January 22, 2008

The Honorable Randy Scott
Senator, District No. 38
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Scott:

You seek clarification of our December 5, 2007 opinion which concluded "that the Town of Summerville may enforce its sign ordinance in state rights of way." By way of background, you provide the following:

> [t]he Town of Summerville is now requiring political campaign signs on state and town rights of way to be removed while allowing real estate and other similar signs to remain on state and town rights of way. While I understand that your office was not asked to opine regarding any First Amendment problems with the Summerville Town ordinance, I respectfully request an opinion from your office concerning whether the ordinance, as written, violates the First Amendment of the United States Constitution and whether it is likely unenforceable as a matter of law.

You have enclosed a copy of the Summerville Ordinance. Your question is whether the portion of the Ordinance which regulates political signs [section 32-243(5)] would likely be deemed by a court to be violative of the First Amendment. It is our opinion, based upon the existing case law, that it would.

Law / Analysis

Section 32-243(5) of the Summerville Ordinance provides as follows:

A permit is not required for the following types of signs in any zoning district:

... (5) Political campaign posters, placards, and special event notices, provided such signs do not exceed 310 square inches. Political campaign posters shall not be displayed more than 30 days before an election/primary and all signs are to be removed within ten days after their reason for existence.

A number of other types of signs, including "for sale," "for rent" or "for lease" signs also do not require a permit; however, these signs are not governed by the restriction placed upon political signs – that they may be displayed only at certain times (i.e. no more than 30 days before an election/primary).

Typically, courts afford municipal ordinances the same presumption of validity as are given statutes. As we stated in a prior opinion of this Office, dated December 14, 2006,

> ... an ordinance is a legislative enactment and, therefore, is presumed constitutional. *Town of Scranton v. Willoughby*, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991). Our Supreme Court "has held that a duly enacted ordinance is presumed constitutional; the party attacking the ordinance bears the burden of proving its unconstitutionality beyond a reasonable doubt. *City of Beaufort v. Baker*, 315 S.C. 146, 153, 432 S.E.2d 470, 474 (1993). Moreover, "[w]hile this office may comment upon constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional."

However, we note also that some courts do not afford a municipal ordinance (or statute) the usual presumption of validity in situations in which First Amendment rights are implicated thereby. As was stated in *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd*., 276 F.3d 876, 879 (6th Cir. 2002),

> [w]e start by presuming that the ordinance is unconstitutional. Detroit can overcome that presumption only by proving that the ordinance is necessary to serve a compelling state interest and narrowly drawn to achieve that interest.

Nevertheless, from the standpoint of providing the opinion of this Office, we must advise that only a court may determine that the Ordinance is invalid. While we may comment upon the Ordinance's constitutionality, we reiterate that the Ordinance remains valid and enforceable until a court concludes otherwise.

With that caveat in mind, we proceed to our analysis of whether the Summerville Ordinance could be declared by a court to contravene the First Amendment. The issue here is the 30 day durational limitation which the Ordinance places upon political expression. You have cited in your letter two cases: *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) and *McFadden v. City of Bridgeport*, 422 F.Supp.2d 659 (N.D.W.Va. 2006).

In *City of Ladue*, the United States Supreme Court invalidated an ordinance which banned all residential signs but those falling within one of ten exceptions. The Supreme Court acknowledged that, while signs are protected by the Free Speech Clause of the First Amendment,

such signs "pose distinctive problems that are subject to municipalities' police powers." Said the Court,

> [u]nlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs, just as they can, within reasonable bounds and absent censorial purpose, regulate audible expression in its capacity as noise.

512 U.S. at 48. Relying principally upon its decision in *Linmark Associates Inc. v. Willingboro*, 431 U.S. 85 (1977), which had held that *Linmark's* interest in maintaining a stable, racially integrated neighborhood was not sufficient to uphold a prohibition of residential "For Sale" signs, the Court in *Ladue* concluded that "[t]he impact on free communication of Ladue's broad sign prohibition, moreover, is manifestly greater than in Linmark." In the Court's view, "... Ladue has almost completely foreclosed a venerable means of communication that is both unique and important. It has totally foreclosed that medium to political, religious or personal messages." *Id*. at 54. Rejecting the City's argument that the Ordinance "is a mere regulation of the time, place, or manner' of speech" because residents possess alternative means of presenting their message, the Court found that "[i]n this case, we are not persuaded that adequate substitutes exist for the important medium of speech that Ladue has closed off." *Id.* at 56.

