercise "editorial control and judgment" over what they say. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *see also Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 437 (S.D.N.Y. 2014) ("[A]s a general matter, the Government may not interfere with the editorial judgments of private speakers on issues of public concern ....").

But Ann Arbor law violates these principles by compelling speech. A compelled speech claim has three elements: (1) speech (2) the government compels (3) forcing someone to convey messages they object to. *See Hurley*, 515 U.S. at 572-73 (applying elements); *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015) (identifying these elements). ThinkRight satisfies each element and that triggers strict scrutiny. *See Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1, 19 (1986) (plurality) ("*PG&E*") (applying strict scrutiny to law compelling speech).

A. ThinkRight engages in protected speech.

As a political consulting firm, ThinkRight creates advocacy content for politicians and organizations to promote conservative messages, policies, and causes. VC ¶¶ 61-65. Its services include designing and creating websites and social-media content; drafting press releases and speeches; helping guide canvasing efforts to mobilize voters; and coaching candidates for debates. *Id.* ¶ 67. Through all its services, ThinkRight uses text, images, or spoken words to convey

political messages. *Id.* ¶¶ 61-62, 67, 93-94, 114-126. And ThinkRight exercises complete editorial control over the content of its services. *Id.* ¶¶ 80-83.

By communicating through text, words, or images, ThinkRight's services constitute pure speech protected by the First Amendment. *See Kaplan v. California*, 413 U.S. 115, 119-20 (1973) ("[B]oth oral utterance and the printed word have First Amendment protection ...."); *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735-36 (2017) ("[S]ocial media users employ [websites] to engage in ... First Amendment activity ...."); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) ("[T]he creation and dissemination of information are speech within the meaning of the First Amendment."); *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) (mediums of protected expression include "music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures").

And this conclusion does not change just because ThinkRight charges for its services. "[A] speaker is no less a speaker because he or she is paid to speak." *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 791, 801 (1988); *see also ETW Corp.*, 332 F.3d at 924 ("Speech is protected even though it is carried in a form that is sold for profit."). Likewise, this protection remains even though ThinkRight creates advocacy materials for others. Commissioned speakers receive as much protection as non-commissioned ones. *See Riley*, 487 U.S. at 794 n.8

(fundraiser paid to convey charity's message "has an independent First Amendment interest in the speech" conveyed); (*WIN) Wash. Initiatives Now v. Rippie*, 213 F.3d 1132, 1134-35 (9th Cir. 2000) (protecting political consulting company's right to collect signatures for other groups).

B. The Accommodation, Policy, and Effects Clauses compel ThinkRight to speak.

Because ThinkRight speaks through its advocacy services, Ann Arbor compels speech and infringes ThinkRight's editorial judgment when compelling these services. This infringement occurs in three ways.

First, the Accommodation Clause makes it illegal for ThinkRight to "discriminate" in providing services. Ann Arbor Code § 9:153. Because "discriminate" is defined as "mak[ing] a decision ... based in whole or in part" on someone's "political beliefs," § 9:151(6), it is illegal for ThinkRight to decline advocacy services for someone advancing political beliefs ThinkRight opposes.

For example, because ThinkRight will design and publish a Republican's campaign website expressing her conservative political beliefs and encouraging people to vote for her, ThinkRight must be willing to create a Democrat's campaign website pitching progressive policy positions and encouraging viewers to vote for him. Declining to promote the Democrat's platform means declining services based on political beliefs. And that is illegal in Ann Arbor. §§ 9:153, 9:151(6).

Second, Ann Arbor's Policy Clause makes it illegal for ThinkRight to "adopt, enforce or employ any policy or requirement ... which discriminates or indicates discrimination" in the provision of services. § 9:155(1). This prevents ThinkRight from adopting policies that specify ThinkRight's conservative political beliefs and desire to only provide services advocating those beliefs. *Id.*; § 9:151(6). In other words, the Policy Clause bars ThinkRight from establishing and exercising editorial judgments over the political positions it promotes.

Finally, Ann Arbor's Effects Clause makes it illegal for ThinkRight to "adopt, enforce or employ any policy or requirement which has the effect of creating unequal opportunities according to ... political beliefs ... for an individual to obtain" ThinkRight's services. § 9:156. The Effects Clause compels speech and restricts editorial discretion much like the Policy Clause does. But the former prevents even a facially "neutral" policy—one that says ThinkRight will operate consistent with its owners' beliefs—because its "effect" is to require ThinkRight to decline to advocate for progressive causes—i.e., those contrary to its owners' beliefs.

