

FILED  
11-09-2020  
Clerk of Circuit Court  
Waukesha County  
2020CV001583

STATE OF  
WISCONSIN

CIRCUIT  
COURT

WAUKESHA  
COUNTY



PLAINTIFFS

Erica Brewer  
W367 S9594 South Road  
Eagle, WI 53119-1571

Case No.: \_\_\_\_\_  
Case Codes: 30701, 30704, 30301

Zachary Mallory  
W367 S9594 South Road  
Eagle, WI 53119-1571

Plaintiffs,

v.

DEFENDANTS

Town of Eagle  
820 E. Main St.  
Eagle, WI 53119

Town of Eagle Town Board  
820 E. Main St.  
Eagle, WI 53119

Don Malek, in his official capacity as  
Chairman of the Town Board  
820 E. Main St.  
Eagle, WI 53119

**FILED**  
**11-09-2020**  
**Clerk of Circuit Court**  
**Waukesha County**  
**2020CV001583**

Chris Mommaerts, in her official capacity as  
Supervisor on the Town Board  
820 E. Main St.  
Eagle, WI 53119

Steve Muth, in his official capacity as  
Supervisor on the Town Board  
820 E. Main St.  
Eagle, WI 53119

Janis Suhm, in her official capacity as  
Supervisor on the Town Board  
820 E. Main St.  
Eagle, WI 53119

Daniel West, in his official capacity as  
Supervisor on the Town Board  
820 E. Main St.  
Eagle, WI 53119

Municipal Law & Litigation Group, S.C.  
in its official capacity as Town Attorney  
730 N. Grand Ave.,  
Waukesha WI 53186

Martin Montoya, in his official capacity as  
Town Building Inspector  
820 E. Main St.  
Eagle, WI 53119

Tim Schwecke, in his official capacity as  
Town Planner and Zoning Administrator  
820 E. Main St.  
Eagle, WI 53119

Defendants.

---

SUMMONS

---

THE STATE OF WISCONSIN, To each person named above as a Defendant:

You are hereby notified that the Plaintiffs named above have filed a lawsuit against you.

The complaint, which is attached, states the nature and basis of the legal action.

Within twenty (20) days of receiving this summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is:

Clerk of the Circuit Court for Waukesha County  
Waukesha County Courthouse  
515 W. Moreland Blvd.  
Waukesha, WI 53188

and to Michael Van Kleunen, Plaintiffs' attorney, whose address is:

Michael Van Kleunen  
CRAMER, MULTHAUF & HAMMES, LLP  
1601 East Racine Ave., Ste. 200  
Waukesha, WI 53186

Plaintiffs also request that you please send copies of your answer to Plaintiffs' lead counsel—Kirby West, Marie Miller, and Alexa Gervasi—whose pro hac vice applications are currently forthcoming. Their addresses are:

Kirby West  
Marie Miller  
Alexa Gervasi  
INSTITUTE FOR JUSTICE  
901 N. Glebe Suite, Suite 900  
Arlington, VA 22203

You may have an attorney help or represent you.

If you do not provide a proper answer within twenty (20) days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law.

Dated this 9th day of November, 2020.

Kirby West\* (Pa. Bar No. 321371)  
Marie Miller\* (Ind. Bar No. 34591-53)  
Alexa Gervasi\* (D.C. Bar No.  
1500433)  
INSTITUTE FOR JUSTICE  
901 N. Glebe Suite, Suite 900  
Arlington, VA 22203

Electronically signed by Michael Van Kleunen  
Michael Van Kleunen  
(Wis. Bar No. 1113958)  
CRAMER, MULTHAUF & HAMMES, LLP  
1601 East Racine Ave., Ste. 200  
Waukesha, WI 53186  
(262) 542-4278  
mvk@cmhlaw.com

*\* Lead counsel for Plaintiffs; Pro Hac  
Vice Applications Forthcoming*

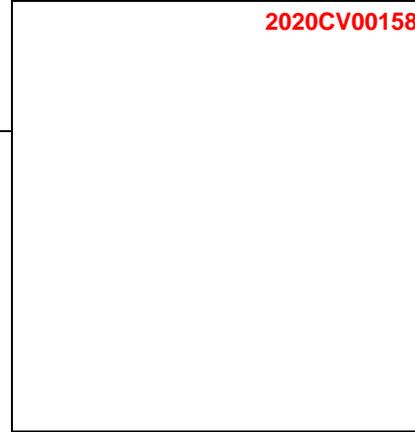
*Local Counsel for Plaintiffs*

FILED  
11-09-2020  
Clerk of Circuit Court  
Waukesha County  
2020CV001583

STATE OF  
WISCONSIN

CIRCUIT  
COURT

WAUKESHA  
COUNTY



PLAINTIFFS

Erica Brewer  
W367 S9594 South Road  
Eagle, WI 53119-1571

Case No.: \_\_\_\_\_  
Case Codes: 30701, 30704, 30301

Zachary Mallory  
W367 S9594 South Road  
Eagle, WI 53119-1571

Plaintiffs,

v.

DEFENDANTS

Town of Eagle  
820 E. Main St.  
Eagle, WI 53119

Town of Eagle Town Board  
820 E. Main St.  
Eagle, WI 53119

Don Malek, in his official capacity as  
Chairman of the Town Board  
820 E. Main St.  
Eagle, WI 53119

**FILED**  
**11-09-2020**  
**Clerk of Circuit Court**  
**Waukesha County**  
**2020CV001583**

Chris Mommaerts, in her official capacity as  
Supervisor on the Town Board  
820 E. Main St.  
Eagle, WI 53119

Steve Muth, in his official capacity as  
Supervisor on the Town Board  
820 E. Main St.  
Eagle, WI 53119

Janis Suhm, in her official capacity as  
Supervisor on the Town Board  
820 E. Main St.  
Eagle, WI 53119

Daniel West, in his official capacity as  
Supervisor on the Town Board  
820 E. Main St.  
Eagle, WI 53119

Municipal Law & Litigation Group, S.C.,  
in its official capacity as Town Attorney  
730 N. Grand Ave.,  
Waukesha WI 53186

Martin Montoya, in his official capacity as  
Town Building Inspector  
820 E. Main St.  
Eagle, WI 53119

Tim Schwecke, in his official capacity as  
Town Planner and Zoning Administrator  
820 E. Main St.  
Eagle, WI 53119

Defendants.

---

**CIVIL RIGHTS COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

---

**INTRODUCTION**

1. This is a civil-rights lawsuit to vindicate the constitutional rights of Erica Brewer and Zachary Mallory (the “Mallorys”) to speak freely without retribution from their local government and to be protected from a deprivation of their property without due process of law. The Town of Eagle and its Town Board have implemented a policy or custom of retaliating and discriminating against property owners, such as the Mallorys, by selectively enforcing Town ordinances against them—and not other violators of the ordinances—for speaking out against Town officials’ exercise of authority. The United States Constitution unequivocally prohibits this selective enforcement. To make matters worse, the Town has deprived the Mallorys of their right to due process by (1) implementing its selective-enforcement practice through individuals who have an improper financial interest in the enforcement proceedings; (2) demanding that the Mallorys either raze certain structures and utility lines on their property or pay punitive permit fees based on the mere fact that the Town cannot locate existing permits in its own records; and (3) imposing fines based on unconfirmed allegations of ordinance violations. The Mallorys are entitled to declaratory and injunctive relief, as well as nominal damages, to redress these constitutional violations and to restore the Mallorys’ rights to free speech and enjoyment of their property.

