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December 9, 2009

James M. Armbruster, Manager
Borough of Penbrook
150 South 28th St.
Penbrook, PA 17103-1996

VIA FACSIMILE TO (717) 233-8589

Re: Borough of Penbrook Sign Ordinance

Dear Mr. Armbruster:

The American Civil Liberties Union of Pennsylvania (ACLU-PA) has received a complaint from resident Alissa Myers that the Borough of Penbrook has directed her to apply for a zoning permit in order to display a sign that reads, "You're in Steelers Country," at any time other than "game days" or face citations under the Penbrook Zoning Code. *See attached* Letter from James M. Armbruster, dated October 15, 2009. We believe that the Borough's threatened action to curtail Ms. Myers' expression, on her own private property, violates the Free Speech Clause of the First Amendment to the United States Constitution. Moreover, the ACLU-PA believes that the Borough's sign ordinance, Penbrook Zoning Code §§ 266-68, *et seq.*, is facially unconstitutional because it is replete with content-based distinctions and favors commercial over non-commercial speech. We write to request that you provide us with written assurance by the close of business this Friday, December 11, that the Borough is rescinding all threatened sanctions against Ms. Myers for display of the Steelers' sign, and that the Borough will take no further action to discourage its display, even if Ms. Myers chooses to display it every day of the year.

The First Amendment to the Constitution guarantees, among several liberties, the freedom of expression. "A special respect for individual liberty in the home has long been a 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." *City of Ladue v. Gilleo,* 512 U.S. 44, 58 (1994). That liberty

includes a right to erect signs that are "a form of expression protected by the Free Speech Clause" of the First Amendment. *Id.* at 48. Indeed, yard and window signs are a unique medium that "may have no practical substitute." *Id.* at 57. Although expression in the home is subject to constitutionally appropriate regulation (*Id.* at 48), the Borough's regulatory scheme is constitutionally flawed. It is a content-based restriction on expression that accords less protection to non-commercial speech than commercial speech. Such content-based favoritism is presumptively unconstitutional under the First Amendment. *See Rosenberger v. Rector and Visitors of Univ. of Virginia,* 515 U.S. 819, 828-29 (1995); *Forsyth County, Georgia v. Nationalist Movement,* 505 U.S. 123, 130 (1992); *Simon and Schuster, Inc. v. Members of the New York State Crime Victims Bd.,* 502 U.S. 105, 115 (1991). *See also, Gilleo,* 512 U.S. at 59 (O'Connor, J., concurring) ("With rare exceptions, content discrimination in regulations of the speech of private citizens on private property or in a traditional public forum is presumptively impermissible, and this presumption is a very strong one"). Furthermore, commercial speech cannot be accorded greater protection than non-commercial speech. *See, e.g., Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 513 (1981) (holding unconstitutional an ordinance prohibiting noncommercial billboards while permitting commercial billboards in the same locations).

The Borough's ordinance allows, in residential districts (where Ms. Myers lives), *permanent* signs "advertising the sale or development of the premises" up to 20 square feet (§ 266-69(A)(2)), "business identification signs" up to 100 square feet (§ 266-69(A)(9)) and "ground or pole business signs" up to 24 square feet (§ 266-69(A)(11)). On the other hand, signs conveying a non-commercial message — be it political, religious or personal — are limited to sixteen square feet, permitted only for brief time periods and allowed only if they "advertise political parties or candidates for election" (§ 266-72(E)), "nonprofit, charitable and similar events" (§ 266-72(C)), or qualify as "holiday decorations" (§ 266-72(F)).

The First Amendment prohibits the Borough from regulating the type of non-commercial messages a homeowner wishes to display on a sign in her own yard. Accordingly, Ms. Myers must be allowed to display signs bearing any non-commercial message she chooses, not just ones related to elections, specific events or holidays. And she has a right to display them whenever she pleases, so long as they do not pose a public-safety or traffic threat, e.g., on a corner obstructing motorists' vision. In other words, the First Amendment guarantees Ms. Myers the right to display a sign bearing any non-commercial message, be it Jesus Saves, Elect Richard Nixon, Troops out of Afghanistan, No Death Panels, Impeach the Penbrook Council, or You're in Steelers Country. And she can display those signs 24 hours per day, 365 days a year if she so chooses.

