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November 30, 2009

Mayor Elizabeth C. Paterson
Town of Mansfield
Audrey P. Beck Municipal Building
4 South Eagleville Road
Mansfield, CT 06268

RE: Zoning Regulations, Town of Mansfield, Article Ten, Section C (Sign Regulations)

Dear Mayor Paterson,

We are writing in response to a complaint about the Zoning Regulations of the Town of Mansfield, Article Ten, Section C (Sign Regulations). In pertinent part, the Regulations allow political signs, on residential property, only if they "pertain to the election of candidates to a public office [or] to the passage or defeat of a measure for which a specific voting date has been established" (C-4-b-1) and are "displayed no earlier than thirty (30) days prior to a voting day and ... removed within five (5) days after the voting day" (C-4-b-6). No political signs are allowed on commercial or industrial property (C-4-b-5), and commercial signs, on all such property, must "pertain only to goods sold, services rendered, and establishments, activities, persons or organizations on the same lot where the sign is located" (C-1-c). All of these requirements violate the First Amendment to the United States Constitution and Article First, Sections 4 and 5 of the Connecticut Constitution under clearly controlling principles enunciated by the United States Supreme Court, the Connecticut Supreme Court and other courts in the federal and state systems.

I. The Residential Sign Restrictions

The residential sign restrictions are unconstitutional for two reasons. First, they are impermissibly content based. Second, even if a court were somehow to conclude that they are content neutral, which we think nigh inconceivable, they "foreclose an entire medium of expression," Ladue v. Gilleo, 512 U.S. 43 (1994), namely, residential signs – the very medium that the Court protected in Ladue.

A. Content Discrimination

It surely requires no elaborate citation of cases to establish that content discrimination – including discrimination based on subject matter – is highly

suspect and can survive only if it satisfies the most rigorous standard of judicial scrutiny. Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994). For examples of constitutionally forbidden subject-matter discrimination, see City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993); Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105 (1991); Boos v. Barry, 485 U.S. 312 (1988); Metromedia v. San Diego, 453 U.S. 490 (1981); and Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530 (1980). It also requires no elaborate argument to demonstrate that the regulations in question discriminate on the basis of subject matter. They allow, for specified brief periods, signs that advocate the election or defeat of candidates for office, or the approval or rejection of ballot measures. They even allow signs or displays that celebrate holidays (C-5). See The Complete Angler, LLC v. City of Clearwater, 607 F.Supp.2d 1326 (M.D. Fla. 2009) (finding municipal sign ordinance unconstitutionally content based, in part because the ordinance gave holiday decorations preferential treatment). But they do not allow signs that advocate political positions in more general terms (for instance, "For Peace in the Gulf" – precisely the sign that was at issue in Ladue, supra). They do not allow signs that call for the impeachment of an office-holder. They do not allow signs that say "God Is Love," "Abortion Is Murder," or "Have a Nice Day."

Neither does it require elaborate argument to show that the regulations cannot survive strict scrutiny. As in Ladue, the Town of Mansfield's legitimate interests can easily be satisfied by "more temperate measures." Interestingly, in City of Clearwater, supra, the defendant essentially conceded that it could not satisfy the strict scrutiny standard. It would behoove Mansfield to do the same.

B. Medium Foreclosure

The Supreme Court ruled unanimously, in Ladue, that the display of signs on the windows, walls or lawns of one's own residence was not only protected by the First Amendment but was inextricably intertwined with the cherished right to "individual liberty in the home." Accordingly, municipalities may not "foreclose [this] entire medium of expression," on private residential property, even if the "prohibitions [are] completely free of content or viewpoint discrimination."

Mansfield's signage regulations, of course, foreclose the entire medium of residential signs apart from miniscule exceptions for holiday decorations and such. *This total foreclosure extends even to the temporary political signs that the regulations countenance;* as to these, the regulations are "the equivalent of a year-round ban on political sign posting, which is simply temporarily suspended for the prescribed period." Painesville Bldg. Dept. v. Dworken & Bernstein Co., 89 Ohio St.3d 564 (Ohio 2000). That is why "the overwhelming majority of courts that have reviewed sign ordinances imposing durational limits for temporary political signs tied to a specific election date have found them to be unconstitutional." Id. A number of these cases are cited in Painesville; see in particular (or in addition) Whitton v. City of Gladstone, 54 F.3d 1400 (8th Cir. 1995); Bell v. Baltimore County, 550 F.Supp.2d 590 (D. Md. 2008); McGuire v. City of American Canyon, 2007 WL 875974 (N.D. Cal. 2007); McFadden v. City of

Bridgeport, 422 F.Supp.2d 659 (N.D. W.Va. 2006); Quinly v. City of Prairie Village, 446 F.Supp.2d 1233 (D. Kan. 2006); Dimas v. City of Warren, 939 F.Supp. 554 (E.D. Mich. 1996). We believe that any federal or state court in Connecticut would do the same.