## JURISDICTION AND VENUE

2. The Mallorys bring this civil-rights lawsuit under the First Amendment to the U.S. Constitution; the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution; the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution; and the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983.

3. The Mallorys seek declaratory and injunctive relief, as well as nominal damages, under Wis. Stat. §§ 806.04 and 813.01 to redress past harms that Defendants have caused and to enjoin future harms that Defendants continue to cause by selectively enforcing Town ordinances based on the Mallorys' protected speech and by depriving the Mallorys of their right to due process of law.

4. This Court has jurisdiction under Wis. Stat. §§ 753.03 and 801.04.

5. Venue is proper in this Court pursuant to Wis. Stat. §§ 801.50(2)(a)-(b) and 227.40(1).

## PARTIES

6. Erica Brewer and Zachary Mallory are a married couple and the owners of the property located at W367 S9594 South Road, Eagle, Wisconsin 53119-1571 (the "Farm"). They have been threatened with fines and fees for alleged violations on that property; those threats are the subject of this lawsuit.

7. Defendant Town of Eagle (the “Town”) is a municipality in Waukesha County, Wisconsin. This case concerns unconstitutional ordinance-enforcement policies or customs instituted by the Town and implemented by the Town’s officials.

8. Defendant Town of Eagle Town Board (the “Town Board”) was created by the Town in accordance with Wis. Stat. § 60.10 and is authorized to, among other things, determine whether to investigate, pursue, and enforce ordinance violations against residents of the Town, including the Mallorys.

9. Defendant Don Malek is named in his official capacity as the Chairman of the Town Board. In this role, he is a policymaker for the Town and votes on whether to investigate, pursue, and enforce ordinance violations, including those that are the subject of this lawsuit.

10. Defendant Chris Mommaerts is named in her official capacity as a Supervisor on the Town Board. In this role, she is a policymaker for the Town and votes on whether to investigate, pursue, and enforce ordinance violations, including those that are the subject of this lawsuit.

11. Defendant Steve Muth is named in his official capacity as a Supervisor on the Town Board. In this role, he is a policymaker for the Town and votes on whether to investigate, pursue, and enforce ordinance violations, including those that are the subject of this lawsuit.

12. Defendant Janis Suhm is named in her official capacity as a Supervisor on the Town Board. In this role, she is a policymaker for the Town and votes on whether to investigate, pursue, and enforce ordinance violations, including those that are the subject of this lawsuit.

13. Defendant Daniel West is named in his official capacity as a Supervisor on the Town Board. In this role, he is a policymaker for the Town and votes on whether to investigate, pursue, and enforce ordinance violations, including those that are the subject of this lawsuit.

14. Defendants Malek, Mommaerts, Muth, Suhm, and West are collectively referred to as the "Board Members."

15. Defendant Municipal Law & Litigation Group, S.C. ("Municipal Law Group") is a law firm hired by the Town to enforce ordinance violations. Municipal Law Group is named in its official capacity as Town Attorney. This lawsuit concerns the unconstitutionality of Municipal Law Group's financial interest in investigating, pursuing and enforcing or threatening to enforce ordinance violations.

16. Defendant Martin Montoya is named in his official capacity as the Town Building Inspector. This lawsuit concerns the unconstitutionality of Montoya's financial interest in the Town's inspection, pursuit, and enforcement of ordinance violations.

17. Defendant Tim Schwecke is named in his official capacity as the Town Planner and Zoning Administrator. This lawsuit concerns the unconstitutionality of

Schwecke's financial interest in the Town's investigation, pursuit, and enforcement of ordinance violations.

## STATEMENT OF FACTS

### THE MALLORYS AND THEIR ENJOYMENT OF THE FARM

18. Plaintiff Erica Brewer is an operating-room nurse specializing in cardiothoracic procedures.

19. Plaintiff Zachary Mallory is a cyber-security specialist and veteran of the United States Coast Guard.

20. In 2016, the Mallorys purchased their Farm with intention of creating a stable family business that would generate enough income to provide for the and to enable them to retire early from their outside professions. For the Mallorys, farming is not simply a hobby; it is a business and a way of life.

21. The Farm is a 3.8-acre property, upon which the Mallorys maintain a house, barn, chicken coop, and sixteen beehives.

22. The house, barn, and water and electrical lines were built and installed on the Farm at or around the same time in 1997, long before the Mallorys purchased the property.

23. At the time of purchase, the Mallorys were assured that the house, barn, and original utility lines were properly permitted. They continue to be unaware of any

evidence that either the house or the barn were built, or the original utilities were installed, without the required permits.

24. When the Mallorys purchased their Farm, it was zoned as “Agricultural 3”; however, the Town unexpectedly rezoned the property to “Rural Residential” in 2017, limiting the Mallorys’ ability to engage in agricultural activities under the Town’s Zoning Code.

25. Despite the rezoning, the Mallorys are allowed to utilize their property for limited agricultural uses. And because of Mr. Mallory’s service in the armed forces, their Farm is recognized as a Veteran Farm by the Farmer Veteran Coalition, and the Mallorys are certified members of the Coalition’s Homegrown by Heroes program.

26. The Mallorys’ farming activities provide an important source of income for their family.

27. Prior to Defendants’ actions at issue in this case, the Farm housed a farm stand, from which the Mallorys sold fresh vegetables, eggs, poultry, and other products to their neighbors, allowing neighbors to leave payment for their purchases on an honor system.

28. On information and belief, Board Members and their families regularly purchased products from the Mallorys’ farm stand.

29. In addition to growing fresh produce, raising laying hens, and preparing organic poultry, the Mallorys conscientiously and humanely extract honey and beeswax

from their beehives for jarring and to create hot sauce, lip balm, reusable food wraps, and other products.

30. The Mallorys, with proper permits and licenses, sell their products at local farmers' markets.

31. During the COVID-19 pandemic, the Mallorys have exercised all necessary precautions to ensure the safety of themselves and their customers.

32. Because of the Farm's status as a Veteran Farm and its value to the community, country-music star Brantley Gilbert selected the Mallorys to provide food from their farm during his tour stop in southeastern Wisconsin as part of a Homegrown by Heroes program.

33. The Mallorys' long-term dream is to offer Mallory Meadows as a haven for veterans to experience nature and engage in therapeutic farming and beekeeping.

34. Defendants' actions that are the subject of this lawsuit have threatened the Mallorys' long-term plans for their property, including their plans for retirement.

#### **DEFENDANTS' ORDINANCE INVESTIGATION AND ENFORCEMENT PRACTICES**

35. According to the Town's written policy, the Town may investigate and enforce ordinance violations only in response to written complaints submitted by residents alleging their neighbors are non-compliant with Town ordinances. The terms "ordinance" or "ordinances," as used herein, include the Town of Eagle's Zoning Code,

the Town of Eagle's Municipal Code, the Town of Eagle's Building Code, and other civil ordinances enforced through proceedings before the Town Board.

36. According to the Town's written policy, complainants may submit complaints anonymously after speaking with a Board Member and requesting that the Board Member write and sign the complaint on the complainants' behalf.

37. According to the Town's written policy, all complaints must be signed by the Town Chairman and forwarded to the Town Clerk before a site inspection may occur.

38. On information and belief, Defendants do not follow their written policy in all circumstances.

39. On information and belief, Defendants selectively investigate and enforce violations even if they have not received a neighbor complaint.

40. On information and belief, Defendants draft and sign certain "anonymous" complaints, though they have not received a complaint from a neighbor of the allegedly non-compliant resident.

