

**Testimony of Professor Alan K. Chen  
In Support of HB21-1310  
House Transportation & Local Government Committee  
May 25, 2021**

My name is Alan Chen, and I am the Thompson G. Marsh Law Alumni Professor at the University of Denver Sturm College of Law. My teaching and scholarship focus on American constitutional law, with a particular expertise in the law of free speech. I have over 30 years of experience not only teaching and writing about the First Amendment, but also engaged in litigation to protect the freedom of expression. I have attached a copy of my current curriculum vitae to this testimony.

I submit this written testimony in support of HB21-1310. This statement is intended to supplement my oral testimony, to be presented at a hearing on May 25, 2021. In my testimony, I would like to share with you a little bit the freedom of speech and why, under both the U.S. and Colorado Constitutions, laws that discriminate against speakers based on their viewpoint or on the content of their speech, are considered to be inherently suspect. Enactment of HB21-1310 will help promote free speech interests in a neutral manner that is healthy for our democracy while still allowing homeowners' associations to engage in content and viewpoint neutral regulations to protect their interests in aesthetics and other concerns.

**III. The First Amendment, Free Speech, and the Flag**

**A. The First Amendment**

The First Amendment to the United States Constitution states that “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. AMEND. I . Although the text refers only to federally enacted laws, the United States Supreme Court has recognized for nearly a

century that the First Amendment's free speech guarantees are also enforceable against all state and local governments. *Gitlow v. New York*, 268 U.S. 652 (1925).

## **B. Purposes of the First Amendment**

The Constitution's free speech guarantee is designed to promote a society in which there is a diversity of viewpoints that make their way into the public discourse, facilitating both a collective advancement of knowledge and thinking (sometimes called the "search for truth") and a better functioning and accountable democracy. The best societal and governmental decisions are more likely to result from a full and unfettered discussion of ideas. Moreover, free speech is viewed as a fundamental aspect of individual autonomy and freedom. No person can truly be free if his or her ideas are controlled or constrained or dictated by others.

In keeping with these values, it is perhaps the United States's grandest and boldest historical and legal tradition that it not only protects speech that disagrees with the government, but embraces it and protects it from interference with a constitutional guarantee. The founders also recognized that one of the foremost devices for constraining individual liberty was giving powerful actors such as the government the authority to dictate orthodox views of important issues. As the Supreme Court has eloquently stated, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

Under well-established Supreme Court precedent, the First Amendment's protections are strongest when there are institutional attempts to discriminate against speech on the basis of the speaker's content. Governmental interference with the topics or subject matter that citizens can

discuss are anathema to the idea of freedom of speech; if the government render some topics “out of bounds” for the purposes of public discourse, it risks interfering with the scope and content of discussion. The most egregious form of content discrimination is viewpoint discrimination, in which the government not only regulates the topics that are open for discussion, but also restricts only speakers on one side of a public debate. Laws that further viewpoint discrimination are immediately suspect because the Supreme Court fears that the enforcer of such discrimination is using its authority to distort the marketplace of ideas, either by favoring its own views or by squelching the views of those who disagree. “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397, 414 (1989). It is totalitarian governments, not democratic ones, that are historically the first to punish those who express themselves through in ways that do not comfortably fit within the accepted government orthodoxy.

In terms of conventional free speech law, distinguishing among the types of flags or signs that can be displayed by a homeowner belonging to an HOA compromises values central to the First Amendment’s protection of expression. First, it effectuates viewpoint discrimination because it allows regulation of homeowners specifically with reference to their views or beliefs. One type of flag may be displayed, but others may not. Thus, what HOA’s may do under the current Colorado statutes is profoundly, and somewhat ironically, un-American. What I mean by this is that restricting the display of all flags that are not American flags effectively restricts homeowners’ ability to express their political viewpoint, thus contradicting a long legacy of tolerance of opposing views and the celebration of freedom symbolized by the flag itself. In fact, speech restrictions do more to destroy a community than to enhance its harmony.

