AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Massachusetts

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Via Email

Town of Plymouth
Melissa Arrighi, Town Manager
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Colleen Tavekelian, Zoning Inspector
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26 Court Street
Plymouth, MA 02360

Re: Section 51-2 of Town of Plymouth General By-Law and Section 203-3 C2c of Town of Plymouth Zoning By-Law

Dear Manager Arrighi and Inspector Tavekelian,

We are writing with regard to section 51-2 of the Town of Plymouth By-Laws (hereafter "the General By-Law") prohibiting "indecent, profane or insulting" language on public property and on or near private property, and section 203-3 C2c of the Zoning By-Law concerning temporary political signs (hereafter "the Zoning By-Law"). We write to urge the Town to discontinue enforcement of both By-Laws and to repeal them.

We have become aware that the Town issued a Violation Notice to Plymouth resident XXXX on March 9th, ordering him to remove his yard sign that stated "Biden is not my president," or face fines up to $300.00 per day. The Town's action with respect to Mr. XXX's sign, as well as the General and Zoning By-Laws, plainly violate the First Amendment to the U.S. Constitution and Article 16 of the Massachusetts Declaration of Rights, as amended, as well as the Massachusetts Civil Rights Act, G.L. c. 12, §§ 11H and I.

Residents have a constitutional right to post signs on their own property expressing their political views. Towns may not impose unreasonable restrictions on political speech, nor impose content-based restrictions on the display of signs unless such restrictions are narrowly tailored to serve a compelling interest. Both the General and Zoning By-Laws contain unconstitutional content-based restrictions on speech and prevent too much speech by individuals on their own property.

Moreover, the General By-Law prohibiting indecent, profane or insulting language is unconstitutionally overbroad because it forecloses a wide swath of constitutionally protected speech on both private and public property.

Finally, even if it could constitutionally proscribed, XXX's sign does not constitute "indecent, profane, or insulting" speech under the plain meaning of these terms and relevant case law.

I. Key Provisions of the Zoning By-Law

Section 203-3 C2c provides as follows (emphasis supplied):

> Permits for temporary Signs remain in effect for three months but are not renewable. Temporary Signs which do not require a permit shall only be deemed in compliance with this Bylaw at such time as the Building Inspector is notified of the date of their placement and their location, and *such Signs may be displayed for a maximum time of three months. In the case of political Signs, such Signs must be removed within one week after the election or action to which they apply.*

Legal Background

Political speech, including political speech on one's own private property, is entitled to the highest form of protection under the First Amendment and Article 16.

The Supreme Court has recognized that "residential signs have long been an important and distinct medium of expression." *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994). In *City of Ladue*, the Court struck down a municipal ordinance that prohibited many types of yard signs on private property, expressing particular concern that laws limiting yard signs "foreclose an entire medium of expression" and "suppress too much speech." *Id.*

The act of posting signs in one's own yard is "a venerable means of communication that is both unique and important." *Id.* at 54. 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.* at 58. (internal citations omitted). The Court held that the town's ordinance restricting residential signs violated the First Amendment. *Id.*

Further, a law that places restrictions on speech based on its content is unconstitutional unless the government can prove that the law is narrowly tailored to serve a compelling government interest. *Reed v. Town of Gilbert, Arizona*, 576 U.S. 155, 163 (2015). In *Reed*, the Court invalidated an ordinance that subjected different categories of signs – temporary directional signs, political signs, and ideological signs – to different restrictions. *Id.* at 164. The Court determined that these distinctions were content-based, and thus subjected the ordinance to the highest level of scrutiny. *Id.* Because the Town failed to demonstrate that restricting some categories of signs more stringently

than others was necessary to preserve aesthetics or "eliminate threats to traffic safety," the ordinance failed strict scrutiny. *Id.* at 172.

Towns may reasonably regulate the time, place, and manner of speech so long as that regulation is content-neutral and furthers a significant governmental interest. *See, e.g.*, *Matthews v. Town of Needham*, 764 F.2d 58, 59 (1st Cir. 1985). Regulations limiting political signs on private property during certain periods of the year are not content-neutral and will likely fail strict scrutiny. *City of Ladue*, 512 U.S. at 55. Residents have a right to express their political views by posting yard signs at any time, including as a way of communicating their approval or *disapproval* of a past election outcome. These forms of expression may not be unduly burdened. *Id.* at 57.