41. On information and belief, Defendants at times direct neighbors of specific residents to lodge complaints, giving the appearance of compliance with the Town's stated enforcement procedures.

42. According to the Town's written policy, the Town Clerk must forward complaints to the Zoning Administrator and/or Building Inspector who then performs an

on-site inspection and notes instances of non-compliance with photographs and references to the violated ordinance.

43. According to the Town's written policy, if the Zoning Administrator and/or Building Inspector identifies violations, he must give notice of the violations to the non-compliant resident, providing the resident thirty days to come into compliance.

44. On information and belief, despite this written policy, the Town and Town Board retroactively impose, or threaten to impose, fines for violations even if the resident comes into compliance within the thirty-day compliance period.

45. Pursuant to the Town's written policy, residents, after making "substantial progress" toward compliance, may appear before the Town Board to request a thirty-day extension.

46. On information and belief, the Town Board will, in its sole discretion, grant some residents additional extensions.

47. Pursuant to the Town's written policy, the Zoning Administrator and/or Building Inspector conducts a follow-up inspection after expiration of the time the Town allotted for coming into compliance.

48. On information and belief, the Zoning Administrator, Building Inspector, and/or Town Attorney at times conduct additional inspections between providing notice of non-compliance and the deadline for compliance, occasionally without either receiving

the property owner or occupant's consent for the inspection or obtaining a warrant, though additional inspections are not provided for in the Town's written policy.

49. On information and belief, the Zoning Administrator, Building Inspector, and/or Town Attorney at times conduct additional inspections after the resident has come into compliance, occasionally without either receiving the property owner or occupant's consent for the inspection or obtaining a warrant, though additional inspections are not provided for in the Town's written policy.

50. According to the Town's written procedures, if the resident has failed to come into compliance after their time limit has expired, the Zoning Administrator and/or Building Inspector forwards the matter to the Town Attorney for a citation to be issued.

51. However, based on information and belief, the Town Attorney is often made aware of, and begins communicating with, the non-compliant resident before the time limit for coming into compliance has expired.

52. According to the Town's written policy, if a resident's property returns to non-compliance within six months of coming into compliance, the Town Attorney might issue a citation or commence a civil action without first providing the resident with notice of the new violation.

53. Though it is not provided for in the Town's written policy, members of the Town Board generally vote on whether to either pursue fines and fees for violations or to dismiss the allegations and findings of non-compliance.

54. The Town contracts with Defendant Schwecke, principal of Civi Tek Consulting, LLC, to serve as Zoning Administrator and Town Planner.

55. Schwecke is paid hourly—\$75.00 per hour—for investigating, pursuing, and enforcing violations, including communicating with residents regarding alleged violations and providing instructions for how to come into compliance.

56. On information and belief, Schwecke receives additional financial compensation for identifying and enforcing violations.

57. On information and belief, Schwecke advises the Town of additional ordinances that he believes the Town should pass, and he is then compensated for enforcing those ordinances.

58. On information and belief, Schwecke's fees for investigating, pursuing, and enforcing violations are paid by residents against whom violations are found, either through the fines imposed for the violations or through separate fees.

59. The Town contracts with Defendant Montoya, a building inspector with SafeBuilt, Inc., to serve as Town Building Inspector.

60. On information and belief, Montoya is paid on an hourly basis for investigating complaints and enforcing violations, including communicating with residents regarding alleged violations and providing instructions for how to come into compliance.

61. On information and belief, Montoya receives additional financial compensation for identifying and enforcing violations.

62. On information and belief, Montoya's fees for investigating, pursuing, and enforcing violations are paid by residents against whom violations are found, either through fines imposed for the violations or through separate fees.

63. The Town contracts with Municipal Law Group to serve as Town Attorney.

64. On information and belief, Municipal Law Group is paid on an hourly basis for all work related to enforcing Town ordinances, including conducting inspections, deciding whether to bring enforcement actions, negotiating with residents, attending Town Board meetings related to ordinance violations, and prosecuting violations.

65. Though Municipal Law Group does not have the authority to determine whether ordinance violations exist, it will conduct inspections of residents' property without the presence of the Zoning Administrator or Building Inspector.

66. Municipal Law Group has no authority under the Town's written policy to conduct an inspection.

67. On information and belief, in its bills to the Town and/or the non-compliant resident, Municipal Law Group includes charges for the time spent conducting inspections.

68. On information and belief, Municipal Law Group's fees for investigating, pursuing, and enforcing violations are paid by residents against whom violations are found, either through the fines imposed for the violations or through separate fees.

69. On information and belief, with Municipal Law Group's advice and counsel, the Town Board has enacted extensive ordinances to facilitate more aggressive enforcement and fine and fee recovery.

70. On information and belief, many in-town attorneys will not represent residents in enforcement proceedings for fear of retribution, resulting in many residents participating or defending themselves in enforcement proceedings without legal counsel.

71. On information and belief, Municipal Law Group exercises broad discretion and makes critical decisions, including whether to negotiate out-of-court resolutions, negotiation tactics, and fine and fee amounts.

72. The Town does not have neutral government attorneys without personal financial incentives to communicate with residents, make settlement decisions, or consider, advise on, or oversee enforcement actions.

73. Residents are given no opportunity to discuss their violations with neutral government attorneys who do not have a financial stake in the outcome of the enforcement action.

74. On information and belief, if residents attempt to discuss their violations with Municipal Law Group, Schwecke, or Montoya, these Defendants will either directly

bill the resident for the time spent discussing the matter or they will bill the Town, who then passes the bill through to the resident.

75. On information and belief, Municipal Law Group assists the Town in ensuring that residents—instead of the Town—ultimately pay the bills for Municipal Law Group’s, Schwecke’s, and Montoya’s fees.

76. On information and belief, Municipal Law Group assisted the Town in creating a cost reimbursement agreement, which the Town—often through Municipal Law Group—demands residents sign before an enforcement action can be resolved.

77. In meetings and in communications to the Mallorys, Board Members have acknowledged that Municipal Law Group and Schwecke charge “excessive,” and occasionally duplicative, fees.

78. On information and belief, Municipal Law Group, Schwecke, and Montoya may at times exercise ultimate control over enforcement decisions.

#### **THE MALLORYS’ SPEECH AND THE TOWN’S RETALIATION**

79. After learning that the Town used its enforcement policy to impede a neighbor’s ability to run a small horse-farm business on their property, the Mallorys began speaking up at town meetings and on social media, questioning the propriety of the Town Board’s actions.

80. The Mallorys have made open records requests for documents and regularly attempt to communicate with members of the Town Board and the Town Clerk regarding whether the Town Board is following the law and proper procedures.

81. The Mallorys have been respectful, but persistent, in questioning and calling attention to the Town Board's practices and exercise of authority.

82. On or about May 15, 2020, Defendant Town Chairman Malek either received or himself created an anonymous complaint alleging that the Mallorys and their Farm were in violation of numerous Town ordinances.

83. By letter dated May 19, 2020, Schwecke informed the Mallorys that a complaint had been lodged against them for unspecified allegations of ordinance violations.

84. Schwecke's May 19 letter expressly noted that the Town had "not determined if there [was] merit to the complaint or not."

85. After requests by the Mallorys, Schwecke provided them with a copy of the anonymous complaint on May 26, eleven days after the complaint was submitted. It alleged that the Mallorys:

- a. Were running a retail business from the Farm and promoting the Farm on social media as a pick-up location for community supported agriculture;
- b. Had excess grazing animals per acre and were announcing, via social media, their intention to sell meat to the public;

- c. Had unconfined poultry and “possible” excess poultry;
- d. Kept livestock in an accessory building fewer than fifty feet from a lot line;
- e. Had an excess number of accessory buildings;
- f. Had constructed or expanded accessory buildings without a permit; and
- g. Had an outdoor wood burning stove too close to their residence.