Flags have historically been the subject of great controversy and powerful vehicles for expressing both support for and dissatisfaction with the government. Indeed, the Supreme Court has decided numerous free speech cases in which the display or treatment of a flag is the central issue. *See, e.g., U.S. v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989); *Spence v. Washington*, 418 U.S. 405 (1974); *Smith v. Goguen*, 415 U.S. 566 (1974); *Street v. New York*, 394 U.S. 576 (1969); *Stromberg v. California*, 283 U.S. 359 (1931). Not only do these cases clearly define First Amendment law, but they also uphold the very tradition of individual freedom and pluralistic society that that U.S. flag itself represents. The United States is not, unlike many societies, a totalitarian state that is too weak to tolerate the viewpoints of dissidents, even when those viewpoints are difficult to accept or hear or are even offensive or upsetting.

HB21-1310 addresses the potential speech suppressing powers of HOAs by making it clear that HOAs may not restrict the display of any type of flag on their property, whether it is a Rainbow Flag, flown to support LGBTQ rights and equality, or a Thin Blue Line Flag, exhibited to represent support for the law enforcement officers. Indeed, flags have historically been used as ways to convey individual political beliefs as well as social and sports team affinities. The proposed bill also removes the provision limiting the display of political signs within periods close to elections, and clarifies that HOAs may not prohibit the display of any sign “within the boundaries of the unit or in a window of the unit,” including yard signs. At the same time, the bill would permit HOAs to continue their traditional function of advancing the character of their neighborhoods by imposing content- and viewpoint-neutral regulations (for example, limiting the physical size of flags or signs without regard to their content or the density of their display if there are multiple flags or signs).

I urge you to move this bill forward and strongly support the enactment of HB21-1310, which will enhance the free speech rights of all Colorado residents whose homes are part of an HOA. Thank you.

## **ALAN K. CHEN**

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### **ACADEMIC APPOINTMENT**

#### **THOMPSON G. MARSH LAW ALUMNI PROFESSOR**

**UNIVERSITY OF DENVER STURM COLLEGE OF LAW**, Denver, Colorado

*University Lecturer, University of Denver, 2017-2018*

*William M. Beaney Memorial Research Chair, 2014-2017*

*Associate Dean for Faculty Scholarship, 2008-2014*

*Visiting Research Fellow, Queen Mary & Westfield College, University of London, London, England, on sabbatical leave Fall 1999*

*Courses: Constitutional Law, First Amendment, Federal Courts, Public Interest Lawyering Lab, Social Change Lawyering*

### **OTHER PROFESSIONAL EXPERIENCE**

**STAFF COUNSEL, ROGER BALDWIN FOUNDATION OF ACLU, INC.**, Chicago, Illinois

*Supervised and conducted civil rights and civil liberties litigation in federal and state courts at both trial and appellate level. Emphasis on Fourth Amendment, privacy, and First Amendment litigation (Sept. 1987-June 1992).*

**LAW CLERK, HONORABLE MARVIN E. ASPEN**, Chicago, Illinois

*United States District Court Judge for the Northern District of Illinois (Sept. 1985-August 1987)*

### **EDUCATION**

**STANFORD LAW SCHOOL**, Stanford, California

J.D., 1985

*Hilmer Oehlmann, Jr. Award for Excellence in First Year Legal Research and Writing  
Best Brief, Marion Rice Kirkwood Moot Court Competition*

**CASE WESTERN RESERVE UNIVERSITY**, Cleveland, Ohio

B.A., Political Science, 1982, *summa cum laude*

*Graduation with Honors in Political Science*

*Madge McKinney Award for Excellence in Political Science*

*Mather Alumnae Award for Excellence in Political Science*

## **SCHOLARSHIP**

### ***Books and Book Chapters***

FREE SPEECH AND UNDERCOVER INVESTIGATIONS IN THE TWENTY-FIRST CENTURY (forthcoming Cambridge University Press 2022) (with Justin Marceau)

