01-026

CONSTITUTION OF THE UNITED STATES: AMENDMENT I.

Constitutionality of local ordinance limiting time period within which political signs advocating particular candidate or political party may be displayed on private property, either before or after primary or general election, must be determined on case-by-case basis.

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May 10, 2002

Issue Presented

You ask whether a local ordinance may limit the time period within which political signs advocating a particular candidate or political party may be displayed on private property, either before or after a primary or general election.

Facts

You advise that York County has adopted a zoning ordinance, providing specifically for the erection, alteration, expansion, reconstruction, replacement or relocation of signs on any property in conformance with the ordinance.[1] The term "political sign" is defined in the ordinance to mean "[a] temporary sign which pertains to an issue of public concern or to an issue or candidate in a pending election."[2] You explain that the ordinance contains a table indicating the function, structure, footage, height, and type of illumination permitted for signs within each zoning district.[3]

You advise further that certain categories of signs are exempt from the zoning district sign regulations and may be erected, altered or maintained in any zoning district.[4] Among the categories of exempt signs are nonilluminated political signs and posters ranging up to six square feet in area, which must be removed within seven days following an election, canvass or primary.[5] You also explain that permits are not required for political signs, nor is there any limitation on the number of political signs permitted on any property, provided that no single sign exceeds the maximum permitted area, and all political signs are removed within the specified time period. You provide no rationale or purpose underlying the county's seven-day

limitation on the display of political signs following an election, canvass or primary.

Discussion

It is clear that political signs exist for the sole purpose of communicating messages. Therefore, any regulation of signs is inevitably a regulation of speech protected by the First Amendment to the Constitution of the United States.[6] "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."[7] "For speech concerning public affairs is more than self-expression; it is the essence of self-government."[8] Political signs generally pertain to events with definite dates, such as the dates for holding primary or general elections, and therefore generally are susceptible to time limit restrictions simply because the importance of such signs are bound by time. The Supreme Court of the United States has permitted local regulation of political signs in certain factual contexts.

In the case of *Burson v. Freeman*, an ordinance prohibited the display of political campaign signs within one hundred feet of a polling place.[9] Since only political signs were banned, the ordinance clearly was content-based.[10] The state, therefore, had to show that the regulation was necessary to serve a compelling state interest, and that it was narrowly drawn to achieve that end.[11] The Court upheld the ordinance, determining that it served the compelling governmental interest of protecting voters from intimidation and fraud.[12] In *Lehman v. City of Shaker Heights*, the Court approved a city's refusal to permit political advertising on its transit system, because "[t]he city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience."[13] In the case of *Greer v. Spock*, the Court upheld a federal military reservation regulation that banned speeches and demonstrations of a partisan political nature and prohibited the distribution of literature without prior approval of post headquarters.[14] These cases stand for the general proposition that singling out political speech for regulation is not per se unconstitutional.

You observe that a Fourth Circuit case appears to endorse the idea of durational limits as a means of controlling visual congestion.[15] In *Arlington County Republican Committee v. Arlington County, Virginia*, the Fourth Circuit considered a county ordinance that

limited the number of temporary signs that could be posted by an owner on his property in residential districts to two signs.[16] The Court observed that the county could promote its interest in aesthetics by, among other means, "limiting the duration of these [political] signs."[17] The Court did not specifically address that which constitutes a reasonable time limit restriction, noting only that the county limitations were seventy days before and ten days after an event.[18] Furthermore, the Court did not comment on the county's periods of limitation.

In the process of declaring election sign regulations unconstitutional for other reasons, however, several other courts have stated that reasonable time limits would be allowed.[19] Such a time limit regulation may limit the length of time a sign may be displayed or retained, or both, before or after an election.[20] It is, however, easier to define the period subsequent to an event, because the message on a sign has no utility after the event, unless the covered event is not the final election scheduled to resolve the subject. Where the election is one of a sequence, such as a primary election leading up to a general election, the sign's utility is not ended until the general election is held. Several ordinances considered by the courts specifically have allowed the signs of the winners of the primary election to remain on display throughout the period between the primary and general election.[21] Finally, in two cases, ten-day limits have been approved for the removal of political signs following elections.[22]

Conclusion

I, therefore, conclude that decisions of the United States Supreme Court may be read so as to permit localities to impose reasonable time restrictions on political signs.

Defining the date when political signs may begin to be displayed, however, is extremely problematic. Courts have struck down ordinances with sixty-day limits.[23] Another court invalidated a forty-five-day period.[24] In addition, the First Circuit declared that a three-week limit was inadequate.[25] A New Jersey community's ordinance that limited signs advertising political events or viewpoints to ten days before the event was found to be content-based; however the court noted that signs advertising yard sales, town festivities, or athletic events presumably could be posted at any time within thirty days of the event.[26] Finally, other courts have upheld general restrictions on the total time for the display of temporary signs which made no specific reference to election dates.[27]

While preelection restrictions are looked on unfavorably, postelection removal requirements create fewer problems for the courts. While striking down the ordinance placing a ten-day restriction on political signs prior to the election, the New Jersey district court found that the locality's interests in safety and aesthetics were adequately served by a provision requiring removal of all temporary signs within ten days after termination of the special event.[28] In addition, the same court that rejected a preelection restriction on the posting of campaign signs in Washington upheld a provision requiring removal of campaign signs within ten days following the election.[29] The court reasoned that preelection political speech interests that may outweigh a locality's regulatory interests are not present following the event and may be outweighed by a locality's demonstrated interests in aesthetics and traffic safety. It, therefore, appears that the safest method for imposing durational requirements on political campaign signs is to aim the requirement at special event signs generally, rather than political signs in particular, and to target the limitation to the postevent or postelection period.