86. On or about June 18, 2020, Schwecke and Montoya conducted an on-site inspection of the Farm pursuant to a special inspection warrant.

87. By letter dated June 30, 2020, Schwecke and Montoya informed the Mallorys that numerous violations had been identified on their property, including:

- a. Having too many detached accessory buildings, including a prohibited soft-sided structure;
- b. Having an unpermitted hot tub;
- c. Operating a home business without a permit;
- d. Having too many livestock;
- e. Housing livestock in a structure within fifty feet of the Mallorys’ lot line;
- f. Failing to properly maintain property by keeping farming equipment and construction materials outside and having tufts of grass or weeds taller than twelve inches;
- g. Building “something” on their second-floor deck without a permit;
- h. Having unpermitted water and electrical lines running to their barn; and

- i. Failing to complete accessory buildings, evidenced by the sight of plywood on the roof.
88. On information and belief, none of the cited violations created a health or safety risk for the Mallorys, their neighbors, or the Town.
89. On information and belief, Defendants do not enforce many of these violations, or similar violations, against similarly situated residents, including the Board Members themselves, who do not speak out against the Town Board.
90. On information and belief, Defendants do not conduct investigations, even after receiving a written complaint, of Board Members' properties or the properties of Board Members' friends and families.
91. On information and belief, Defendants conduct less thorough investigations on the properties of similarly situated residents who do not speak out against the Town Board, reducing the chance of identifying the violations alleged in complaints.
92. Schwecke and Montoya provided the Mallorys with instructions for how to remedy some of the alleged violations and informed the Mallorys that failure to remedy all violations would result in the Town pursuing legal action and the imposition of an undisclosed monetary penalty.

93. Schwecke and Montoya instructed the Mallorys to direct their questions regarding the property maintenance ordinance and building code to Montoya and to direct their questions regarding the zoning code to Schwecke.

94. In response to these threats of unspecified fines, the Mallorys hired the below-signed attorney, Mr. Van Kleunen, for guidance and took steps to bring the Farm into compliance.

95. Because in-town attorneys are dissuaded from representing residents, the Mallorys had to seek legal counsel from outside their immediate geographical area. Mr. Van Kleunen is not a resident of the Town of Eagle, and his law firm, Cramer, Multhauf, & Hammes, LLP, is located in Waukesha, Wisconsin, approximately twenty miles from the Town of Eagle.

96. Between June 30, 2020 and October 5, 2020, the Mallorys—either personally or through their attorney—communicated regularly with Defendants about the Mallorys' efforts to come into compliance, to seek clarification regarding why certain ordinances were being enforced against them, and to accommodate Defendants' requests for follow-up site visits.

97. During this time, the Mallorys received conflicting information from Schwecke, Montoya, and Municipal Law Group regarding what steps the Mallorys needed to take to come into compliance and which violations would be enforced by the Town, increasing costs and drawing out the enforcement proceedings.

98. On October 2, 2020, after a follow-up site inspection, Montoya informed the Mallorys that they must apply for quadruple-fee permits to bring their barn and water line into compliance with the requirement that such structures and features must be permitted. Montoya insisted on requiring these quadruple-fee permits despite the Mallorys' reliable representations that the barn and water line have been on the property since 1997 and were installed with proper permits.

99. Despite receiving conflicting advice from Schwecke, Montoya, and Municipal Law Group regarding how to come into compliance, the Mallorys took significant steps to resolve their violations, including closing and tearing down their farm stand, making arrangements to slaughter their excess livestock, razing their greenhouse, removing equipment and building materials from their property, and cutting their grass where necessary.

100. The Mallorys did not want to take any of these compliance steps.

101. The Mallorys want their farm stand—which they purchased—on the Farm.

102. The Mallorys want to be able to sell produce, poultry, eggs, honey, and other products from the Farm—which they are authorized to do by the State of Wisconsin.

103. The Mallorys want to have the greenhouse—which they purchased—on the Farm.

104. In addition to taking these undesired steps to come into compliance, the Mallorys also filed an open records request for copies of the permits related to their Farm, as the Town is responsible for maintaining records of these permits; however, the Town claimed it did not have any permit records related to the Mallorys' house, barn, or original utility lines.

105. On October 5, 2020, the Mallorys provided the Town Board with an update on their substantial progress, requested an extension on their deadline to comply, and requested that the Town Board not pursue certain alleged violations due to the Mallorys' belief that they were inapplicable.

106. The Town Board considered the Mallorys' request in a closed-door session.

107. By letter dated October 9, 2020 (the "October 9 Letter"), Municipal Law Group, through its representative Paul Alexy, responded to the Mallorys' requests, accusing the Mallorys of an "apparent lack of effort to address the multiple violations" identified by Schwecke and Montoya on June 30, 2020, and further informing the Mallorys, on behalf of the Town Board, that:

- a. Despite Schwecke's previous instructions, the Mallorys were required to fully remove their entire hot tub, not just the wood-burning heating device, by October 31, 2020;
- b. Despite Schwecke and Montoya's original contention that the Mallorys could keep their tarp shed as long as it was built before March 28, 2017—

which it was—the Mallorys were required to remove their tarp shed by October 31, 2020;

- c. The Mallorys remained in violation of property maintenance requirements due to a “vast amount of outside storage” and that the Mallorys were required to come into compliance by October 31, 2020;
- d. The Mallorys were required to either remove the flower shelf from their second-floor balcony or obtain a permit by October 31, 2020;
- e. The Mallorys were required to obtain a permit for the water line to their barn by October 31, 2020;
- f. The Mallorys were required to remove all but two of their beehives by October 31, 2020;
- g. The Mallorys would *only* be granted an extension for slaughtering their excess livestock—to accommodate the butcher’s first available appointment—if the Mallorys satisfied all other conditions set forth in the letter;
- h. Despite Schwecke’s suggestion to the Mallorys otherwise, it is irrelevant that the Town is considering changes to its ordinance to allow structures that house animals within fifty feet of lot lines was irrelevant, and the Mallorys would *only* be excused from razing the housing structure *if* the

Mallorys satisfied all other conditions set forth in the letter, applied for a permit for the exception, and paid all permit fees;

- i. The Town would not charge the threatened fees *only if* the Mallorys “sign[ed] a reimbursement agreement with the Town to demonstrate their agreement to reimburse the Town for its costs and expenses in addressing the violations”;
- j. If the Mallorys failed to comply with all of the terms set forth in the letter, the Town would pursue fines and fees for each day of each violation, beginning on the date of the anonymous complaint, amounting to undefined “forfeitures in the area of \$20,000.”

108. In September of 2020, the Town passed an ordinance limiting properties of less than four acres to two beehives. The Town thereafter added the Mallorys’ beehives, which Montoya observed in one of his follow-up inspections, to the list of the Mallorys’ violation, as expressed in the October 9 Letter.

109. After receiving the October 9 Letter, and in response to the threatened fines, the Mallorys additionally removed their tarp shed, which they used to store farming equipment. As with the other changes the Mallorys have been forced to make to their Farm, they did not want remove the tarp shed—which they purchased—and they want to reinstall the structure on the Farm.

110. The Mallorys do not want to remove the hot tub from their property, which, without the heating unit that has been removed, is not in violation of a Town ordinance.