*Cause Lawyering for the Caged: Invisibility, Moral Suasion, and Disenfranchisement in the Prisoners' Rights and Animal Protection Movements* (with Vikram D. Amar) (forthcoming Cambridge University Press 2021) (book chapter)

FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT (NYU Press 2017) (with Mark V. Tushnet and Joseph Blocher)

LAW, LAWYERING, AND SOCIAL CHANGE (Wolters Kluwer Law & Business 2013) (with Scott L. Cummings)

TEACHER'S MANUAL FOR LAW, LAWYERING, AND SOCIAL CHANGE (Wolters Kluwer Law & Business 2014) (with Scott L. Cummings)

### ***Articles***

*Compelled Speech Doctrine and the Regulatory State*, 97 IND. L.J. \_\_\_\_ (forthcoming 2022)

*Cheap Speech Creation*, 54 U.C. DAVIS L. REV. \_\_\_\_ (forthcoming 2021)

*The Right to Advise Investigations*, 2021 U. ILL. L. REV. \_\_\_\_ (forthcoming 2021) (with Rebecca Aviel)

*Free Speech, Rational Deliberation, and Some Truths About Lies*, 62 WM. & MARY L. REV. 357 (2020)

*The Intractability of Qualified Immunity*, 93 NOTRE DAME L. REV. 1937 (2018)

*Developing a Taxonomy of Lies Under the First Amendment*, 89 U. COLO. L. REV. 655 (2018)

*Free Speech and the Confluence of National Security and Internet Exceptionalism*, 86 FORDHAM L. REV. 379 (2017)

*Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991 (2016) (with Justin Marceau)

*High Value Lies, Ugly Truths, and the First Amendment*, 69 VAND. L. REV. 1435 (2015) (with Justin Marceau)

*Instrumental Music and the First Amendment*, 66 HASTINGS L.J. 381 (2015)

*Rights Lawyer Essentialism and the Next Generation of Rights Critics*, 111 MICH. L. REV. 903 (2013)

*Right Labels, Wrong Categories: Some Comments on Steven D. Smith's, Why is Government Speech Problematic?*, (response to paper presented at the 17th Annual Ira C. Rothgerber, Jr. Conference on Constitutional Law) (DENV. U. L. REV. ONLINE) (2010)

*Rosy Pictures and Renegade Officials: The Slow Death of Monroe v. Pape*, 78 UMKC L. REV. 889 (2010)

*Bureaucracy and Distrust: Germaneness and the Paradoxes of Academic Freedom Doctrine*, 77 U. COLO. L. REV. 955 (2006)

*The Facts About Qualified Immunity*, 55 EMORY L. J. 229 (2006) (reprinted in 22 CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK (Thomson West 2006))

*Forced Patriot Acts*, 81 DENV. U. L. REV. 703 (2004)

*Foreword: Bill Beaney's Continuing Relevance*, 81 DENV. U. L. REV. 217 (2003)

*Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31 (2003)

*Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535 (1999)

*The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1 (1997)

"Meet the New Boss . . . .," 73 DENV. U. L. REV. 1253 (1996)

*The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261 (1995)

*Due Process as Consumer Protection: State Remedies for Distant Forum Abuse*, 20 AKRON L. REV. 9 (1986)

## **OPINION/COMMENTARY**

*Judge Gorsuch and the Role of Public Interest Litigation in Our Democracy*, Dorf on Law, <http://www.dorfonlaw.org/2017/03/judge-gorsuch-and-role-of-public.html> (reposted at ACS

Blog: [https://www.acslaw.org/acsblog/judge-gorsuch-and-the-role-of-public-interest-litigation-in-our-democracy?utm\\_content=buffer9462&utm\\_medium=social&utm\\_source=twitter.com&utm\\_campaign=buffer](https://www.acslaw.org/acsblog/judge-gorsuch-and-the-role-of-public-interest-litigation-in-our-democracy?utm_content=buffer9462&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer))