I cannot conclude with certainty, therefore, that the time limitation used by York County for the display of political signs will withstand a constitutional challenge. Absent a controlling decision from the Supreme Court of the United States, the appropriate time periods for regulation of political signs will have to be established on a case-by-case basis, depending on the testimony and other evidence offered on aesthetics, public safety concerns, and nature and character of the zoning classification.

[1]York County, Va., Code ch. 24.1, art. VII, § 24.1-700 (2001).

[2]*Id*. § 24.1-701.

[3]*Id*. § 24.1-703.

[4]*Id*. § 24.1-707.

[5]*Id*. § 24.1-707(g).

[6]Baldwin v. Redwood City, 540 F.2d 1360, 1366 (posting of temporary political campaign signs "is virtually pure free speech") & n.10 (9th Cir. 1976) (citing California v. LaRue, 409 U.S. 109, 117 (1972) for fact that extent of permissible regulations increases significantly as mode of expression moves from pure speech to speech combined with conduct).

[7]Mills v. Alabama, 384 U.S. 214, 218 (1966).

[8]Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).

[9]504 U.S. 191, 193 (1992).

[10]*Id*. at 197-98.

[11]*See id.* at 198. The State of Tennessee advanced as a compelling interest the prevention of voter intimidation and election fraud. *See id*. at 198-99, 205-06, 210.

[12]*Id*. at 211.

[13]418 U.S. 298, 304 (1974).

[14]424 U.S. 828 (1976).

[15]Section 2.2-505(B) requires that any request by a county attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions."

[16]983 F.2d 587 (4th Cir. 1993).

[17]*Id*. at 594.

[18]*Id*. at 594 n.8.

[19]*See* Verrilli v. City of Concord, 548 F.2d 262, 265, *appeal after remand*, 557 F.2d 664 (9th Cir. 1977); Baldwin v. Redwood City, 540 F.2d 1360, 1370 (9th Cir. 1976); McCormack v. Township of Clinton, 872 F. Supp. 1320, 1326 (D.N.J. 1994); City of Lakewood v. Colfax Unlimited Ass'n, Inc., 634 P.2d 52, 63 n.15 (Colo. 1981) (en banc) (per curiam).

[20]The regulation also would have to cover other time-bound events in order to satisfy the ruling in *Cincinnati v. Discovery Network, Inc.*, where the categorical ban by the City of Cincinnati on commercial handbills, but not newspapers, was content-based, was not narrowly tailored, and was not a legitimate time, place, or manner restriction on protected speech. 507 U.S. 410 (1993).

[21]*See, e.g.*, Curry v. Prince George's County, Md., 33 F. Supp. 2d 447, 449, 456 (D. Md. 1999) (striking down § 27-628(b)(1) of Prince George's County Code, which required removal of signs ten days after general election and ten days after primary for unsuccessful candidates); Dimas v. City of Warren, 939 F. Supp. 554, 555 n.1, 557 (E.D. Mich. 1996) (finding § 31-20(b) of City of Warren "Political Signs" ordinance not content-neutral where signs could not be posted more than forty-five days prior to election).

[22]*See* Messer v. City of Douglasville, Ga., 975 F.2d 1505, 1513 (11th Cir. 1992); Ross v. Goshi, 351 F. Supp. 949, 954-55 (D. Haw. 1972).

[23]City of Antioch v. Candidates' Outdoor Graphic Serv., 557 F. Supp. 52, 61 (N.D. Cal. 1982); Collier v. City of Tacoma, 854 P.2d 1046, 1048, 1058 (Wash. 1993) (en banc).

[24]*Curry v. Prince George's County, Md.*, 33 F. Supp. 2d at 455.

[25]John Donnelly & Sons v. Campbell, 639 F.2d 6, 15 (1st Cir. 1980), *aff'd*, 453 U.S. 916 (1981).

[26]*McCormack v. Township of Clinton*, 872 F. Supp. at 1323-24, 1328 (ordering grant of preliminary injunction against enforcement of ten-day time restriction).

[27]Brayton v. City of New Brighton, 519 N.W.2d 243 (Minn. Ct. App. 1994) (upholding ordinance allowing resident to post one opinion sign or campaign sign on property year round and additional signs during election season); City of Waterloo v. Markham, 600 N.E.2d 1320 (Ill. App. Ct. 1992) (upholding zoning ordinance requirement that all temporary signs be removed after ninety days, regardless of sign's message).

[28]*McCormack*, 872 F. Supp. at 1326.

[29]*Collier*, 854 P.2d at 1058-59 (citing *Baldwin v. Redwood City*, 540 F.2d at 1374).

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