AMERICAN CIVIL LIBERTIES UNION of GEORGIA
ACLU FOUNDATION

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August 24, 2017

Lamar Scroggs, Mayor
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CC: Sam Evans, Council Member
Todd Wilson, Council Member
Sheri Clark Millwood, Council Member
Pat Jones, Council Member
Dwight Wood, Council Member

Via First-Class Mail and E-mail

Dear Mayor Scroggs, Chief Moon, and Council Members of the City of Oakwood,

We write on behalf of the Young Democrats of Hall County concerning the suppression of their peaceful political protest in the City of Oakwood last month, in violation of the First Amendment to the United States Constitution. The unconstitutional suppression of free speech impacts all of us, regardless of political party or viewpoint.

On Saturday, July 1, 2017, a group of about 11 protestors peacefully gathered on the public sidewalk corners on the intersection of Old Mundy Mill Rd (Mathis Dr.) and Highway 53, just outside the University of North Georgia. The protestors displayed hand-held signs that were no bigger than a poster board, they did not use sound amplification devices, and they did not impede walking traffic on the sidewalks or step onto the road.

Oakwood police officers nonetheless approached the protestors and informed them that in order to protest, they had to satisfy three requirements. First, their signs had to be pre-approved by the Oakwood Police Department. Second, the protestors had to have a peddler's license. Third, the protestors needed a permit to protest on the sidewalk. Because they did not have these things, the police shut down their protest. But as explained below, each of these requirements is unconstitutional as applied to peaceful sidewalk protests like the one that occurred here.

We request that the City of Oakwood and the Oakwood Police Department take prompt action to ensure that this does not happen again, and we are happy to discuss these matters and work with you to achieve that goal. If, however, you do not respond within 30 days of receiving this letter, we reserve the right to bring legal action.

I. Oakwood's Sign Ordinances are Breathtakingly Overbroad and Unconstitutional

The protestors were first informed that they had to submit their signs for pre-approval by the Oakwood Police Department. This restriction appears to be based on Chapter 36 of the Code of the City of Oakwood, which governs "Signs." Section 36-22 provides that "it shall be unlawful for any person to . . . display . . . a sign in the city without first having obtained a sign permit." The Code goes on to explain the elaborate procedures for obtaining a sign permit, *see* Section 36-23, which requires the payment of a fee, currently $1.00 per square foot per sign, *see* Section 36-28,[1] and the permit application may remain pending up to 30 days, *see* Section 36-24. The definition for "sign" is breathtakingly overbroad: Section 36-19 provides that a "Sign means a device or representation for visual communication that is used for the purpose of bringing the subject thereof to the attention of others," which potentially applies to any number of homespun visual devices such as poster boards, flyers, and religious tracts. Apparently, the permit requirement would apply even to a sign displayed in the window of a home or to an American Flag displayed on a front porch on the Fourth of July.

In addition, the ordinances create a number of exemptions to the permitting requirement, including *any* "[s]igns erected by a public officer in the performance of his duties," "Directional or information or public service signs . . . erected for the convenience of the public;" and even "Signs that appear on vending machines or similar devices so long as the sign refers to the product contained within or on the device." Section 36-38.

A. Oakwood's sign ordinances are unconstitutional content-based restrictions that cannot survive strict scrutiny

As a preliminary matter, Oakwood's sign ordinances are unconstitutional because "many of the sign code's exemptions are plainly content based." *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1264 (11th Cir. 2005). Ordinances that restrict speech based on their content are presumptively unconstitutional and are thus subject to strict scrutiny, which Oakwood's sign ordinances cannot survive. *See id.* at 1258 ("'Our precedents . . . apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.'" (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994)).