II. Sign Restrictions On Commercial and Industrial Property

The Connecticut case that bears most closely on Regulations C-4-b-5 and C-1-c is Burns v. Barrett, 212 Conn. 176 (1989). Burns upheld, as content neutral, a state regulation that permitted premises-related, but not non-premises related, billboards within 500 feet of highway interchanges. There is an important difference, however, between that case and this one (in addition to the fact that the state's asserted safety interests, in Burns, were of the highest order): as the Connecticut Supreme Court explained in Burns, "We construe the regulation, however, to include in the exception for on-premises signs those relating to noncommercial as well as commercial activities located on the premises, such as those of a hospital, church, club, *political organization* or other noncommercial institution" (emphasis added). Had it been otherwise, the analysis and outcome would have been very different, for, as the Court recognized, "a political message falls classically within the protection of the First Amendment and any justification for its curtailment must be greater than for a restriction on commercial speech."

By expressly prohibiting political signs on commercial or industrial lots, Regulation C-4-b-5 precludes a court from adopting a similar saving construction of Regulation C-1-c. Accordingly, the two regulations fall squarely within the strictures – which Burns acknowledges – of the U.S. Supreme Court's decision in Metromedia, supra. Not only do they discriminate on the basis of subject matter; they do so, moreover, in the most invidious possible way: they "invert" First Amendment priorities "by affording a greater degree of protection to commercial than to noncommercial speech." Id. Burns states flatly that no court will tolerate this inversion.

Although it is not presently an issue, we would add that if the Town supposes that it can comply with Burns, and with its own constitutional obligations, simply by excising the concluding sentence of Regulation C-4-b-5 (the one that bars political signs on commercial and industrial property), it is in all likelihood mistaken. In the first place, Burns has been undermined, even as a First Amendment precedent, by later U.S. Supreme Court decisions that tighten up the "intermediate" review standard which (despite inconsequential differences in wording) controls both commercial speech and the content-neutral time, place and manner regulation of noncommercial speech. Thus, Burns ignored various exemptions (for on-premises signs; for signs near interchanges located within large cities) as inconsequential under that standard. Yet a decade later, the U.S. Supreme Court held that a commercial regulatory scheme contained so many exemptions that it did not "directly advance" the government's objectives, as the standard requires. The Court has also held, in Discovery Network, Inc., supra, that content differentiations in commercial speech regulations must be related "to the particular interests that the city has asserted." (The on- versus off-premises distinction is not so related, as far as we can discern.) In recognition of these developments, more recent

rulings that address on-premises versus off-premises signage restrictions have rejected the Burns approach. E.g., Vono v. Lewis, 594 F.Supp.2d 189 (D. R.I. 2009).

Even more importantly, Article First, Section 4 of the Connecticut Constitution explicitly protects the right to "speak, write and publish *on all subjects*" (emphasis added). States with similarly worded speech clauses have construed this language to prohibit any sort of subject-matter discrimination whatsoever. E.g., State v. Henry, 732 P.2d 9 (Or. 1987). The Burns plaintiff pled Section 4 but did not brief it separately, and the Court pointedly responded, in the opinion's first footnote: "The defendant has not in his brief argued that *the textual differences* between our state and federal freedom of speech provisions are of any particular significance in this case. Accordingly, our discussion is limited to the federal constitutional provisions" (emphasis added). We cannot imagine a clearer invitation to address those textual differences – the "all subjects" language and other language as well (for instance, "publish") – when the opportunity presents itself. We are prepared to pursue that opportunity.

Although the town is not now enforcing the political sign restrictions, they should nevertheless be deleted. Recommending voluntary compliance while keeping them on the books can have a chilling effect, because residents who are unaware that the restrictions are not being enforced will likely err on the side of caution by complying with them in order to avoid fines. Moreover, nothing prevents future town administrators from enforcing them again. For these reasons, we do not believe that the present non-enforcement policy renders the matter moot.

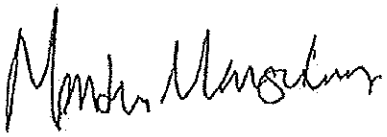
In event of litigation, a plaintiff, if successful in his or her First Amendment claims, would recover damages and attorneys fees from the Town under 42 U.S.C. Sections 1983 and 1988. In addition, we believe that the controlling First Amendment principles are so clear, in their application to the present regulations, that town officials who attempt to enforce those regulations might forfeit their qualified immunity against individual liability and perhaps expose themselves to punitive damages. See, e.g., Gilles v. Pepicky, 511 F.3d 239 (2d Cir. 2007) (discussing loss of qualified immunity for violating settled rules of which reasonable officials ought to have known); Smith v. Wade, 461 U.S. 30 (1983) (allowing punitive damages for "callous indifference" to constitutional rights).

We appreciate your time and concern regarding this important issue. Please provide written assurance that you will revise the pertinent Mansfield zoning regulations to reflect constitutional standards at the next zoning meeting.

Thank you for the courtesy of your attention and early reply.

Sincerely,

David McGuire
Staff Attorney



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