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March 15, 2019

Via First Class Mail

James Boudreau
Situata Town Administrator
600 Chief Justice Cushing Way
Scituata, MA 02066

Re: Section 710 of Scituata Zoning By-Laws on Signs

Dear Mr. Boudreau:

We are writing with regard to the Town of Scituata Zoning By-Law concerning signs, section 710 (hereafter “the By-Law”). We write in the hope that the Town will take immediate action to suspend its operation as applied to political signs, so as to avoid the need for litigation.

This matter is time sensitive because elections for the Town’s Select Board are scheduled for May 18, 2019 and some candidates for office seek to – and we believe have a constitutional right to – post political signs in favor of their candidacy in or on their own or others’ yards and vehicles at any time. Non-candidates also have a constitutional right to post signs expressing their views on political issues at any time.¹

Because the By-Law discriminates on the basis of the content of signs and the identity of those who wish to post signs, and also because the By-Law simply forecloses too much free speech, including political speech, we think it is clearly inconsistent with and in violation of the First Amendment to the United States Constitution and Article 16 of the Massachusetts Declaration of Rights, as amended.

Key Provisions of the By-Law

Section 710.1 D. provides as follows (emphasis supplied):

Political signs shall not exceed six square feet in size, and may be staked into the ground, in a window, or vehicle mounted. *Political signs may be erected thirty days prior to the applicable election and must be taken down*

¹ In this letter, we are focusing on the By-Law as it relates to political signs. The By-Law, however, is also rife with other provisions that are content-based and not narrowly tailored and therefore raise serious constitutional questions.

within three days after such election. Signs for candidates who win state fall primary elections may remain up until three days after the full general election.

As far as we have been able to discern, the By-Laws contain no definition of “political” so it is not clear how broadly this by-law is intended to sweep. For instance, it is not clear whether signs with messages such as “Make America Great Again,” “Impeach Trump,” “Black Lives Matter,” “All Are Welcome Here,” or “No More Brown Water” are allowed or when they are allowed under the By-Laws.

But the By-Law is clearly intended to cover signs advocating for or against the election of a candidate for political office. Such signs are apparently forbidden for most of the year except during the short period 30 days prior to and three days after an election. Indeed, because subsection D applies to political signs that are “vehicle mounted,” it would seem to say that bumper stickers with political messages are not allowed except for this short 33-day window.

In contrast, under subsection A of section 710.1, “property protection signs” such as “beware of dog” or “no trespassing” are allowed all year round. And under subsection B, for sale, for rent and rooms to let signs are also allowed year round.

Moreover, under 710.2, some signs not otherwise authorized, or generally authorized only in a certain size, are candidates for a Special Permit, but only if the sign is “economically necessary.” Since a sign sending a political message is generally not a matter of economic necessity, but of even more fundamental democratic principles, the Special Permit provision apparently applies only to commercial signs and not political ones.

Further, under 710.6 A, church and civic groups – but not others – may erect “temporary signs or banners” but only for the purpose of announcing an event.

Finally, under Section 930 of the By-Laws, those found in violation are subject to fines of either \$300 per sign per day or \$25 per sign per day.

Legal Background

The First Amendment and Article 16 prohibit the government from encroaching on residents’ rights to free speech. Political speech, and particularly political speech on private property, is entitled to the highest form of protection.

In *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), the Supreme Court struck down a municipal ordinance that prohibited many types of yard signs on private

property. In doing so, the Court noted that its “prior decisions have voiced particular concern with laws that foreclose an entire medium of expression,” such as prohibitions on handbills and door-to-door distribution of literature. *Id.* at 55. Even where ordinances of this nature do not discriminate based on the content of the speech, the Court held, “the danger they pose to the freedom of speech” nonetheless “is readily apparent—by eliminating a common means of speaking, such measures can suppress too much speech.” *Id.*

The Court went on to explain that the act of posting signs in one’s own yard is “a venerable means of communication that is both unique and important.” *Id.* at 55. “Displaying a sign from one’s own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means.” *Id.* at 56 (noting that “[a] sign advocating ‘Peace in the Gulf’ in the front lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child’s bedroom or the same message on a bumper sticker of a passing automobile.”). Moreover, “[a] special respect for individual liberty in the home has long been part of our culture and our law; that principle has special resonance when the government seeks to constrain a person’s ability to speak there.” *Id.* (emphasis in original, internal citations omitted). *Id.* at 55. Accordingly, the Court held, “Ladue’s ban on almost all residential signs violates the First Amendment.” *Id.* at 58.