In a 2019 case brought by ACLU of Massachusetts, the U.S. District Court permanently enjoined the City of Holyoke from enforcing an ordinance restricting lawn signs during certain months of the year and bumper stickers all year round.[1] The court declared the ordinance unconstitutional.

Analysis

The Zoning By-Law is unconstitutional because it prohibits "too much speech" on private property. *City of Ladue*, *supra*. By forbidding political signs to remain on a resident's property for more than three months and no more than a week after an election, the By-Law unduly burdens political speech. *Id.* at 57.

The By-Law is also unconstitutionally content-based under *Reed*. As in *Reed*, section 203-3 C2c regulates the duration of permits for signs based on the content of the sign. Under that section, "permanent signs," "directory signs," and "temporary signs," are subject to different restrictions. Additionally, while temporary signs may be displayed for up to three months (which in and of itself is problematic), political signs are treated differently and must be removed within one week after an election, regardless of how long they were displayed.

This Zoning By-Law cannot satisfy a constitutional free speech analysis. Prohibiting a resident from expressing their political views for longer than three months and for no more than a week after an election impinges on and has an unjustifiable chilling effect on freedom of speech.[2]

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[1] *See* ACLU of Massachusetts, *Molloy et al. v. City of Holyoke*, https://www.aclum.org/en/cases/molloy-et-al-v-city-holyoke.

[2] The Zoning Ordinance is also problematic because it is ambiguous and therefore chilling of speech. A political sign is defined as: "A temporary Sign for elections, ballot questions, warrant articles or other political or legislative activity." Zoning By-Law 203-3B. This definition is not clear as to its application to the expression of views with regard, e.g. to "Black Lives Matter," "All Are Welcome Here," "Blue Lives Matter." Indeed, the sign at issue here saying "Biden is not my President" does not clearly meet the definition. Yet, if the Town believes a sign meets the definition – subject to no additional standards to

II. Key Provisions of the General By-Law

Section 51-2 provides as follows:

> No person shall use any indecent, profane or insulting language in any public place in the town or near any dwelling house or other buildings.

Legal Background

Laws that target indecent, profane, and insulting language are constitutionally suspect for several reasons.

First, a law may not restrict speech that merely offends the person who hears it. *Gooding v. Wilson*, 405 U.S. 518, 527 (1972) (rejecting a broadly sweeping law making it a breach of peace to merely "speak words offensive to some who hear them"); *Cohen v. California*, 403 U.S. 15, 26 (1971) (reversing the conviction of a man convicted for wearing a jacket with the words "F---the Draft" by holding that the state could not, under the First Amendment, "make the simple public display" of a "four-letter expletive a criminal offense"); *Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785, 792 (8th Cir. 2015) ("The broad sweep of the [Act's] ban on profane discourse, rude, or indecent behavior can prevent significant messages from being publicly expressed, solely because they are offensive or disagreeable to some."); *State v. Authelet*, 120 R.I. 42, 48 (1978) ("[T]he state cannot prohibit speech merely because the words offend, cause indignation, or anger the addressee.").

Second, laws restricting speech that is "indecent," "profane," or "insulting," are content-based and are subject to, and generally cannot satisfy, strict scrutiny. *See, e.g.*, *State v. Poe*, 139 Idaho 885, 896 (2004) (holding a statute barring vulgar, profane, or indecent speech was unconstitutionally content-based); *City of Bellevue v. Lorang*, 140 Wash. 2d 19, 26 (2000) (finding that the court must assess whether an ordinance barring "profane" speech serves a compelling state interest).

Third, laws that proscribe profane, indecent, or insulting speech or other words – if not limited in scope to the narrow categories of unprotected speech[3] –

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guide discretion – it apparently is subject to the time limitation in the Zoning Ordinance and subject to fines.