In these three ways, the Accommodation, Policy, and Effects Clauses strip ThinkRight of editorial control over its speech. If not for the Accommodation Clause, ThinkRight would decline requests to promote political messages and causes it opposes. VC ¶¶ 198-200; Decl. of Grant Strobl in Supp. of Pls.' Mot. for Prelim. Inj. ¶¶ 98-100 (sample

message to decline requests). If not for the Policy Clause, ThinkRight would adopt an internal selection policy requiring ThinkRight to promote certain political views and not others. VC ¶¶ 138-144, 205-209; VC Ex. C (full text of policy). And if not for the Effects Clause, ThinkRight would adopt an operating agreement stating ThinkRight's purpose of advancing its political beliefs. VC ¶¶ 210-219; VC Ex. E at 1 (text of operating agreement).

By infringing editorial judgment this way, Ann Arbor's law operates much like the law in *Tornillo*. There, if a newspaper published anything criticizing a political candidate, a Florida law required the newspaper to publish that candidate's reply. 418 U.S. at 244. But "the decisions made as to ... content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Id.* at 258. So the Court invalidated the law "because of its intrusion into the function of editors." *Id.*

Surely, if laws cannot compel a business to simply *publish* materials prepared by others without infringing editorial discretion, then laws cannot compel the *creation and publication* of objectionable material nor ban policies designed to effectuate editorial standards. A law requiring *The Atlantic* to print pro-Donald Trump editorials and forbidding policies that set content standards for *The Atlantic* goes too far. And Ann Arbor's law goes even further.

Courts have condemned much weaker attacks on editorial discretion than this. *See, e.g.*, *McDermott v. Ampersand Pub., LLC*, 593 F.3d 950, 959-63 (9th Cir. 2010) (federal law could not force newspaper to rehire employees seeking to influence editorial decisions); *Groswirt v. Columbus Dispatch*, 238 F.3d 421, at *2 (6th Cir. 2000) (unpublished) (federal anti-discrimination law could not force newspaper to publish article); *Baidu.com*, 10 F. Supp. 3d at 441-43 (public accommodations law could not force internet company to publish political material on search engine because infringing "its editorial judgments about what political ideas to promote cannot be squared with the First Amendment").

To be sure, the Accommodation, Policy, and Effects Clauses do not mention websites, press releases, or ThinkRight's other advocacy services. But that does not matter. Because Ann Arbor's law applies to ThinkRight to compel these services, it compels ThinkRight's speech.

Hurley shows why. In *Hurley*, the public accommodations law there did "not, on its face, target speech or discriminate on the basis of its content"; its "focal point" was stopping "the act of discriminating." 515 U.S. at 572-73. But the law still compelled speech because "application of the statute had the effect of declaring the sponsors' speech itself [a parade] to be the public accommodation." *Id.* Ann Arbor's Accommodation, Policy, and Effects Clauses do the same to a

different medium—ThinkRight's advocacy materials. That compels speech.

C. The Accommodation, Policy, and Effects Clauses compel ThinkRight to speak messages it opposes.

Not only do the Accommodation, Policy, and Effects Clauses infringe editorial discretion and compel speech, but they also force ThinkRight to express messages it strongly opposes.

For instance, like most conservatives, ThinkRight believes in free enterprise, limited government, and traditional values. So it cannot promote socialism or abortion. VC ¶¶ 60, 145-153, 159. But under Ann Arbor law, if ThinkRight will create ads to promote pro-life pregnancy centers, it must create ads for Planned Parenthood to promote abortion. And if ThinkRight will create website material for the Republican Party saying "Vote Republican," it must also create similar material saying "Vote Socialist" for the Socialist Party of Michigan.

This imposes no small burden on ThinkRight. In fact, compelling speech inflicts "additional damage" beyond silencing speech because "[f]orcing free and independent individuals to endorse ideas they find objectionable is *always* demeaning ...." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (emphasis added). Indeed, something as simple as forcing someone "to sign a document expressing support for a particular set of positions on controversial public issues—say, the platform of one of the major

political parties ... plainly violates the Constitution ...." *Id.* The unconstitutional effect of Ann Arbor's law is just as plain.