111. The Mallorys do not want to remove their beehives. The honey and beeswax gathered from the beehives, and the products made from the honey and wax, provide an essential source of income for the Mallorys.

112. The Mallorys have repeatedly requested that the Town and Town Board inform them of the amount of the costs, or an approximation thereof, that they will be responsible for if they sign the cost reimbursement agreement. To date the Town and Town Board have not provided the Mallorys this information or any documents that would aid the Mallorys in understanding what costs they might face.

113. The amount of the costs the Mallorys will be responsible for if they sign the reimbursement agreement is a critical consideration in whether they will sign and, therefore, will satisfy the requirements set forth in the October 9 Letter.

114. Though this cost-liability information is critical to the Mallorys' ability to make an informed decision, the Town and Town Board have not extended the Mallorys' deadline to comply with the October 9 Letter—including the requirement that the Mallorys sign the reimbursement agreement—to account for the Town's failure to provide this information.

115. Following bouts of rain and snow during the week of the Mallorys' October 31 deadline, the Mallorys requested an additional two weeks, until November 15, 2020,

to consider the conditions set forth in the October 9 letter and to take additional steps toward compliance.

116. Municipal Law Group, through its representative Paul Alexy, initially responded to the request by suggesting that the Town Board *might* consider granting the extension at their next Town meeting (scheduled for November 2, 2020, two days after the October 31 deadline).

117. Mere hours later, and before receiving a response from the Mallorys, Municipal Law Group, through its representative Paul Alexy, sent a follow-up response (the “October 26 Letter”). The response proclaimed that, even though Alexy did not have discretion to extend or modify the offer set forth in his October 9 letter, his impression “[q]uite frankly . . . is that it is unlikely that [the Mallorys’] request would be granted.” Alexy realleged that—despite the Mallorys’ destruction of their farming structures, arrangements to slaughter their livestock, movement of their livestock to be at least fifty feet from the lot line, and efforts to remove their outside storage and farming equipment—the Mallorys had not made “a concerted effort to bring the property into compliance.”

118. Alexy closed the October 26 Letter by informing the Mallorys that, though the Town Board had not considered or voted on the Mallorys’ request for an extension, the Mallorys should consider the October 31 deadline to remain in effect. He also

informed them, for the first time, that the Town wanted to again reinspect the Mallorys' property on November 2, 2020.

119. Though the October 26 Letter noted that the Town sought reinspection on November 2, 2020, the letter also claimed that the Town Board had to cancel its previously scheduled November 2 meeting and could not make the time to consider the Mallorys' request for an extension because of the upcoming election.

120. Municipal Law Group, through its representative Paul Alexy, ultimately reinspected the Mallory's Farm on November 6, 2020.

121. Between June 18 and the filing of this complaint, Schwecke, Montoya, and/or Municipal Law Group have made five separate visits to the Mallorys' property, regularly changing their instructions regarding what steps the Mallorys needed to take to come into compliance.

122. On information and belief, Schwecke, Montoya, and/or Municipal Law Group have billed or will bill hourly fees for each visit, with the intention of charging, or with the understanding that the Town will charge, those fees to the Mallorys.

123. On the basis of the October 9 Letter, the Mallorys now face the threat of either (1) agreeing to pay Schwecke, Montoya, and Municipal Law Group an undisclosed amount for their visits to the Farm, communications with the Mallorys and the Town Board, meeting attendance, ever-changing compliance guidance, and other fees; or (2) facing non-itemized, non-specified "forfeitures in the area of \$20,000," calculated from

the date of the complaint, more than a month before the property was inspected or the Mallorys received notice of the specific violations. Defendants have never provided the Mallorys with an itemized list of the specific violations, the dates on which each specific violation occurred, or the fine that the Town will impose for each violation.

124. By email dated October 27, 2020, Suhm, a Town Board Supervisor, informed the Mallorys that the Board Members voted against them in deciding to pursue enforcement of the above-enumerated violations because the Mallorys “have literally ticked off all the board members with [their] meeting comments and on [F]acebook.” Suhm then warned the Mallorys “that wasn’t good because the board members voted with emotion,” leaving the Mallorys with no option but to pay for the permits and abide by Municipal Law Group’s compliance instructions—which would include agreeing to pay Municipal Law Group’s, Montoya’s, and Schwecke’s fees—“to get this over with.”

125. Defendants have spent six months investigating, pursuing, and enforcing trivial ordinances against the Mallorys, that it does not enforce against similarly situated residents, because the Mallorys spoke out against the Town Board.

126. The Mallorys want their Farm restored to the way it was before the Town began its enforcement proceedings, and they do not want to tear down their barn, prematurely slaughter their livestock, take down or pay for a permit that is not required by the zoning code for their flower shelf, pay for quadruple-fee permits, remove their bees from the Farm, or pay an undisclosed amount of fees to Municipal Law Group,

Montoya, and Schwecke—actions that other members of the Town would not be forced to take. But the Mallorys also cannot afford tens of thousands of dollars in fines. The Town’s enforcement proceedings, which were only initiated because the Mallorys exercised their constitutional right to speak freely, have placed the Mallorys in the position of choosing one of these two injurious paths.

127. Since the Town began its enforcement proceedings against the Mallorys in June of 2020, the Mallorys have not been able to exercise their right to speak about the Town, Town Board, or Town officials without first weighing whether speaking up is worth the risk of likely retribution.

128. If the Town’s retaliatory actions are not enjoined, so that the Mallorys may exercise their right to free speech without constant fear of retribution, they will have no choice but to move away from the Town of Eagle, leaving behind their home, their Farm, and their retirement plans.

### **INJURY TO PLAINTIFFS**

129. Because of Defendants’ retaliatory and discriminatory threats of fines and fees and unconstitutional enforcement practices, the Mallorys have suffered significant injury, including, but not limited to:

- a. Being forced to destroy structures on their property that the Town allows similarly situated residents to have and that the Mallorys want to have;

- b. Being forced to destroy structures on their property that the Mallorys paid to construct;
- c. Being forced to make changes to their property that the Town does not require of similarly situated residents and that the Mallorys did not want to make;
- d. Being forced to retain an attorney to protect their property rights;
- e. Being forced to destroy their farm stand and cease selling products from the Farm, limiting their earning potential through their farming activities;
- f. Facing the continuing threat that the Town will file suit to enforce an undisclosed fine amount for unspecified violations;
- g. Taking actions that they otherwise would not take based on the Town's threats of litigation to enforce an undisclosed fine amount for unspecified violations;
- h. Facing the continuing threat of Defendants arriving on their property without notice and alleging additional violations;
- i. Living with the fear that they will be subjected to further unconstitutional retaliation and deprivations of property without due process;
- j. Facing threats that they will be compelled to pay an undisclosed amount—but potentially thousands of dollars—to Municipal Law Group, Montoya, and Schwecke for their alleged fees;

- k. Taking actions that they otherwise would not take in reliance on the Town's threats that they will charge the Mallorys an undisclosed amount for Municipal Law Group's, Montoya's, and Schwecke's fees;
- l. Being deprived of the opportunity to fully enjoy their property;
- m. Being forced to reconsider their plans for income post-retirement;
- n. Being forced to choose between remaining in the Town of Eagle or exercising their right to free speech;
- o. Worrying that the Town will continue retaliating against them for their past speech; and
- p. Knowing that they will likely face retribution for exercising their right to engage in speech against the Defendants and being forced to weigh whether exercising that right is worth the retaliation and discrimination.