While *City of Ladue* did not specifically address the constitutionality of a 30 day restriction upon display of political signs, such as is imposed by Summerville's Ordinance, numerous other federal and state courts have followed *Ladue* in concluding that such a temporal Ordinance violates the First Amendment. For example, in *McFadden v. City of Bridgeport, supra*, the District Court addressed the constitutionality of an ordinance which allowed unpermitted political signs only 30 days prior to an election and 48 hours thereafter. The Court concluded that this provision "is content-based since the Ordinance's temporal restrictions apply only to limited categories of signs based on what those signs say ..." and because "the City's asserted interests in regulating temporary and political signs are not compelling." 422 F.Supp.2d at 662. Rejecting the argument that the Ordinance was "content-neutral because its [City's] interests in aesthetics and traffic safety are not related to the content of the temporary [and political] signs," the Court noted that the Town

> provides no evidence that signs carrying political messages and signs relating to specific events give rise to adverse secondary effects that differ in any way from similarly constructed signs carrying messages Bridgeport allows to be permanently displayed. *Political signs and other signs defined as temporary by the City of Bridgeport are regulated differently from other signs based on what they say. Section 1325.07 of Bridgeport's sign ordinance is a content-based regulation of speech.*

422 F.Supp.2d at 674. (emphasis added). Moreover, in the *McFadden* Court's view, the City's asserted interests justifying imposing of the restrictions - aesthetics and traffic safety - were "not compelling, and ... not the least restrictive alternatives available to achieve those interests." Accordingly, the Court concluded that the Ordinance "is an impermissible content-based regulation of speech that facially violates the First Amendment of the Constitution." *Id*. at 675.

Other decisions are in accord. In *City of Painesville Bldg. Dept. v. Dworkin & Berstein*, 733 N.E.2d 1152 (Ohio 2000), the Supreme Court of Ohio found that such a temporal ordinance is unconstitutional, concluding that the ordinance was not a narrowly drawn "time, place and manner provision," but one which could be deemed "to operate to prohibit the display of a political message at the very time it would be most relevant to an issue upon which the citizen wishes to speak." 733 N.E.2d at 1159. The ordinance in question was deemed to prohibit a law firm, as an owner of private property, from posting on its property a single political sign outside the temporal period set by the ordinance. The Court reviewed the case law, stating as follows:

> [a]lthough the Supreme Court has not considered the issue, the overwhelming majority of courts that have reviewed sign ordinances imposing durational limits for temporary political signs tied to a specific election date have found them to be unconstitutional. *Whitton v. Gladstone* (C.A.8, 1995), 54 F.3d 1400 (ordinance deemed unconstitutional which limited placement or erection of political signs to thirty days prior to the election to which the sign pertains until seven days after the election); *Dimas v. Warren* (E.D.Mich.1996), 939 F.Supp. 554 (ordinance deemed unconstitutional which prohibited posting of political yard signs earlier than forty-five days prior to any election, and ordering removal within seven days after); *Orazio v. North Hempstead* (E.D.N.Y.1977), 426 F.Supp. 1144 (holding that no time limit on the display of preelection political signs is permissible under the First Amendment); *Antioch v. Candidates' Outdoor Graphic Serv.* (N.D.Cal.1982), 557 F.Supp. 52 (ordinance deemed unconstitutional which limited display of political signs to the period sixty days before election); *Collier v. Tacoma* (1993), 121 Wash.2d 737, 854 P.2d 1046 (ordinance deemed unconstitutional which limited posting of political signs to the period sixty days prior to election to seven days after, where no time restrictions were imposed on other temporary signs); *Curry v. Prince George's Cty., supra*, 33 F.Supp.2d 447 (ban on political campaign signs posted on private residences for all but forty-five days before and ten days after an election deemed unconstitutional); see, also, *Christensen v. Wheaton* (Feb. 16, 2000), N.D. Ill. No. 99C8426, unreported, 2000 WL 204225 (granting preliminary injunction enjoining enforcement of ordinance the effect of which was to prohibit the display of political signs for more than thirty days); *Knoeffler v. Mamakating* (S.D.N.Y.2000), 87 F.Supp.2d 322, 327 (noting that "durational limits on signs have been repeatedly declared unconstitutional"); *Union City Bd. of Zoning Appeals v.*

