FIRE
Foundation for Individual Rights and Expression

July 1, 2024
Amherst Town Council
Amherst Town Hall
174 S. Main Street
Amherst, Virginia 24521

Sent via U.S. Mail and Electronic Mail (townhall@amherstva.gov)

Dear Amherst Town Council:

On June 5, FIRE wrote to inform you of the unconstitutionality of Amherst's sign ordinance. Since then, we have not heard back, suggesting the Council either has no intention of bringing its ordinance into constitutional conformity or incorrectly believes it passes muster in its current form.

As explained in FIRE's initial letter, the United States Court of Appeals for the Fourth Circuit, whose decisions bind Amherst, has already invalidated an analogous two-sign limit.[1] Yet Amherst continues to maintain its two-sign limitation in blatant contradiction of binding federal court precedent. By continuing to flout established law, Amherst not only violates its residents' civil liberties but also leaves itself at risk of litigation.[2]

Amherst's two-sign limit, square footage limits, and durational limits all present constitutional defects. FIRE urges the town council to reconsider these aspects of the sign ordinance, and our offer to assist Amherst, free of charge, in remedying these defects remains open.

We respectfully request a substantive response no later than July 8, 2024.

Sincerely,

M. Brennen VanderVeen

M. Brennen VanderVeen, Esq.
Program Officer, Public Advocacy

[1] *Arlington Cnty. Republican Comm. v. Arlington Cnty.*, 983 F.2d 587, 596 (4th Cir. 1993).

[2] *See Columbia v. Haley*, 738 F.3d 107, 118 (4th Cir. 2013) (government officials are not entitled to qualified immunity—and therefore may be held personally liable—for violations of "clearly established statutory or constitutional rights of which a reasonable person would have known").

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Dear Amherst Town Council:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech,[1] is concerned by how Amherst's sign ordinance limits residents' engagement in purely expressive activity, such as supporting causes, policies, or candidates.[2] Because the ordinance restricts First Amendment rights, the town must amend it to bring it within constitutional bounds, an effort with which we would be happy to assist (at no cost) should the town desire.

Two-sign limit

One way in which Amherst's ordinance creates constitutional issues is in limiting property owners to no more than two signs that "exercise the property owner's right to right to [*sic*] free speech and express noncommercial messages such as ideals, causes, policies, or candidates."[3] The United States Court of Appeals for the Fourth Circuit, the decisions of which bind Amherst, has held that a similar two-sign limit in another Virginia locality violated the First Amendment because it (1) burdened freedom of speech, (2) was not narrowly tailored to furthering the government's substantial interests in aesthetics and traffic safety, and (3) failed to leave open ample alternative means of communicating desired messages.[4] Amherst's ordinance is equally constitutionally suspect.

The Fourth Circuit recognized a two-sign limit as a burden on freedom of speech, observing that communication by signs "is virtually pure speech"[5] and that the restriction prevented

[1] More information about our mission and activities is available at thefire.org.

[2] AMHERST, VA., CODE OF ORDINANCES ch. 24, art. IX, Sec. 24-576(1)(f) https://library.municode.com/va/amherst/codes/code_of_ordinances?nodeId=PTIICOOR_CH24ZOSU_ARTIXSI.

[3] *Id.*

[4] *Arlington Cnty. Republican Comm. v. Arlington Cnty.*, 983 F.2d 587 (4th Cir. 1993).

[5] *Id.* at 593 (quoting *Baldwin v. Redwood*, 540 F.2d 1360, 1366 (9th Cir. 1976)).

people "from expressing support for more than two candidates when there are numerous contested elections."[6] Additionally, "if two voters living within the same household support opposing candidates, the two-sign limit significantly restricts their ability to express support through sign posting."[7]

In holding the limit not narrowly tailored to advance the government's asserted aesthetic and traffic safety interests, the court, rather than attempting to identify some supposedly ideal number of signs, "question[ed] whether the County needs to limit the number of signs on private property" at all—especially given the Supreme Court's observation that private property owners' own aesthetic concerns will "keep the posting of signs on their property within reasonable bounds."[8] The Fourth Circuit also cited the lack of any specific aesthetic or traffic problems while the two-sign limit was not in force due to a preliminary injunction and identified several other less restrictive means for the county to further its interests.[9]

Finally, the Fourth Circuit held the two-sign limit failed to provide sufficient alternatives for political speech. It rejected the government's proposed alternatives such as giving speeches in public places, door-to-door and public canvassing, distributing flyers, and appearing at citizen group meetings as too time-intensive or expensive.[10] Even though the plaintiffs in the case were political parties, the court explicitly noted the county's "laundry list" of alternatives failed to recognize how the two-sign limit infringed homeowners' rights, leaving no "viable alternative to the homeowner *on his property*."[11]

Square footage limits

Amherst's size limitations for personal expression signs also unconstitutionally burden speech. Because the town appears to impose stricter limitations on personal expression signs than on signs communicating other messages, the limitations are likely subject to strict scrutiny as content-based regulations. Such regulations are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."[12] It is the "rare case in which a speech restriction withstands strict scrutiny."[13] But even analyzing Amherst's size limitations as content-neutral and therefore

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[6] *Id.* at 594.

[7] *Id.*

[8] *Id.* (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 811 (1984)).

[9] *Id.* ("First, the County could regulate the design and condition of these signs. Second, to ensure traffic safety the County could prevent posting signs within a certain distance of the street. Third, limiting the duration of these signs also furthers the County's interest."). Although the Fourth Circuit does list durational limits as a possible alternative means, it provided no analysis and did not elaborate. Any actual durational limit, such as Amherst's, would still need to be analyzed on its own terms (as discussed below), and notably, the United States District Court for the District of Maryland preliminarily enjoined a durational limit even after the Fourth Circuit decision in *Arlington County*. *Curry v. Prince George's Cnty.*, 33 F. Supp. 2d 447, 454–55 (D. Md. 1999).