D. The Accommodation, Policy, and Effects Clauses compel speech based on content and viewpoint.

Although ThinkRight satisfies the three-part test for compelled speech, the Accommodation, Policy, and Effects Clauses go further and compel speech in a particularly egregious way: based on content and viewpoint. They do so in three ways.

First, they compel ThinkRight to convey content it would not otherwise convey: political advocacy objectionable to ThinkRight. "Mandating speech that a speaker would not otherwise make necessarily alters the content" and constitutes "a content-based regulation of speech." *Riley*, 487 U.S. at 795; *see also Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (same).

Second, the Accommodation, Policy, and Effects Clauses only compel ThinkRight's speech if ThinkRight will convey particular content. If ThinkRight only created car advertisements, these clauses would not compel it to promote socialism. ThinkRight must advance socialism only because it advances conservative political beliefs.

In this way, the law's application is triggered by the content of ThinkRight's speech. That makes the law's application content based. *See PG&E*, 475 U.S. at 13-14 (plurality) (law regulates based on content if "it [is] triggered by a particular category of ... speech" or "condition[s]

[access] on any particular expression" conveyed earlier); *Tornillo*, 418 U.S. at 256 (statute "exact[ed] a penalty on the basis of the content of a newspaper" because it only required newspapers to publish certain editorials if they printed editorials with particular content earlier).

Third, the Accommodation, Policy, and Effects Clauses only require ThinkRight to speak for those with *opposing* political beliefs. *See PG&E*, 475 U.S. at 13-14 (plurality) (law is content-based when access is "awarded only to those who disagree[] with the [speaker's] views"). That is because the law compels access only when ThinkRight declines to provide services *because* it disagrees with the beliefs promoted by those services. *See* §§ 9:153, 9:151(6). In contrast, if ThinkRight declined to provide services advancing conservative political beliefs, ThinkRight would not violate the law; that decline would be for reasons other than political beliefs—e.g., lack of capacity or expertise. *Cf.* VC ¶¶ 71-72. By compelling ThinkRight to promote political views it opposes—i.e., to "utter what is not in [its] mind and indeed what [it] might find deeply offensive"—Ann Arbor is guilty of "the most aggressive form of viewpoint discrimination." *Ward v. Polite*, 667 F.3d 727, 733 (6th Cir. 2012) (cleaned up).

These content-based and viewpoint-based applications confirm that Ann Arbor's law triggers strict scrutiny.

II. The Posting Clause violates the First Amendment by restricting ThinkRight's speech based on content and viewpoint.

Besides compelling speech, Ann Arbor law also bans ThinkRight from posting its desired message on its website. This is a content and viewpoint-based restriction.

Restricting speech based on its content or viewpoint is "presumptively unconstitutional" and triggers strict scrutiny. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226, 2230 (2015). A law is content-based if it facially draws distinctions based on a speaker's message, if it cannot be justified without reference to speech's content, or if it was adopted because of disagreement with a speaker's message. *Id.* at 2226-27.

Under this test, Ann Arbor's Posting Clause is content based. The Posting Clause says, "No person shall ... publish, post or broadcast any advertisement, sign or notice which discriminates or indicates discrimination in providing ... public accommodations." Ann Arbor Code § 9:155(1). So whether this Clause bans a particular posting turns on what that posting says—i.e., whether its content "indicates discrimination" or not.

Applying this Clause to ThinkRight illustrates the point. ThinkRight wants to post a statement saying it will provide advocacy materials to promote conservative values like "lower taxes" and "the right to bear arms," but not services for "politically liberal candidates to

advance their politically liberal beliefs"—like "the Green New Deal" and "government-controlled healthcare." VC ¶¶ 134-136; VC Ex. B. But this statement violates the Posting Clause because the statement's content "indicates discrimination." § 9:155(1). That is, it makes distinctions in the provision of services based on "political beliefs." § 9:151(6).

To simplify, ThinkRight *may* post a statement saying it will not create materials promoting certain chewing-gum flavors. But ThinkRight *may not* post a statement saying it will not create materials promoting certain political beliefs. The Posting Clause bans the latter, not the former. That is content discrimination. *See Reed*, 135 S. Ct. at 2230 ("[A] law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation ....").

While content discrimination alone triggers strict scrutiny, the Posting Clause ups the ante and commits viewpoint discrimination—"a more blatant and egregious form of content discrimination." *Id.* (cleaned up). "[T]he test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed." *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring); *see also Reed*, 135 S. Ct. at 2230 (describing forms of viewpoint discrimination).