> *Justice Outdoor Displays, Inc.* (1996), 266 Ga. 393, 467 S.E.2d 875 (limitation of political signs to six weeks prior to and one week after election deemed unconstitutional); *McCormack v. Clinton Twp.* (D.N.J.1994), 872 F.Supp. 1320 (limitation on political signs to ten days prior to and three days after election deemed unconstitutional). Cf. *Waterloo v. Markham* (1992), 234 Ill.App.3d 744, 175 Ill.Dec. 862, 600 N.E.2d 1320 (ninety-day time limitation for temporary signs not unconstitutional).

733 N.E.2d at 1157. Finding that a speaker's "message is of equal relevance during other times of the year" besides the 30 day period, the Ohio Supreme Court concluded the ordinance was "unnecessarily over-restrictive even as to traditional campaign signs ...." Typically, a traditional election season, observed the Court, was viewed as "starting on Labor Day and continuing to election day in early November – a period of approximately eight to nine weeks." The flaw in the ordinance in question was that the Court concluded that

> ... Section 1135.02 (d) limits the time in which political campaign signs may be displayed to only two and one-half weeks before election day. By its own terms the ordinance would prohibit the posting of a sign reading "Vote for Bush [or Gore]" in front of Bush (or Gore) campaign headquarters, except for the nineteen-day period set by the ordinance, even though campaigns supporting presidential candidates often are organized at the local level for months rather than days or weeks.

Id at 1159. Thus, the Court held the Ordinance "unconstitutional when applied to prohibit the owner of private property from posting on that private property a single sign outside the durational period set by the Ordinance." *Id*. at 1160.[1] Thus, there is a wealth of authority that has concluded that the type of temporal restriction placed upon the placement of political signs, when no such temporal restriction is imposed upon other signs, is content-based, and that there is no compelling interest to justify such a content-based restriction.

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[1] The *Painsville* Court intimated that there might be a constitutional distinction between application of the Ordinance to purely residential property and other property. Ultimately, the Court concluded, however, that *City of Ladue* is applicable to "political signs displayed on privately owned property such as a law office." *Id*. at 1158. In addition, it has been held that an ordinance restricting the display of political signs to residential areas of the town also violates the First Amendment. *Beaulieu v. City of Alabaster*, 338 F.Supp.2d 1268 (N.D.Ala. 2004). *Beaulieu*, however, concluded that the City possessed authority to ban placement of political signs on public property or public rights-of-way, under *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) [Supreme Court upheld a ban on political signs on public property, specifically utility poles].

Conclusion

It is our opinion that the political sign portion of the Summerville Ordinance is constitutionally suspect under the First Amendment. The Ordinance restricts the time in which political signs may be freely displayed (30 days prior to an election) while placing no such time constraints upon other types of signs (e.g. "For Sale") which may be displayed at any time without a permit. While the United States Supreme Court has not specifically addressed the validity of durational restrictions upon political signs, such as are imposed by the Summerville Ordinance, a number of lower federal courts, as well as state courts, have read *City of Ladue, supra* as sufficiently broad to strike down such provisions. These courts have concluded that such temporal restrictions upon political signs, but not upon other types of signs, are content-based, and that the interests served by such restrictions (aesthetics or traffic control) are not compelling interests pursuant to the state or local government's police power. Moreover, these courts conclude that placing time restrictions upon the display of political signs is not the least restrictive alternative available to achieve these interests. As the Ohio Supreme Court concluded in the *Painesville* case, courts have characterized ordinances which impose a time restriction upon when political signs may be displayed "as imposing the equivalent of a year round ban on political signs posting, which is simply temporarily suspended for the prescribed period surrounding an election." 733 N.E.2d at 1158.

While it is our opinion that this restriction in the Ordinance is constitutionally suspect, we reiterate that only a court may declare the ordinance either facially unconstitutional or unconstitutional as applied. And only a court may prevent enforcement of such ordinance. As we reiterate, it is solely within the province of the courts, not this Office, to declare an act or an ordinance constitutionally invalid.

Very truly yours,

Henry D. McMaster
Attorney General

By: Robert D. Cook
Assistant Deputy Attorney General

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