First, the broad exemption for signs displayed by the government (i.e., "public officers") is a content-based restriction. As the Eleventh Circuit has explained, "the Supreme Court has 'frequently condemned such discrimination among different users of the same medium for expression.'" *Solantic, LLC*, 410 F.3d at 1267 (citation omitted). Permit exemptions for government speakers are content-based because "public utilities and government bodies may freely erect signs expressing their political preferences, their positions on public policy matters, and, indeed, their chosen messages on virtually any subject[; so although] the city council could paper the entire City of Neptune Beach with signs advancing its agenda—an individual resident could not freely post even a single yard sign advocating the opposing position." *Id.* at 1266. "The sign code exemptions that pick and choose the *speakers* entitled to preferential treatment are no less content based than those that select among subjects or messages." *Id.*; *see also Dimmitt v.*

[1] *See* Fee Schedule (2017), found at http://www.cityofoakwood.net/Applications-Permits.aspx.

City of Clearwater, 985 F.2d 1565, 1549 (11th Cir. 1993) (ordinance exempting government flags from the permit process but not private flags was an unconstitutional content-based restriction).

Second, the ordinances' permit exemption for "[d]irectional or information or public service signs . . . erected for the convenience of the public" is also content-based. Recently, in *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015), the Supreme Court expressly held that treating "Temporary Directional Signs" differently from signs covering other topics was a content-based restriction, notwithstanding the banal nature of the content at issue, i.e., providing directions. Even before *Reed*, a similar exemption for directional signs was found to be content-based in *Solantic, LLC*, where the Eleventh Circuit explained: "a sign espousing a viewpoint on a salient political issue—for example, 'Reform Medicare,' 'Save Social Security,' 'Abolish the Death Penalty,' or 'Overturn *Roe v.* Wade'—would be subject to a permitting process and to numerous restrictions on form and placement form which other signs—such as those 'guiding traffic and parking'—are exempt." *Solantic, LLC*, 410 F.3d at 1265. That content-based distinction, the court held, subjected the ordinance to strict scrutiny.

Third, even the permit exemption for signs referring to products on vending machines is a content-based restriction, because the owner of the vending machine may display a sign promoting his or her product but must obtain a permit if the owner wants to promote their favored causes. Thus, in *Solantic, LLC*, an exemption for "signs incorporated into machinery that advertise the service provided by the machine" was found to be content-based because it prohibited "comparable signs advertising the manufacturer or operator's favored causes. . . . Thus, a sign reading, 'Mow Your Lawn With A John Deere,' may receive more protection than one that says, 'Support Your Local Public Schools" . . . ." *Id.* at 1265. In other words, an exemption that "favors commercial speech over noncommercial speech" is content-based and subject to strict scrutiny. *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1271 (11th Cir. 2006).

Here, the Oakwood ordinances plainly fail strict scrutiny because there is no justification for discrimination against signs based on their content. As in *Solantic, LLC*, "the sign code recites only the general purposes of aesthetics and traffic safety, offering no reason for applying its requirements to some types of signs but not others." *Id.* at 1267. The ordinances are unconstitutional on this basis alone.

B. Oakwood's sign ordinances are unconstitutionally overbroad, restricting all picketing activity without adequate justification

Even if strict scrutiny did not apply, Oakwood's sign ordinances are still overbroad and unconstitutional, principally because they require individuals and groups, regardless of size, to go through an onerous permitting process just to engage in core First Amendment activity.

The use of signs in "[p]ublic-issue picketing, [is] 'an exercise of . . . basic constitutional rights in their most pristine and classic form,' [and] has always rested on the highest rung of the hierarchy of First Amendment values." *Carey v. Brown*, 447 U.S. 455, 466-67 (1980) (citation omitted). The ordinances furthermore apply to the display of signs *anywhere*, including on public sidewalks, which "occupy a 'special position in terms of First Amendment protection' because of

their historic role as sites for discussion and debate." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (citation omitted). And requiring everyone to submit *all* "signs" for a 30-day approval process is a prior restraint on speech, which "'bears a heavy presumption against its constitutional validity.'" *Café Erotica of Fla., Inc. v. St. Johns Cnty.*, 360 F.3d 1274, 1282 (11th Cir. 2004) (citation and internal alterations omitted). That is because "[a]ny notice period is a substantial inhibition on speech," *American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005), and "'[t]he simple knowledge that one must inform the government of his desire to speak and must fill out appropriate forms and comply with applicable regulations discourages citizens from speaking freely,'" *id.* (quoting *NAACP v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984)).