## **CONSTITUTIONAL VIOLATIONS**

### **COUNT I: RETALIATORY ENFORCEMENT (Freedom of Speech—U.S. Constitution amend. I)**

130. The Mallorys incorporate Paragraphs 1–129 as if fully set forth herein.

131. The Mallorys' actions in questioning and challenging the Town Board and holding Board Members accountable to their official duties are safeguarded by the First Amendment to the U.S. Constitution, made applicable to the states through the Fourteenth Amendment.

132. The Town, Town Board, and Board Members are forbidden from enforcing Town ordinances against individuals in retaliation for engaging in free speech.

133. Yet, the Town and Town Board—acting through the Board Members under color of state law—adopted and enforced a deliberate and pervasive policy or custom to retaliate against residents who speak out against the Town, Town Board, and Town officials.

134. Motivated to punish the Mallorys for their free speech and to deter them from exercising this right in the future, the Board Members relied on the Town and Town Board's retaliatory policy to repeatedly investigate, pursue, and enforce minor violations that are not enforced against others.

135. The Board Members' scheme against the Mallorys was part of its deliberate, long-term, and pervasive policy or custom, which the Board Members implemented by:

- a. Enabling Board Members to anonymously bring complaints against targeted residents or, when necessary, to ask a neighbor of the targeted resident to bring a complaint, initiating enforcement proceedings;
- b. Designing their system so that they deliberate behind closed doors to decide when and why to proceed in enforcement actions against residents;
- c. Passing extensive ordinances to create opportunities to find violations; and
- d. Discouraging local attorneys from representing residents in enforcement proceedings by instilling fear that such attorneys will be treated

unfavorably by the Town Board, resulting in residents engaging in the proceedings without legal counsel who might identify the Town Board's abuses.

136. The Town Board's decision to enforce violations against the Mallorys can easily be separated from the Town Board's interest in protecting the health, safety, or wellbeing of the Town and its residents. Instead of enforcing Town ordinances for the good of the Town, the Board Members—relying on the Town and Town Board's policy or custom of retaliation—"voted with emotion" to pursue enforcement against the Mallorys because they were "ticked off" by the Mallorys' speech.

137. But for the Mallorys' speech, the Board Members would not have voted to enforce these ordinances.

138. The Board Members' actions are attributable to the Town and Town Board. The Board Members are the final policymakers of the Town, and in exercising their final authority, they made a deliberate choice to adopt a course of action that retaliated against the Mallorys.

139. The Board Members also ratified these retaliatory acts by authorizing and directing Schwecke, Montoya, and Municipal Law Group to selectively investigate, pursue, and enforce Town ordinances.

140. The Board Members are municipal policymakers, and their decision and actions described in this complaint—including their exercise of authority to direct Town

staff members such as Schwecke, Montoya, and Municipal Law Group—represent the Town's policy.

141. The Town's policy or custom of retaliatory enforcement against residents who criticize the Town, Town Board, or its officials has become more persistent and widespread in recent years.

142. For instance, in the past year, the Town Board has, on multiple occasions, tacked on additional violations after residents complained of or challenged the initial enforcement decisions; and Board Members have expressed open hostility toward residents who stand up for their rights and their property by disparaging them at Town meetings, repeatedly inspecting their property to find violations (regardless of whether a complaint has been lodged), and making open-ended threats of future enforcement actions.

143. As noted, the reputation of the Town and Town Board's retaliatory policy or custom is so pervasive that in-town attorneys refuse to represent residents in enforcement proceedings for fear of retribution by the Town Board.

144. As these examples demonstrate, the Town and Town Board's retaliatory policy would chill the speech of any person of ordinary firmness.

145. Absent the Town and Town Board's policy of retaliating against individuals who criticize those in power, the Mallorys would not have been subjected to the

enforcement proceedings, threats of extensive fines and fees, and all of the harms that followed.

146. If the Town and Town Board's retaliatory policy is not stopped, the Mallorys will be forced to move away from the Town of Eagle so that they can exercise their constitutionally protected rights without retribution.

147. The Mallorys are entitled to protection from this retaliation and to relief for the harms they have endured as a result of the Town and Town Board's unconstitutional actions.

**COUNT II: DISCRIMINATORY ENFORCEMENT**  
**(Equal Protection Clause—U.S. Constitution amend. XIV)**

148. The Mallorys incorporate Paragraphs 1–129 as if fully set forth herein.

149. The Mallorys' right to be treated equally to those similarly situated to them is guaranteed by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

150. The Town, Town Board, and Board Members are forbidden from enforcing generally *unenforced* Town ordinances against select individuals for their engagement in constitutionally protected activity.

151. Yet, the Town and Town Board—acting through the Board Members under color of state law—adopted and enforced a deliberate and pervasive policy or custom to discriminate against residents who speak out against the Town, Town Board, and Town officials.

152. Motivated to punish the Mallorys for exercising their right to engage in protected speech and to deter them from exercising this right in the future, the Board Members relied on the Town and Town Board's discriminatory policy to repeatedly investigate, pursue, and enforce minor violations against the Mallorys that are not enforced against others who are similarly situated.

153. The Board Members' scheme against the Mallorys was part of its deliberate, long-term, and pervasive policy or custom, which the Board Members implemented by:

- a. Enabling Board Members to anonymously bring complaints against targeted residents or, when necessary, to ask a neighbor of the targeted resident to bring a complaint, initiating enforcement proceedings;
- b. Designing their system so that they deliberate behind closed doors to decide when and why to proceed in enforcement actions against residents;
- c. Passing extensive ordinances to create opportunities to find violations; and
- d. Discouraging local attorneys from representing residents in enforcement proceedings by instilling fear that such attorneys will be treated unfavorably by the Town Board, resulting in residents engaging in the proceedings without legal counsel who might identify the Town Board's abuses.

154. The Town Board's decision to enforce violations against the Mallorys can easily be separated from the Town Board's interest in protecting the health, safety, or

wellbeing of the Town and its residents. The minor violations claimed against the Mallorys are pervasive, but generally unenforced, throughout the Town, and they have not been enforced against the Mallorys' similarly situated neighbors, or Board Members, who have not spoken out against the Town's leadership.

155. Instead of enforcing Town ordinances for the good of the Town, the Board Members—relying on the Town and Town Board's policy or custom of discrimination—"voted with emotion" to pursue enforcement against the Mallorys, for violations it does not enforce against others who are similarly situated, because the Board Members were "ticked off" by the Mallorys' speech.

156. But for the Mallorys' constitutionally protected activity, the Board Members would not have voted to enforce these ordinances.

157. The Board Members' actions are attributable to the Town and Town Board. The Board Members are the final policymakers of the Town, and in exercising their final authority, they made a deliberate choice to adopt a course of action that caused the Mallorys to be treated differently from similarly situated residents of the Town.

158. The Board Members also ratified these discriminatory acts by authorizing and directing Schwecke, Montoya, and Municipal Law Group to selectively investigate, pursue, and enforce these violations that are not enforced against similarly situated individuals.

159. The Board Members are municipal policymakers, and their decision and actions described in this complaint—including their exercise of authority to direct Town staff members such as Schwecke, Montoya, and Municipal Law Group—represent the Town’s policy or custom.

160. The Town’s policy or custom of discriminatory enforcement against residents who criticize the Town, Town Board, or its officials has become more persistent and widespread in recent years.

