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June 26, 2019

Via Email (snichols@fluvannacounty.org)

Steven M. Nichols, County Administrator
Fluvanna County
132 Main Street
Post Office Box 540
Palmyra, VA 22963

RE: Fluvanna County Restrictions on Political Signs / County Code § 22-15-2(2)

Dear Mr. Nichols:

The Rutherford Institute¹ has been asked by Dr. Elizabeth Alcorn² to review the constitutionality of Fluvanna's sign regulations, which make content-based distinctions that result in limiting political speech in support of candidates.

Provisions of the Fluvanna County Code restrict the display of signs within the County to the 60-day period preceding the date of the relevant election, which in this case is November 5, 2019. Under controlling court decisions, the 60-day time limit on erecting or displaying political signs is indeed a content-based, overbroad restriction on speech that violates the First Amendment's guarantee to freedom of speech.

These sign restrictions impair Dr. Alcorn's ability to promote her candidacy and establish name recognition in her campaign against an entrenched 17-year incumbent delegate. Thus, in order to dispel the chilling effect imposed by the 60-day limit on the political speech of all candidates and their supporters, we are asking that Fluvanna County officials not enforce that provision of the County's sign regulations.

¹ The Rutherford Institute is a non-profit civil liberties organization that provides free legal representation to individuals whose civil rights are threatened and infringed.

² Dr. Elizabeth Alcorn is the duly-nominated candidate of the Democratic Party to represent Virginia's 58th District, which includes large parts of Fluvanna County, in the state House of Delegates.

The 60-Day Limit

County Code § 22-22-1 defines a political sign as a temporary sign that seeks to influence the election or appointment of government officials. That section also defines a temporary sign as one relating to an election or campaign of a political organization. The substantive provisions of the County's sign regulations provide that temporary signs "shall be posted a reasonable time before, but in no event greater than sixty (60) days prior to and shall be removed a reasonable time after, but in no event greater than ten (10) days after the event, election, . . . or seasonal activity to which the temporary sign refers." County Code § 22-15-2(2) (emphasis added).³ Although § 22-15-2(2) exempts temporary signs from the otherwise generally-applicable permit requirement, its effect is to limit political signs to limit the duration persons can erect and display political signs, including those promoting candidates for political office.

Significantly, the County's sign regulations impose no duration limits on signs with non-political messages that are exempt from the regulations' permit requirement.

For example:

- Real estate signs relating to the sale or lease of real property are exempt but are not subject to any duration limit. County Code § 22-15-2(g);
- Estate signs identifying the name of an estate or farm are exempt, but may be erected for permanent display. County Code § 22-15-2(e);
- "No Trespassing" or other warning signs are similarly exempt and may be permanent. County Code § 22-15-2(k); and
- Directional signs are not subject to a duration restriction. County Code § 22-15-2(d).

Even some signs defined as "temporary" can avoid the time limit imposed on political signs based upon the content of those signs. Thus, construction signs that function as advertising for the architect, engineer, contractor or material supplier involved in improving real property can be erected as soon as the building permit is issued and can remain up as long as the project continues. County Code § 22-22-1 ("Sign, construction" definition). And "temporary" subdivision advertising signs are allowed to be erected and displayed for unlimited six (6) month intervals. County Code § 22-22-1 ("Sign, temporary subdivision advertising" definition).

As a result, the time limits on the display of signs under Fluvanna County's sign regulations depend upon the message conveyed by the sign. While signs conveying a political message or support for a candidate may only be put up and displayed for 60 days before and 10 days after an election, other signs conveying non-political or commercial messages may be displayed as long as the property owner desires. Because Fluvanna's sign regulations impose different duration limits depending on the sign's message, the regulations are content-based.⁴

³ The County Code's definition of a temporary sign similarly provides that temporary signs may not be posted more than 60 days prior to the event to which the sign relates. County Code § 22-22-1.

⁴ *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993).

Content-Based Sign Regulations Violate the First Amendment

The U.S. Supreme Court has clearly established that state and local sign regulations that discriminate against particular messages on signs are content-based regulations of speech and presumptively violate the First Amendment's protection of freedom of speech.

In *Reed v. Town of Gilbert*, 135 S. Ct. 1228 (2015), the Court struck down provisions of a town's sign code that drew distinctions between signs on the basis of the message the sign conveyed and subjected signs to different restrictions depending on their message. "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 2228.

As pointed out above, Fluvanna's sign regulations make content-based distinctions that limit political speech in support of candidates such as Dr. Alcorn. While a person can leave a real estate "For Sale" sign up so long as the property is on the market, a supporter of Dr. Alcorn must wait until September 6 of this year to begin expressing support for her candidacy and position on issues, and then only for 70 days. This kind of discrimination against political speech is presumptively unconstitutional. See also *Whitton v. City of Gladstone*, 54 F.3d 1400, 1404 (8th Cir. 1995) (ordinance restricting placement of candidate signs to 30 days before election violated First Amendment because the words on the sign defines whether it was subject to the durational limitations).

Fluvanna's time limitation on political signs is valid only if it is supported by a narrowly-drawn, compelling interest. As the decision in *Reed* makes clear, Fluvanna's alleged interest in aesthetics or traffic safety do not support the restriction because political signs do not inherently harm these interests more than signs with different messages that are not subject to the restriction. The County cannot credibly claim a compelling interest in limiting the duration of political signs "while at the same time allowing unlimited numbers of other types of signs that create the same problem." *Reed*, 135 S. Ct. at 2231.

Thus, the time restriction on political signs violates the First Amendment.

The Time Restriction is Overbroad

Apart from the content discrimination problem, Fluvanna's restriction on political signs offends the First Amendment because it is an overbroad restriction on the right of property owners to post signs on their property.

In *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), the U.S. Supreme Court recognized that special respect for individual liberty in the home extends to the posting of political signs on one's

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property. It held that a city's attempt to virtually ban residents from displaying such signs was an overbroad restriction on that medium of expression. *Id.* at 55.

Under Fluvanna's restriction on political signs, residents are prevented from expressing their support for politicians except for a 70-day period straddling an election day. This is the kind of drastic restriction on property owners' rights of expression that was struck down in the *Gilleo* decision. Indeed, a sign supporting a candidate may be a significant political expression even after an election is finalized, such as a Trump campaign sign showing support for the current president's policies, or a Hillary Clinton sign expressing revulsion at the result of the last election and opposition to the current administration. Thus, the County's regulation of political signs unduly restricts the rights of expression of property owners and is unconstitutional.

Fluvanna County's restriction on when and how long political signs may be displayed is an invalid restraint on speech and invalid. Its presence is causing a chilling effect on not only the speech of Dr. Alcorn's supporters and her campaign but on citizens of all political persuasions within the County. However, the restriction is particularly harmful to Dr. Alcorn's campaign as she attempts to establish her identity with voters and make inroads against a long-time and well-known incumbent.

Therefore, we ask that you provide assurances that political signs supporting Dr. Alcorn (or, for that matter, any candidate) will not be removed or citations issued to those who erect and display such signs more than 60 days before November 5, 2019.

Because the political sign restriction impinges on fundamental First Amendment rights, it is imperative that we receive a prompt response to this request by Wednesday, July 3, 2019 in case further action is necessary to secure the rights at stake here.

Sincerely yours,



Douglas R. McKusick
Senior Staff Attorney

cc: Dr. Elizabeth Alcorn