Some ordinances which impose prior restraints on speech have been upheld as justifiable time, place, and manner restrictions, because they serve "an important or substantial government interest unrelated to the suppression of free speech . . . , and the ordinance is narrowly drawn to achieve its desired ends, leaving other channels for the communication of information." *Messer v. City of Douglasville, Ga.*, 975 F.2d 1505, 1510 (11th Cir. 1992). Here, Oakwood's ordinances were ostensibly passed to "promote public health, safety and general welfare;" "promote the reasonable, orderly and effective display of signs" to "enhance the economy;" "restrict signs that increase the probability of traffic accidents by obstructing vision;" to promote signs "that are compatible with their surroundings;" and to ensure "the appearance and attractiveness of signs." Section 36-21 ("Intent and purpose.").

These interests, even assuming they are "important or substantial," might justify some minimal restriction on permanent, large sign fixtures in specific locations, such as billboards. But they do *not* justify the sweeping prior restraint on *all* "signs" of *all* sizes—including something as transient as a hand-held poster board—displayed anywhere, anytime, and by any number of people.

First, the ordinances are overbroad because the permit requirement applies "not only to large groups, but also to small groups and even lone individuals." *Broadley v. U.S. Dep't of the Interior*, 615 F.3d 508, 520 (D.C. Cir. 2010). That is because the government's interests in safety or public welfare "is not advanced by the application of the [o]rdinance to small groups." *City of Dearborn*, 418 F.3d at 608; *see, e.g.*, *Burk v. Augusta-Richmond Cnty.*, 365 F.3d 1247, 1255 (11th Cir. 2004) ("it is clear that regulating as few as five peaceful protestors . . . is not the least restrictive means of accomplishing the County's legitimate traffic flow and peace-keeping concerns."). Here, for instance, it is unclear how restricting the display of hand-held poster boards by less than a dozen people on the sidewalk enhances traffic safety or promotes any of the City's other vague interests in "general welfare."

It is therefore unsurprising that courts around the country have struck down categorical permit requirements as overbroad because of their application to any number of individuals. *See, e.g.*, *Broadley*, 615 F.3d at 522 ("why are individuals and members of small groups who speak their minds more likely to cause overcrowding, damage park property, harm visitors, or interfere with park programs than people who prefer to keep quiet?"); *Cox v. City of Charleston*, 416 F.3d 281, 283 (4th Cir. 2005) ("application of the [ordinance to groups as small as two or three renders it constitutionally infirm" because the city failed to "establish[] why burdening such

expression is necessary to facilitate its interest in keeping its streets and sidewalks safe, orderly, and accessible."); *Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009) (en banc) ("we and almost every other circuit to have considered the issue have refused to uphold registration requirements that apply to individual speakers or small groups in a public forum."); *Knowles v. City of Waco*, 462 F.3d 430, 436 (5th Cir. 2006) ("Other circuits have held, and we concur, that ordinances requiring a permit for demonstrations by a handful of people are not narrowly tailored to serve a significant government interest.").