[3] *See United States v. Stevens,* 559 U.S. 460, 468-69 (2010) (listing categories of unprotected speech as obscenity, strictly defined by case law, defamation, fraud, incitement, and speech integral to criminal conduct). The Supreme Court has made it clear that profane language does not qualify as unprotected obscenity. *See Plummer v. City of Columbus*, 414 U.S. 2, 3 (1973) (refusing to single out profanity as a separate class of unprotected speech); *Iancu v. Brunetti*, 139 S.Ct. 2294, 2314 n.6 (2019) (Sotomayor, J., concurring in part) (finding that, while obscenity is excepted from First Amendment protection, profanity is not). *See also Virginia v. Black*, 538 U.S. 343, 359 (2003) ("true threats" of physical violence are unprotected); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) ("fighting words" which would induce a reasonable person to engage in immediate violence are unprotected).

are overbroad and therefore unconstitutional. *See, e.g.*, *Commonwealth v. A Juvenile*, 368 Mass. 580, 589 (1975) ("Vulgar, profane, offensive or abusive speech is not, without more, subject to criminal sanction."); *Milwaukee Mobilization for Survival v. Milwaukee Cty. Park Comm'n*, 477 F. Supp. 1210, 1219 (E.D. Wis. 1979) (holding unconstitutional an ordinance aimed at "cleansing public discourse of objectionable matter without regard for the protected character of the speech"); *Authelet*, 120 R.I. at 51 ("a penal statute barring the use of vulgar or offensive speech runs the risk of being unconstitutionally overbroad because of the sweep of its coverage"); *State v. Profaci*, 56 N.J. 346, 348 (1970) (holding unconstitutional a New Jersey statute prohibiting offensive, profane, and indecent language in a public place). *See also Cohen*, 403 U.S. at 20 (finding that a four-letter expletive displayed by the plaintiff was not worn in a "personally provocative fashion" and it was unlikely that he had "violently aroused" anyone).

Analysis

The General By-Law is blatantly unconstitutional for several reasons. First, the By-Law is content-based and will not survive strict scrutiny. Second, the By-Law is overbroad. Finally, even if the By-Law were limited to restricting speech that is unprotected by the First Amendment, it is inapplicable to Mr. XXX's sign.

The General By-Law is content-based because it specifically bars language that is indecent, profane, or insulting, but it does not bar other types of speech. Therefore, the By-Law imposes a restriction based on the content of speech and the Town cannot demonstrate that this By-Law is narrowly tailored to serve a compelling government interest, particularly given that similar laws have not survived strict scrutiny. *See Survivors Network*, 779 F.3d at 793 (finding that a law barring profane, indecent, or rude language failed strict scrutiny because it drew content-based distinctions unnecessary to achieve the state's interest in protecting the exercise of religion); *City of Bellevue*, 140 Wash. 3d at 29 (recognizing that the city had a compelling interest in preventing telephone harassment, but finding that prohibiting profane speech was unnecessary to prevent any danger).

The By-Law is also unconstitutionally overbroad. By its terms, anyone near a "dwelling house" or "other building[]" will be in violation of the By-Law if they utter, post, or carry a sign expressing words determined to be profane, indecent, or insulting. *See Cohen*, 403 U.S. at 26 (finding that overly broad statutes are vulnerable to abuse where governments may use the "censorship of particular words as a convenient guise for banning the expression of unpopular views").

Moreover, the By-Law is seriously problematic given that by its plain terms it is applicable to critical statements directed at public officials or other members of the public in public buildings or on public property. Residents have a clear

constitutional right to criticize public officials, even in harsh terms, with regard to the performance of those officials' duties or otherwise. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) ("Criticism of government is at the very center of the constitutionally protected area of free discussion."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."); *City of Houston v. Hill*, 482 U.S. 451, 462-63 ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."). Residents also have a right to criticize the judgment or conduct of other members of the public, using terms that may be offensive but are constitutionally protected. *Street v. New York*, 394 U.S. 576, 592 (1969) ("[U]nder our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."). Some criticism will be deemed "insulting" by the listener, but that does not provide the Town with a lawful basis for restricting it.

Lastly, the General By-Law is simply inapplicable to Mr. XXX's sign, which does not contain language falling into any reasonable definition of indecent, profane, or insulting speech. Mr. XXX's sign reflects a constitutionally-protected political viewpoint. *Cohen*, 403 U.S. at 23 (the government may not prohibit certain words as a way to "force persons who wish to ventilate their dissident views into avoiding particular forms of expression").

III. Conclusion

We request that an authorized representative of the Town promptly notify ACLUM, all officials with the power to enforce the By-Laws, Mr. XXX, and other residents of the Town of Plymouth (including through notices published on Town websites), that the Town will cease enforcing and begin steps to repeal the two By-Laws, including with regard to any political signs on private property or constitutionally protected criticism of public officials or others on or near public property.

We are bringing this 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,

Ruth A. Bourquin with
Rachel Davidson, Legal Fellow
Adya Kumar, Legal Intern

Cc: XXX