The Posting Clause does precisely this. ThinkRight can express the view that all political beliefs are equally meritorious and that it will therefore advocate for all political beliefs. But ThinkRight cannot post a

statement expressing the view that conservative beliefs are optimal and that it will therefore only advocate those beliefs. VC Ex. B; Ann Arbor Code § 9:155(1). That is viewpoint discrimination. *Matal*, 137 S. Ct. at 1766 (Kennedy, J., concurring) ("To prohibit all sides from criticizing their opponents makes a law more viewpoint based, not less so.").

III. The Distribution Clause violates the First Amendment by compelling and chilling ThinkRight's speech based on content and viewpoint.

Although Grant and Jacob have long worked to promote conservative political beliefs, they want to expand their influence and partner with more conservative candidates, non-profits, and lawmakers. VC ¶ 61. Of course, to create these opportunities, more people need to learn about ThinkRight. So ThinkRight wants to mail a letter about ThinkRight to conservative groups and individuals. *Id.* ¶¶ 164-166. But it has not done so because of Ann Arbor's Distribution Clause.

The Distribution Clause says that "[n]o person shall discriminate in the publication or distribution of advertising material, information or solicitation regarding ... public accommodations." Ann Arbor Code § 9:155(2). This forbids ThinkRight from targeting its informational letter to groups with particular political views. If ThinkRight mails its letter to group X (e.g., Republicans), it must also mail it to group Y (e.g., Democrats). Otherwise, ThinkRight would "discriminate" based on political beliefs when distributing information about itself.

This result compels speech in two ways. First, it requires ThinkRight to speak objectionable messages and even to lie in its informational letter. For instance, the letter says, "ThinkRight Strategies wants to partner with you because we appreciate your commitment to the conservative principles that we cherish." VC Ex. D. But that statement becomes false—and expresses a viewpoint ThinkRight does not hold—if ThinkRight sends its letter to those opposing conservative values.

Second, because the letter invites recipients to partner with ThinkRight, the Distribution Clause makes it more likely that progressive advocates will try to partner with ThinkRight. And Ann Arbor's law forbids ThinkRight from declining such expressive partnerships. Faced with needing to speak unwanted messages, ThinkRight has taken the only rational course available: not sending the letter at all. VC ¶¶ 234-246.

That the Distribution Clause's compulsion of speech has chilled ThinkRight's speech is unsurprising. Courts have repeatedly recognized how compelling speech can chill speech. *See Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 197-200 (1999) (invalidating law requiring petition circulators to wear identification badges because it deterred participation in the petitioning process); *Tornillo*, 418 U.S. at 256-58 (law deterred newspaper from publishing desired editorials by requiring it to publish unwanted responsive editorials); *PG&E*, 475 U.S. at 14

(law deterred business from speaking by awarding access "only to those who disagree with appellant's views").

Besides hitching unwanted speech to desired speech, the Distribution Clause also raises the cost on ThinkRight's speech. Mailing letters takes time and money. If ThinkRight must mail letters to its opponents every time it mails letters to its allies, ThinkRight's letters become more expensive, more time consuming, less effective, and less likely to occur. VC ¶¶ 239-243. *See Tornillo*, 418 U.S. at 256-57 (noting that desired speech may be avoided if it requires expenditures of time and money on undesired speech).

The First Amendment does not allow Ann Arbor to compel or hinder speech in these ways, so Ann Arbor's application of the Distribution Clause to ThinkRight must face strict scrutiny. *See, e.g.*, *PG&E*, 475 U.S. at 19 (plurality).

IV. The five challenged clauses violate the First Amendment by hindering ThinkRight's expressive association.

The First Amendment protects the "right to associate with others in pursuit of a wide variety of political ... ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). It also protects "[t]he right to eschew association for expressive purposes ...." *Janus*, 138 S. Ct. at 2463.

The government burdens this right to expressively associate when (1) an organization "engage[s] in some form of expression, whether it be public or private," and (2) a law "significantly affect[s]" the

organization's "ability to advocate public or private viewpoints." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648-50 (2000). When evaluating these two elements, courts "give deference" to the organization. *Id.* at 653. And when the organization satisfies these two elements, the government must overcome strict scrutiny. *Id.* at 648, 659 (refusing to apply intermediate scrutiny).