Second, the ordinances are overbroad because of their sweeping definition of the term "sign," which includes *any* kind of visual communication, such as hand-held poster boards routinely used in public picketing, which "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey*, 447 U.S. at 467. Such a sweeping definition of "sign" is unconstitutional especially as it applies to public sidewalks, because it essentially "foreclose[s] an entire medium of expression," *City of Ladue v. Gilleo*, 512 U.S. 43, 54-55 (1994), critical to core First Amendment activity. *See, e.g., id.* at 54 ("Gilleo and other residents of Ladue are forbidden to display virtually any 'sign' on their property. The ordinance defines that term sweepingly.") For that reason, similarly-sweeping restrictions on residential signs, *id.*, the distribution of pamphlets, *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938), handbills on the public streets, *Jamison v. Texas*, 318 U.S. 413, 416 (1942), and the door-to-door distribution of literature, *Martin v. City of Struthers*, 319 U.S. 141, 145-49 (1943), have all been struck down as unconstitutional. Indeed, Oakwood's expansive definition of "sign" appears to include *all* of these categories of protected speech, which all involve visual communications.

Third, the ordinances are overbroad because they outright prohibit spontaneous protests—and really any non-spontaneous expression from 2 to 29 days—due to the 30-day application process. "Individuals and small groups . . . frequently wish to speak off the cuff, in response to unexpected events or unforeseen stimuli," *Broadley*, 615 F.3d at 523, including spontaneous counterprotests in reaction to an existing protest. "Both the procedural hurdle of filing out and submitting a written application, and the temporal hurdle of waiting for the permit to be granted may discourage potential speakers. Moreover, because of the delay caused by complying with the permitting procedures, '[i]mmediate speech can no longer respond to immediate issues.'" *Grossman v. City of Portland*, 33 F.3d 1200, 1206 (9th Cir. 1994); *see also Cox*, 416 F.3d at 285 (same). "[T]iming is of the essence in politics . . . ; when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 162 (1969) (Harlan, J., concurring); *see also Douglas v. Brownell*, 88 F.3d 1511, 1524 (8th Cir. 1996) (striking down five-day notice requirement for this reason). At a minimum, a 30-day waiting period cannot be justified as applied to small demonstrations. As one court has explained:

> Advance notice is critical to its reasonableness; and given that the time required to consider an application will generally be shorter the smaller the planned demonstration and that political demonstrations are often engendered by topical events, a very long period of advance notice with no exception for spontaneous demonstrations unreasonably limits free speech. . . . Courts more skeptical than ours about the validity of advance-notice requirements point out that requiring even a short period of advance notice prevents spontaneous demonstrations.

Vodak v. City of Chicago, 639 F.3d 738, 749 (7th Cir. 2011) (citation omitted).

Fourth, the ordinance requires what amounts to a First Amendment tax—a permit fee of $1.00 per square foot per sign—that seems completely unrelated to the administrative costs necessary for processing permits. The City "cannot profit from imposing licensing or permit fees on the exercise of a First Amendment right. Only fees that cover the administrative expenses of the permit or license are permissible." *Sullivan v. City of Augusta*, 511 F.3d 16, 38 (1st Cir. 2007) (citing *Murdock v. Pa.*, 319 U.S. 105, 113-14 (1994); *Cox v. N.H.*, 312 U.S. 569, 577 (1941)); *see also Fernandes v. Limmer*, 663 F.2d 619, 633 (5th Cir. 1981) (government must "demonstrate a link between the fee and the costs of the licensing process."). Here, the size of the proposed sign has impact whatsoever on the sign approval process outlined in Sections 36-23 to 36-28, which simply requires the applicant to describe the size of the sign on the form; all applicants fill out the exact same form regardless of the size of the sign.

Finally, a time, place, or manner regulation must "leave open ample alternatives for communication" within that public forum. *Forsyth Cnty., Ga. v. The Nationalist Movement*, 505 U.S. 123, 130 (1992). These ordinances, however, require a permit for the display of literally *any* visual representation, anytime, anywhere, essentially leaving *no* real alternatives for core First Amendment speech especially when the display of visual representations communicate messages much more effectively than repeated, one-on-one conversations. *See, e.g.*, *City of Ladue*, 512 U.S. at 56 ("Displaying a sign . . . carries a message quite distinct from . . . conveying the same text or picture by other means.");*Edwards v. City of Coeur d'Alene*, 262 F.3d 856, 863 (9th Cir. 2001) (the act of marching or picketing "traditionally involves the use of signs," and indeed, "the classic image of a picketer . . . is of an individual holding aloft a sign-bearing standard"); *Broadley*, 615 F.3d at 525 ("Given the breadth of these proscriptions, virtually anyone engaging in any permitless expressive activity in a national park risks a penalty."). This is why picketing activity "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey*, 447 U.S. at 467.