161. For instance, in the past year, the Town Board has, on multiple occasions, tacked on additional violations after residents complained of or challenged the initial enforcement decision. Board Members have also expressed open hostility toward residents who stand up for their rights and their property by disparaging them at Town meetings, repeatedly inspecting their property to find violations (regardless of whether a complaint has been lodged), and making open-ended threats of future enforcement actions. The Town Board does not engage in similar behavior against individuals who do not use their speech to challenge or question the Town Board’s authority.

162. As noted, the reputation of the Town and Town Board’s discriminatory policy or custom is so pervasive that in-town attorneys refuse to represent residents in enforcement proceedings for fear of retribution by the Town Board.

163. Absent the Town and Town Board’s policy of discriminating against individuals who criticize those in power, the Mallorys would not have been subjected to

the enforcement proceedings, threats of extensive fines and fees, and all of the harms that followed.

164. The Mallorys are entitled to protection from this discriminatory enforcement and to relief for the harms they have endured as a result of the Town and Town Board's unconstitutional actions.

**COUNT III: PROCEDURAL DUE PROCESS  
IMPROPER PROFIT MOTIVES  
(Due Process Clause—U.S. Constitution amend. XIV)**

165. The Mallorys incorporate Paragraphs 1–129 as if fully set forth herein.

166. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution requires that government deprivations of property occur only through neutral and objective actors.

167. It is a violation of due process for enforcement processes to be infected with personal interests, financial or otherwise.

168. Municipal Law Group, Schwecke, and Montoya have significant financial incentives in initiating, pursuing, and drawing out enforcement processes.

169. These financial interests distort Municipal Law Group's, Schwecke's, and Montoya's decision-making in investigating, identifying, and enforcing ordinance violations.

170. These financial interests incentivize Municipal Law Group, Schwecke, and Montoya to initiate, pursue, and draw out enforcement actions—and to conduct

unnecessary follow-up investigations—unrelated to promoting health and safety, instead of seeking efficient and fair resolution.

171. These financial interests incentivize Municipal Law Group, Schwecke, and Montoya to initiate, pursue, and draw out enforcement actions—and to conduct unnecessary follow-up investigations—unrelated to promoting health and safety, regardless of equities, justice, or the facts of a given situation.

172. These financial interests incentivize Municipal Law Group to initiate, pursue, and draw out enforcement actions—and to conduct unnecessary follow-up investigations—unrelated to promoting health and safety, without regard for the stringent ethical responsibilities of attorneys acting in a prosecutorial role.

173. These financial interests incentivize Municipal Law Group, Montoya, and Schwecke to encourage the Town Board to pass additional ordinances that Municipal Law Group, Montoya, and Schwecke then enforce for financial compensation, further restricting residents' liberty.

174. When costs—such as hourly fees for the investigation, pursuit, and enforcement of violations—are ultimately passed on to the resident found to be in violation, Municipal Law Group, Schwecke, and Montoya's enforcement model incentivizes the Town to exercise minimal supervision over these agents and to pursue aggressive enforcement strategies without regard for whether there is a reasonable

relationship between the cost of the enforcement approach and the severity of the alleged conduct at issue.

175. The Town could mitigate the risk of improper financial incentives infecting their enforcement processes by, among other solutions, entering into flat-fee contracts—instead of their current hourly fee arrangements—with third-party service providers and providing more oversight of the enforcement process.

176. Though the Town may technically be responsible for Municipal Law Group's, Schwecke's, and Montoya's fees, the Town has a policy or custom of passing these fees onto residents found in violation of Town ordinances.

177. The Town has a policy or custom of demanding that residents found in violation of Town ordinances sign a reimbursement agreement promising to pay such fees.

178. The Town has a policy or custom of conditioning settlements on residents agreeing to pay Municipal Law Group's, Schwecke's, and Montoya's fees, even though the amount of those fees are not disclosed at the time of settlement.

179. Because of Municipal Law Group's, Schwecke's, and Montoya's personal financial interest in the enforcement proceedings against the Mallorys, the enforcement proceedings, including all notices of violation and threats of fines and fees, are invalid, and any fines or fees that the Town and Town Board attempt to collect would be illegally obtained.

180. The Mallorys are entitled to protection from this profit-driven enforcement and to relief for the harms they have already endured as a result of the profit-incentivized process they have been subjected to until now.

**COUNT IV: PROCEDURAL DUE PROCESS  
IMPROPER BURDEN OF PROOF FOR PERMITTING  
(Due Process Clause—U.S. Constitution amend. XIV)**

181. The Mallorys incorporate Paragraphs 1–129 as if fully set forth herein.

182. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution guarantees individuals a meaningful opportunity to be heard before they are deprived of their property.

183. The Due Process Clause of the Fourteenth Amendment also requires that governments bear the burden of proving violations of municipal ordinances, and it guarantees those accused of wrongdoing a meaningful opportunity to defend themselves.

184. Individuals are denied a meaningful opportunity to be heard and defend themselves when they are restricted to proving their innocence (that is, that they are in compliance with permit requirements) through only a narrowly described set of documentary evidence—particularly historical records that property owners are unlikely to maintain.

185. However, under the Town's policy or custom, as applied against the Mallorys, proving that structures and utilities are properly permitted can only be accomplished with one document: the permits themselves.

186. In the Mallorys' case, where the Town—who is responsible for maintaining permit records—cannot locate the permits, the burden of producing this one document (or a copy thereof) is placed on the Mallorys, creating an unconstitutionally stringent standard of proof and denying the Mallorys their rights to be meaningfully heard and to defend themselves and their Farm.

187. This burden of proof also creates a significant and real danger that the Mallorys will be penalized even if the barn and utilities were properly permitted, but those permits were lost, destroyed, or damaged through no fault of their own.

188. Due to the unduly high burden of proof the Town has placed on the Mallorys—producing the permits or their copies—which the Mallorys cannot satisfy, the Town and Town Board are now requiring the Mallorys to choose between (1) removing the structure and utilities; or (2) applying for quadruple-fee permits, which the Town Board could ultimately refuse to grant.

189. The only evidence that the Town has that the Mallorys' barn and utilities are unpermitted is the fact that the Town cannot locate *any* of the permit records for the structures and utility lines that were installed on the Farm long before the Mallorys purchased it.

190. The fact that the Town is unable to locate *any* of the permits for the Farm's structures and utilities that were installed prior to the Mallorys' purchase of the Farm—including their house—evidences the Town's own failure to properly maintain records, not the failure of the previous property owners to properly obtain permits.

191. The Mallorys have offered the Town and Town Board evidence such as tax records to demonstrate that the barn and utilities are properly permitted. However, the Town and Town Board have refused to even consider or review these documents.

192. The Mallorys, who were not the owners of the Farm when the house and barn were built or when the original utility lines were installed, reasonably believe these structures and utilities were installed with proper permits. Due process requires that the Mallorys be given a meaningful opportunity to demonstrate the propriety of their structures and utilities through evidence other than the permits, or a narrowly limited set of documents, themselves.

193. Because the Town did not afford the Mallorys a meaningful opportunity to be heard, and unless and until it does so, it may not require the Mallorys to obtain quadruple-fee permits or to demolish their barn and remove their utility lines. Nor may the Town impose any fines or fees for the Mallorys' failure to obtain quadruple-fee permits.

194. The Mallorys have suffered significant injuries, as outlined in Paragraph 129 above, due to the Town Board's threats of fines, fees, and enforcement actions that are based on this violation of the Mallorys' right to due process.

195. The Mallorys are entitled to protection from this threatened, unconstitutional deprivation of property and to relief for the harms they have endured as a result of the Town and Town Board's denial of due process to date.