While the Borough can impose reasonable time, place and manner restrictions on signs, those restrictions must be content-neutral, meaning that the same conditions must apply to all signs, regardless of the message. In particular, size or other restrictions for commercial signs cannot be more generous than size restrictions for non-commercial signs. For example, if business-identification signs meeting the requirements specified at Subsections 266-69(A)(9)(a)-

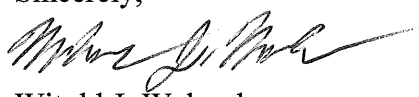
(d)(relating to proportions and positioning) may total 100 square feet, non-commercial signs meeting those requirements must also be permitted to total 100 square feet. Lastly, temporal restrictions cannot be more restrictive for non-commercial signs than for commercial signs. In particular, prohibiting political signs for nearly eleven months out of the year (§ 266-72(E)) is clearly unconstitutional. *See, e.g., Whitton v. City of Gladstone,* 54 F.3d 1400, 1403-04 (8th Cir. 1995) (striking law limiting display of political signs to no more than 30 days before an election and 7 days after an election); *Fehribach v. City of Troy,* 341 F.Supp. 2d 727, 732-33 (E.D. Mich. 2004) (striking law limiting display of political signs to no more than 30 days before an election); *N. Olmsted Chamber of Commerce v. City of N. Olmsted,* 86 F.Supp. 2d 755, 767 (N.D. Ohio 2000) (striking law limiting display of political signs to no more than 10 days after an election); *Dimas v. City of Warren,* 939 F.Supp. 554, 557 (E.D. Mich. 1996) (striking law limiting display of political signs to no more than 45 days before and 1 week after an election); *City of Antioch v. Candidates' Outdoor Graphic Serv.,* 557 F.Supp. 52, 55-61 (N.D. Cal. 1982) (striking law limiting display of political signs to only 60 days per year); *Orazio v. Town of North Hempstead,* 426 F.Supp. 114, 1148-49 (E.D.N.Y. 1977) (striking law limiting display of political wall signs to no more than 6 weeks before an election).

Finally, the Borough's permitting process is unconstitutional as it applies to private-property signage. The Borough has informed Ms. Myers that, in order to erect her Steelers' sign on days other than "game day," she must do so in accordance with Section 266-72(C) and pay a $40.00 permit fee to apply for "a zoning permit for a temporary sign." *See attached* Letter from James M. Armbruster. Section 266-72(C) allows "temporary signs advertising nonprofit, charitable and similar events." Even under the ordinance, it is unclear why the permit and fee requirements apply because the ordinance explicitly excludes such "temporary signs" from the permit and fee requirement: "A permit and fee shall not be required for the following signs: . . . [t]emporary signs . . . ." (§ 266-76(A)). More importantly, however, regardless what the ordinance requires, the First Amendment prohibits the Borough from requiring homeowners to obtain permits and pay fees prior to the erection of signs bearing non-commercial messages. "Prior restraints on speech and publication are the most serious and the least tolerable infringements on First Amendment rights." *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 559 (1976). "Any system of prior restraints on expression . . . bear[s] a heavy presumption against its constitutional validity." *Id.* Although the U.S. Supreme Court has allowed municipalities to apply permitting systems for parades and events in public spaces, *Nationalist Movement,* 505 U.S. at 130, we are unaware of any such system of prior restraint applied to private-property signs. To the contrary, courts that have considered similar permitting requirements declared them unconstitutional. *See, King Enterprises v. Thomas Township*, 215 F.Supp.2d 891 (E.D. Mich. 2002); *North Olmstead Chamber of Commerce v. City of North Olmstead*, 86 F.Supp.2d 755 (N.D. Ohio 2000); *Curry v. Prince George's County*, 33 F.Supp.2d 447, 455 (D.Md. 1999). *See also*, *Peachlum v. City of York*, 333 F.3d 429 (3d Cir. 2003) (reversing trial court decision upholding permit-requirement for lawn signs). Accordingly, no permitting system may be maintained for temporary signs and banners on private property. The same holds true for the fee requirement (§ 266-75). A person cannot be compelled to purchase a privilege freely granted by the Constitution. *Murdock v. Pennsylvania,* 319 U.S. 105, 116 (1943).

For the foregoing reasons, the ACLU-PA believes that the Borough of Penbrook cannot prohibit Ms. Myers from displaying her sign without a permit for as long as she likes. Ms. Myers' sign is clearly a non-commercial message protected by the First Amendment, and at sixteen square feet, is smaller than commercial signs allowed in her zoning district. Consequently, the Borough is violating Ms. Myers' First Amendment rights by threatening legal action for her display of the sign.

The ACLU-PA has much experience litigating municipal sign ordinances, and we would be pleased to work with the Borough of Penbrook to suggest changes needed to correct constitutional flaws in its ordinance. If you have any interest in discussing this matter further, please contact me at 412-681-7864. In the meantime, please let us know by 5:00 p.m. on Friday, December 11, 2009, that the Borough will not enforce the ordinance to prohibit Ms. Myers from erecting her sign at any time she chooses and without first obtaining a permit or paying a fee. Please fax your response to 412-681-8707. If we are forced to take legal action it will be to declare the ordinance unconstitutional, facially and as applied, to enjoin enforcement, and to cover plaintiff's attorneys' fees under 42 U.S.C. § 1988. Our preference would be to discuss both Ms. Myers' sign and the constitutionality of the Borough's ordinance outside of litigation, but we leave the direction this matter takes to the Borough.

Sincerely,



Witold J. Walczak
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ACLU of Pennsylvania

Cc: Solicitor, Bruce Foreman (via facsimile to (717) 236-6602)