ThinkRight satisfies these two elements. First, ThinkRight engages in expression. *See supra* § I.A. Indeed, ThinkRight's services are all expressive and its primary purpose is to advocate for conservative values. VC ¶¶ 60-66. Second, Ann Arbor's Accommodation, Policy, Effects, Posting, and Distribution Clauses intrude on ThinkRight's expressive association for all the same reasons they intrude on ThinkRight's editorial judgment. *See supra* §§ I-III.

Requiring ThinkRight to work with others to advocate for progressive values undermines ThinkRight's conservative message and goals. Indeed, if a gay scoutmaster's mere presence undermined the Boy Scouts' message in *Dale*, then forcing ThinkRight to actually produce objectionable advocacy for progressive causes and candidates must undermine ThinkRight's message too. And that impermissibly impairs the right to expressive association. *Dale*, 530 U.S. at 653-56 (application of public accommodations law violated the Scouts' "freedom of expressive association" by interfering with its "choice not to propound a point of view contrary to its beliefs").

V. The five challenged clauses fail strict scrutiny.

By compelling speech, infringing editorial discretion, impairing expressive association, and restricting speech based on content and viewpoint, Ann Arbor erects a high hurdle for itself: strict scrutiny—"the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997). Under this test, Ann Arbor must show that applying its law to ThinkRight's speech is "narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226. It cannot.

In fact, it is hard to think of a legitimate interest for compelling someone to speak a political message they oppose or to silence someone from peaceful political advocacy they believe in. After all, "expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (cleaned up).

Nonetheless, Ann Arbor may try to invoke stopping "discrimination" to justify applying its law to ThinkRight. But "[t]he general objective of eliminating discrimination of all kinds ... cannot alone provide a compelling State interest ...." *Attorney Gen. v. Desilets*, 636 N.E.2d 233, 238 (Mass. 1994). Strict scrutiny "look[s] beyond broadly formulated interests" to consider "the asserted harm of granting specific exemptions to particular ... claimants." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006).

Ann Arbor may not be able to even justify stopping political-belief discrimination generally. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (requiring government to prove "actual problem" to justify regulation under strict scrutiny). But it certainly cannot invoke that interest to justify regulating speech. As the Supreme Court noted in *Hurley*, the government furthers no "legitimate end" when using a public accommodations law to "require speakers to modify the content of their expression." 515 U.S. at 578. That is decisive here too.

To make matters worse for Ann Arbor, the city cannot prove that its "challenged [law] is the least restrictive means among available, effective alternatives." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). For one thing, if Ann Arbor can justify laws to ensure access to *non-expressive* goods regardless of political beliefs, so be it. But Ann Arbor can accomplish that without infringing ThinkRight's free speech.

For another, Ann Arbor already lets companies discriminate based on "political beliefs" when hiring and firing if those beliefs "threaten to interfere with ... job performance." § 9:151(23). If Ann Arbor can completely exempt this activity and still accomplish its goals, Ann Arbor can surely apply its law in a constitutional way—i.e., not apply it to ThinkRight's constitutionally protected speech and association.

VI. The Distribution Clause is facially overbroad.

Beyond the problems with applying the Distribution Clause to ThinkRight (*see supra* § III), the Clause is also facially overbroad.

A law is overbroad when a "substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010). That is the situation here.

The Distribution Clause regulates only speech—the "publication or distribution of advertising material, information or solicitation regarding ... public accommodations." § 9:155(2). When someone speaks this way, the Clause makes it illegal to "discriminate"—that is, to make a publication or distribution decision "based in whole or in part on" protected traits, including political beliefs, sex, age, or arrest record. *Id.*; § 9:151(6). Practically, this makes it illegal for speakers to only address their desired audience in countless situations. For instance:

- Women's rights groups cannot send workplace-empowerment advice for women only to females.
- Civil rights groups cannot send pamphlets about arrestees' rights and tips for documenting violations only to arrestees.
- Counseling centers cannot send free books about finding purpose after retirement only to those over 55.

The list could go on. And all these potential applications unconstitutionally compel and deter speech by increasing the cost of desired speech and by hitching unwanted speech to desired speech. *See City of Cleveland v. Nation of Islam*, 922 F. Supp. 56, 59 (N.D. Ohio 1995) (law violated First Amendment by forcing Muslim speaker to

speak to both men and women, which in turn changed the "the content and character of" the desired speech); *see also supra* § III. Ann Arbor cannot justify this broad, unconstitutional impact.