In *Reed v. Town of Gilbert, Arizona*, 576 U.S. ___, 135 S.Ct. 2218 (2015), the Supreme Court struck down a municipal ordinance that banned lawn signs but exempted various categories of signs based on content, such as “temporary directional signs,” “political signs,” and “ideological signs.” *Id.* at 2227. The Court held that the town’s sign ordinance included “content-based regulations of speech,” and therefore was subject to “strict scrutiny.” *Id.* at 2224.

Under the test of “strict scrutiny,” laws that “target speech based on its communicative content” are “presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Id.* at 2226. In *Reed*, the town’s two justifications for the ban, “preserving the Town’s aesthetic appeal and traffic safety,” were insufficient under this test because they were “hopelessly underinclusive”—that is, signs subjected to less regulation were just as much of an eyesore or traffic hazard as the kinds of signs the town restricted heavily. *Id.* at 2231-2232.

Finally, to comply with the First Amendment and Article 16, laws otherwise lawfully setting limits on speech are invalid if they fail to include clear standards and thus delegate “overly broad discretion to the decisionmaker.” *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 129 (1992).

In *Minnesota Voters Alliance v. Mansky*, 138 S.Ct. 1876 (2018), the Supreme Court recently ruled that the term “political” was too vague to set a constitutional standard for free speech, even in a nonpublic forum. It therefore found unconstitutional a Minnesota law barring the wearing of political apparel inside polling sites, ruling that the lack of more definite standards “is a serious matter when the whole point of the exercise is to prohibit the expression of political views.” *Id.* at 1891.

Analysis

The By-Law is unconstitutional under the reasoning of *City of Ladue* because it suppresses “too much speech” on private property, under the reasoning of *Reed* because it is content-discriminatory and not narrowly tailored to serve a compelling governmental interest, *and* under the reasoning of *Forsyth County* and *Minnesota Voters Alliance* because it bans “political” signs for most of the year without adequate standards to guide official discretion as to what that term means.

Not only does the By-Law unconstitutionally infringe free speech it would be subject to an immediate injunction by a court of law because it is creating irreparable harm. “[I]rreparable injury is presumed upon a determination that the movants are likely to prevail on [a] First Amendment claim.” *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 11 (1st Cir. 2012). That conclusion flows from the well-established rule that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Such irreparable harm is particularly established where a plaintiff can show “a chilling effect on free expression.” *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965).

Recently, in a case brought by the ACLU of Massachusetts, the U.S. District Court preliminarily enjoined the City of Holyoke from enforcing an ordinance restricting lawn signs during three months of the year and bumper stickers all year round. <https://www.aclum.org/en/cases/molloy-et-al-v-city-holyoke> . That case raised similar issues to the ones raised by the Scituate By-Law.

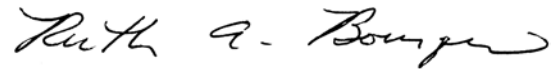
Request

We ask that, on or before Friday, March 22, 2019, an authorized representative of the Town notify us, officials with the power to enforce the By-Law, and residents of the Town of Scituate, including through notices published on Town websites, that the Town will not enforce the By-Law with regard to any political signs on private property until further notice.

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James Boudreau
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As noted above, we are bringing this serious matter to your attention in an effort to avoid litigation. We would be happy to discuss this matter further with you or counsel for the Town and look forward to hearing from you soon.

Sincerely,

A handwritten signature in cursive script that reads "Ruth A. Bourquin".

Ruth A. Bourquin with
Jessica Lewis, Staff Attorney