[10] *Id.* at 594–95.

[11] *Id.* at 595.

[12] *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

[13] *Id.* at 180 (Kagan, J., concurring in the judgment) (cleaned up).

subject to lower scrutiny, they still must be narrowly tailored and leave open ample alternative means for communicating the desired message.[14] The restrictions fail under either analysis.

Amherst treats signs differently depending on the context in which they are placed. For instance, Amherst limits the aggregate sign area for personal expression signs to 40 square feet in the mixed use and commercial and industrial sign districts and 16 square feet in the residential and agricultural sign districts. During construction, signs may be up to 32 square feet, even in the residential and agricultural districts. The rules do not list any size restriction for when a dwelling in a residential district is holding a yard sale. The rules also allow any sign that was lawful at the time the rules were enacted to remain in use. Notably, flags are not regulated at all.

This differential treatment does not appear to be narrowly tailored in service of any significant town interest. It is not at all clear what governmental interests are served by limiting signs exercising a "property owner's right to free speech" to 16 square feet but not signs posted during periods of construction and yard sales, signs erected prior to the rules being enacted, flags, or other yard displays not regulated by the ordinance. As the United States District Court for the District of Maryland held, a town "cannot claim that placing strict limits on temporary directional signs is necessary . . . while at the same time allowing . . . other types of signs that create the same problem."[15] The court further explained there is "no reason why" temporary signs need to be different sizes by district because "concerns with aesthetics and traffic safety would be applicable regardless of the zoning district in which the signs are displayed."[16]

Amherst's aggregate area limits are also not *narrowly* tailored, considering the many homes that have considerable acreage and are located farther from the street. The aggregate area limit of 16 square feet is merely a four-by-four area. A sign larger than that size might be necessary for visibility on properties with relatively large setbacks if the owner wishes to hang the sign from his porch or closer to the house. Amherst's square footage limits require any signs on these properties to be small and therefore located close to the street, far away from the house. A more appropriately tailored rule would recognize that not all homes or properties are the same, even if they are in the same district.

Because Amherst's aggregate sign area limits are not narrowly tailored to promote a significant town interest, they violate the First Amendment whether or not they leave open ample alternative means of communication.

Durational limits

Amherst's requirements that personal expression signs "shall be removed within 60 days of installation" and that "no property can display such signs for more than a total of 120 days per year" also violate the First Amendment as not narrowly tailored and failing to leave open ample

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[14] *See id.* at 593; *see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

[15] *Ficker v. Talbot Cnty.*, 553 F. Supp. 3d 278, 285 (D. Md. 2021) (quoting *Reed v. Town of Gilbert*, 576 U.S. at 172.

[16] *Id.*

alternative means of communicating. By way of comparison, although signs at a property offered for lease or sale must come down within five days of closing on the sale or the start of a lease, they apparently may remain for however long the property is up for sale or lease. Similarly, although construction sites must remove signs "upon issuance of a certificate of occupancy," there apparently is no limit on their being up throughout construction.

One argument for allowing these latter signs to remain indefinitely might be that construction and selling property are ongoing processes during which signs provide helpful and relevant information. But the same argument applies to many expressive signs. For instance, Joe Biden announced his reelection campaign April 25, 2023, and Donald Trump did so even earlier, on November 15, 2022. Supporters may wish to put up signs for the duration of the campaign, but Amherst's rules would prohibit doing so. Amherst's rules would not even have allowed someone to put up a campaign sign on January 1 and leave it up until Virginia's primary elections (March 5). Someone wishing to put up a sign for the November 5 general election cannot do so until September 7 if he wants to leave the sign up continuously. If he had already put a sign up for the 60 days preceding the primaries, that person would be left without the ability to express his opinions—on any subject—through a sign in his yard during the entire months of April, May, June, July, and August.

And Amherst does not single out campaign signs—all personal expression signs face the same restrictions. The town thus effectively bans any personal expression signs for multiple months of the year.

Such a ban cannot be said to leave open ample alternative means of communication. Expressive signs are an important—and, for many, irreplaceable—means of expressing opinions. The Supreme Court has explained how signs lack any real substitute, especially in a residential context:

> Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a hand-held sign may make the difference between participating and not participating in some public debate. Furthermore, a person who puts up a sign at her residence often intends to reach *neighbors*, an audience that could not be reached nearly as well by other means.[17]

While Amherst's durational limits on expressive signs apply to every part of town, not just residential sections (which, to be clear, makes matters worse not better), speech from one's own home has special value and protection:

> 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. Precisely because of their location, such signs provide

[17] *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994) (internal citations omitted).

> information about the identity of the "speaker." As an early and eminent student of rhetoric observed, the identity of the speaker is an important component of many attempts to persuade.[18]

The Supreme Court's recognition of the importance of residential signs led the District of Maryland to conclude that extended durational bans on such signs are unconstitutional and "inconsistent with the 'venerable' status that the Supreme Court has accorded to individual speech emanating from an individual's private residence."[19]

In short, the First Amendment requires Amherst to allow its residents to express themselves on their own property for more than 120 days a year.

Conclusion

FIRE calls on Amherst to excise or revise its rules on personal expression signs to ensure its residents are fully able to exercise their First Amendment rights. Again, we would be happy to work with Amherst—free of charge—to achieve this constitutionally required goal.

We respectfully request a substantive response to this letter no later than June 20, 2024.

Sincerely,

M. Brennen VanderVeen
Program Officer, Public Advocacy

[18] *Id.* at 56–58 (internal citations omitted).

[19] *Curry*, 33 F. Supp. 2d at 454–55.