**COUNT V: PROCEDURAL DUE PROCESS  
PRESUMPTION OF WRONGDOING  
(Due Process Clause—U.S. Constitution amend. XIV)**

196. The Mallorys incorporate Paragraphs 1–129 as if fully set forth herein.

197. The Due Process Clause of the Fourteenth Amendment requires that governments bear the burden of proving municipal-ordinance violations by, at a minimum, a preponderance of the evidence, and it guarantees those accused of wrongdoing a meaningful opportunity to defend themselves.

198. The Town Board has threatened the Mallorys with daily fines calculated from the day an anonymous complaint was filed against them, more than a month before the Town Board inspected the property to determine whether the allegations were true or informed the Mallorys that they were not in compliance with Town ordinances.

199. Apart from relying exclusively on the anonymous complaint, the Town Board has no way of knowing whether there actually were violations on the Farm, or

what those violations were, between the date the complaint was lodged and the date Montoya and Schwecke inspected the Farm.

200. Some of the violations asserted in the anonymous complaint were not confirmed by Montoya and Schwecke's inspection, demonstrating the unreliability of the anonymous complaint.

201. The Town's only basis for imposing violations for the period between the filing of the complaint and the first inspection is its assumption that, because the Mallorys were not in compliance on June 18, they must not have been in compliance on May 15.

202. However, it is entirely possible that the violations did not occur until after the anonymous complaint was lodged. For instance, the Mallorys have been found to be non-compliant with the Town's property maintenance requirements, including maintaining grass at a height of less than 12". It is reasonably likely that the non-complying patches of grass were not taller than 12" every day between May 15 and June 18, particularly as the anonymous complaint did not accuse the Mallory's of having overgrown grass.

203. Further, Montoya and Schwecke cited the Mallorys for violations that were not alleged in the anonymous complaint, meaning the Town has no evidence—not even an anonymous complaint—that those violations existed prior to Montoya and Schwecke's inspection. And because these violations were not alleged in the anonymous

complaint, the Mallorys had no notice of these potential violations prior to receiving a notice of non-compliance on June 30, 2020.

204. Because the Mallorys were not informed of the violations on their Farm until June 30, they did not have an opportunity to remedy any violations that may or may not have existed during the time between the lodging of the complaint and the Town's notice of non-compliance. They therefore did not have the opportunity to reduce the amount of the fines that are now threatened against them.

205. The Town is also, apparently, threatening to enforce daily fines against the Mallorys for each day since the anonymous complaint was submitted through present day, including for violations that were not alleged in the anonymous complaint, if the Mallorys do not comply with every provision of the October 9 letter, even though the Mallorys remedied at least some of their violations weeks and months ago.

206. To date, the Mallorys have not received an itemized list of the specific fines the Town is threatening to levy against them if they fail to come into full compliance with the terms, including the requirement that the Mallorys sign a reimbursement agreement, of the October 9 Letter.

207. For the daily fines that the Town has threatened to impose for violations between May 15 and June 18, the Town has presumed, instead of proven, ordinance violations, contrary to due process.

208. For the daily fines that the Town has threatened to impose for violations that the Mallorys remedied after the Town's inspection—if the Mallorys fail to comply with every term of the October 9 Letter, including signing a reimbursement agreement—the Town has presumed, instead of proven, these violations, contrary to due process.

209. This lack of confirmation and notice produces an extreme risk that the Mallorys will be deprived of their most fundamental interest—their private land and their savings—through governmental error.

210. This particular risk of erroneous deprivation can be eliminated by instead (1) calculating fines from the date that the Town confirms the existence of the specific violation; and (2) refraining from imposing fines for any violations that have been remedied.

211. Making these changes would place no burden on the Town.

212. The Town has denied the Mallorys their right to due process by threatening them with tens of thousands of dollars of fines for violations that the Town has not proven exist or existed and by threatening fines that (1) include charges for the days upon which the Town had “not determined if there [was] merit to the complaint or not”; (2) include fines for days after violations were remedied; and (3) fail to detail the specific fines that the Mallorys would face for their non-compliance.

213. The Mallorys have acted in reliance on the Town's threats of fines that were necessarily inflated by, among other things, the month-long period before the Town

confirmed whether there were any violations on the Mallorys' property at all, and they have suffered significant injuries as a result, as outlined in Paragraph 129 above.

214. The Town may not enforce fines that it has not proven exist or existed, and the Mallorys are entitled to protection against such enforcement and to relief for the harms they suffered as a result of the Town's threats to enforce violations it has not proven.

#### **REQUEST FOR RELIEF**

215. The Mallorys respectfully request the following relief:

- a. A declaration that the Town of Eagle and Town Board violated the Mallorys' right to freedom of speech by selectively enforcing Town ordinances against the Mallorys in retaliation for their constitutionally protected speech;
- b. A declaration that the Town of Eagle and Town Board violated the Mallorys' right to equal protection by selectively enforcing town ordinances against the Mallorys for their constitutionally protected speech;
- c. A declaration that Defendants violated the Mallorys' right to due process by enforcing the Town's ordinances through actors with an impermissible financial incentive in the enforcement;

- d. A declaration that the Town of Eagle and Town Board violated the Mallorys' right to due process by denying them a meaningful opportunity to prove that their barn and utility lines were properly permitting;
- e. A declaration that the Town of Eagle and Town Board violated the Mallorys' right to due process by threatening to charge fines for alleged violations without proving the truth of those allegations;
- f. A permanent injunction enjoining the Town and Town Board from selectively enforcing ordinances against the Mallorys for exercising their right to engage in protected speech;
- g. A permanent injunction enjoining Defendants from enforcing Town ordinances through actors with an impermissible financial incentive in the enforcement;
- h. A permanent injunction enjoining Defendants from limiting the Mallorys to a narrow set of documents for proof of compliance with permit requirements;
- i. A permanent injunction enjoining the Town and Town Board from charging fines for violations that the Town has not proven;
- j. A permanent injunction enjoining the Town of Eagle and Town Board from conditioning resolution of enforcement proceedings on execution of a reimbursement form;

- k. A permanent injunction enjoining the Town of Eagle and Town Board from threatening to impose fines without detailing and specifying the exact fines that will be imposed;
- l. An Order directing the Town Board to dismiss all claims of non-compliance raised prior to November 9, 2020;
- m. An Order allowing the Mallorys to restore the structures they have been forced to tear down since June 30, 2020;
- n. An award of \$1 in nominal damages for Defendants' violations of the U.S. Constitution and the harms that resulted therefrom;
- o. An award of the Mallorys' costs and expenses for this action, together with reasonable attorneys' fees, pursuant to 42 U.S.C. § 1988; and
- p. Such other and further relief this Court deems just and proper.

Dated this 9th day of November, 2020.

Kirby West\* (Pa. Bar No. 321371)  
Marie Miller\* (Ind. Bar No. 34591-53)  
Alexa Gervasi\* (D.C. Bar No. 1500433)  
INSTITUTE FOR JUSTICE  
901 N. Glebe Suite, Suite 900  
Arlington, VA 22203

*\* Lead counsel for Plaintiffs; Pro Hac Vice  
Applications Forthcoming*

Electronically signed by Michael Van Kleunen  
Michael Van Kleunen (Wis. Bar No. 1113958)  
CRAMER, MULTHAUF & HAMMES, LLP  
1601 East Racine Ave., Ste. 200  
Waukesha, WI 53186  
(262) 542-4278  
mvk@cmhlaw.com

*Local Counsel for Plaintiffs*