VII. The five challenged clauses violate the First and Fourteenth Amendments by using a vague definition of political beliefs that grants unbridled discretion.

While Ann Arbor cannot constitutionally apply the five challenged clauses to ThinkRight's speech, those clauses also contain a facial problem: they use a vague definition of "political beliefs."

A law is vague if its "terms are not clearly defined such that a person of ordinary intelligence can readily identify the applicable standard for inclusion and exclusion." *Miller*, 622 F.3d at 539 (cleaned up). Likewise, a "statute that fails to constrain an official's decision to limit speech with objective criteria is unconstitutionally vague." *Id.* And to avoid chilling free speech, "a heightened vagueness standard appli[es]" when a law regulates speech. *See Brown*, 564 U.S. at 793.

Ann Arbor fails this standard because it defines "political beliefs" in a vague way: "One's opinion, whether or not manifested in speech or association, concerning the social, economic, and governmental structure of society and its institutions." Ann Arbor Code § 9:151(23). The problem is that virtually *every* opinion arguably concerns the social, economic, and government structure of society. This definition is so broad and its terms so elastic that citizens must guess whether the

law applies and city officials can apply this definition to target any speech they dislike. So as the Accommodation, Policy, Effects, Posting, and Distribution Clauses relate to "political beliefs" (as opposed to other protected classifications), this Court should enjoin these clauses facially.

Conclusion

In recent times, free speech has come under attack from officials on all sides of the political divide and on all levels. The need to protect free political debate has never been greater. To be sure, some will be tempted to overlook free speech principles when politicians pursue policies they favor. But after protections fall, fortunes may change. Today, Ann Arbor's law compels two conservatives to speak political messages they vigorously oppose and to forgo messages they strongly support. But tomorrow, moderates. And the next day, progressives. In the end, we all eventually lose. Better "to avoid these ends by avoiding these beginnings." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

ThinkRight respectfully asks this Court to stop these troubling beginnings by granting its requested preliminary injunction and stopping the ongoing irreparable harm inflicted by Ann Arbor's law.

Respectfully submitted this 29th day of July, 2019.

By: s/ Jonathan A. Scruggs

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ATTACHMENT A

Provision Name	Ann Arbor Code §	Provision Text (certain defined terms denoted in **bold**)
Accommodation Clause	9:153	"No person shall **discriminate** in making available full and equal access to all goods, services, activities, privileges and accommodations of any **place of public accommodation**...."
Distribution Clause	9:155(2)	"No person shall **discriminate** in the publication or distribution of advertising material, information or solicitation regarding ... **public accommodations**."
Effects Clause	9:156	"No person shall adopt, enforce or employ any policy or requirement which has the effect of creating unequal opportunities according to ... **political beliefs** ... for an individual to obtain ... **public accommodation**, except for a bona fide business necessity...."
Policy Clause	9:155(1)	"No person shall adopt, enforce or employ any policy or requirement ... which **discriminates** or indicates **discrimination** in providing ... public accommodations."
Posting Clause	9:155(1)	"No person shall ... publish, post or broadcast any advertisement, sign or notice which **discriminates** or indicates **discrimination** in providing ... public accommodations."

ATTACHMENT B

Defined term	**Ann Arbor Code §**	**Definition** (certain defined terms denoted in **bold**)
Discriminate	9:151(6)	"To make a decision, offer to make a decision or refrain from making a decision based in whole or in part on an individual's or his or her relatives' or associates' actual or perceived ... **political beliefs** ...."
Place of public accommodation	9:151(22)	"An ... accommodation, business or other facility of any kind, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold or otherwise made available to the public ...."
Political beliefs	9:151(23)	"One's opinion, whether or not manifested in speech or association, concerning the social, economic, and governmental structure of society and its institutions...."

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of July, 2019, I electronically filed the foregoing paper with the Clerk of Court using the ECF system, and I hereby certify that the foregoing paper will be served via private process server with the Summons and Verified Complaint to:

City of Ann Arbor, c/o City Clerk Jacqueline Beaudry
Larcom City Hall, Second Floor
301 E. Huron Street
Ann Arbor, MI 48104

s/ Jonathan A. Scruggs
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