For these reasons, we ask that the Oakwood City Council act promptly to repeal or amend its sign ordinances to comply with the First Amendment within 30 days of receipt of this letter. We are also happy to discuss potential alternatives or provide whatever help you need to ensure compliance.

II. Oakwood's Peddler's License Ordinance Does Not Apply to Protests

The Oakwood Police Department officers also informed the protestors that they needed a peddler's license in order to engage in their protest activity. This is absurd. Chapter 34 of the Code requires anyone who "engage[s] in peddling" to obtain a license, and "peddling" is defined as "traveling from place to place or door to door on foot or in a vehicle and exhibiting, offering to sell or selling goods or services, to households, businesses or passers-by." Sections 34-21, 34-19. In no way were the protestors seeking to sell goods or services. No reasonable officer would construe Oakwood's peddler ordinances to apply to core First Amendment activity, and such an interpretation would be blatantly unconstitutional.

Accordingly, we request that the Oakwood Police Department immediately take steps to retrain its officers so that they may understand the proper application of the peddler ordinance or discipline the appropriate officer who grossly misapplied the ordinance in such a manner. Alternatively, we ask that the City of Oakwood publicly confirm that the peddler's ordinance does not apply to protests that do not involve exhibiting or offering to sell any goods or services.

III. There Is No Such Thing as a "Protest Permit"

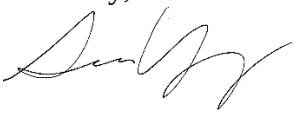
Lastly, the Oakwood Police Department officers informed the protestors that they needed a "protest permit." But Oakwood has no such thing as a generalized "protest permit." We were unable to locate any such thing in the Oakwood Code. To the extent it exists, please identify it and amend any such ordinance immediately to cure its unconstitutional defects.[2]

If no such ordinance exists, then we request that the Oakwood Police Department immediately take steps to retrain its officers so that they know there is no such thing as a "protest permit" or discipline the appropriate officer who believed that such an ordinance exists. Alternatively, we ask that the City of Oakwood publicly confirm that no such requirement exists.

For the above reasons, we request that the City of Oakwood promptly amend its sign permit ordinances (or any protest permit ordinances, if they exist) so that individuals and groups—regardless of their political viewpoints—may again protest freely on public sidewalks. In addition, we ask that the Oakwood Police Department take affirmative steps to ensure that police officers no longer grossly misapply the peddler's license ordinance to protestors, or apply any other speech restrictions that do not exist. Otherwise, the City may be exposed to legal action that could result in declaratory and injunctive relief, damages on behalf of the protestors whose rights were suppressed, and significant liability for costs and attorney fees.

We are happy to provide any help or cooperation necessary to help resolve this situation without resorting to litigation. However, if you do not respond to this letter within 30 days, either in writing or otherwise, we will be prepared to take whatever legal action is required to defend the First Amendment.

Sincerely,



Sean J. Young
Legal Director
ACLU of Georgia

[2] The neighboring city of Gainesville has an ordinance requiring "at least eighteen (18) hours' written notice of any person or persons planning to picket or demonstrate" anytime, anywhere, and regardless of the number of people participating. *See* Section 6-7-28, Code of Ordinances of the City of Gainesville. To the extent this ordinance is applicable here, and we do not believe that it is, that ordinance would suffer from many of the same constitutional defects described above.