*Arkansas's Reckless Rush to the Execution Chamber* (with Justin Marceau), *Dorf on Law*, <http://www.dorfonlaw.org/2017/03/arkansas-reckless-rush-to-execution.html> (reposted at NEWSWEEK: <http://www.newsweek.com/why-arkansas-rush-execute-eight-prisoners-567836>)

*Senate Should Not Delay Obama's Supreme Court Nomination*, DENVER POST, <http://www.denverpost.com/2016/02/19/senate-should-not-delay-obamas-supreme-court-nomination/>

*The Continuing Problems with Lethal Injection* (with Justin Marceau), *Huffington Post Blog*, [http://www.huffingtonpost.com/justin-marceau/problems-with-lethal-injection\\_b\\_5626764.html](http://www.huffingtonpost.com/justin-marceau/problems-with-lethal-injection_b_5626764.html)

Promoted Commenter on *United States v. Alvarez* (First Amendment challenge to Stolen Valor Act), SCOTUS Blog, <http://www.scotusblog.com/community/the-stolen-valor-act/#comment-17464>

*Protecting Words That Hurt*, THE NEW YORK TIMES, Room for Debate, <http://www.nytimes.com/roomfordebate/2010/10/06/free-speech-and-picketing-funerals/theperils-of-censorship>

## **OTHER PUBLICATIONS**

*Qualified Immunity Limiting Access to Justice and Impeding Development of the Law*, ABA HUMAN RIGHTS (July 2015)

*Legislation Restricting Access to Indoor Tanning Throughout the World*, ARCHIVES OF DERMATOLOGY Online First (July 2012) (with M. Pawlak, M. Bui, M. Amir, D. Burkhardt, and R. Dellavalle)

*Teens in the UV Tanning Booth? Tax the Tan*, (co-authored with Dellavalle, RP, Schilling, LM, Hester, EJ), ARCHIVES OF PEDIATRIC AND ADOLESCENT MEDICINE 2003, 157: 845-846

*Youth Access Laws: In the Dark at the Tanning Parlor*, (co-authored with Dellavalle, Parker, Cersonsky, Hemme, Burkhardt, and Schilling), 139 ARCHIVES OF DERMATOLOGY 443 (April 2003)

*Liability of Private Firms Performing Public Functions*, TRIAL, Oct. 1999, at 60.  
*Constitutional Law*, in 1997 ANNUAL SURVEY OF COLORADO LAW (1997)

*Burns v. Reed – Narrowing the Prosecutor's Protection From Liability for Unconstitutional Conduct*, 3 POLICE MISCONDUCT AND CIVIL RIGHTS LAW REPORT 121 (1991)

**RECENT ACADEMIC PRESENTATIONS** (all presentations from March 2020 through May 2021 were virtual)

*Compelled Speech Doctrine and the Regulatory State*, Plenary Panel on Compelled Speech, Freedom of Expression Scholars Conference, Yale Law School Information Society Project, April 30, 2021

*Compelled Speech Doctrine and the Regulatory State*, Indiana Law Journal Symposium, Compelled Speech: The Cutting Edge of First Amendment Jurisprudence, March 5, 2021

Discussant, Gregory Magarian, *How Cheap Speech Underserves and Overheats Democracy*, U.C. Davis Law Review Symposium, Cheap Speech Twenty-Five Years Later: Democracy & Public Discourse in the Digital Age, October 30, 2020

Discussant, Brian Soucek, *The Constitutional Irrelevance of Art*, Freedom of Expression Scholars Conference, Yale Law School Information Society Project, October 24, 2020

*Newsgathering in Troubled Times*, Access and Accountability Conference 2020, Yale Law School, October 23, 2020

*Reviewing the Supreme Court's 2019/20 Term: A Panel Discussion*, Colorado Lawyers Chapter of the Federalist Society, Denver, Colorado, August 12, 2020

*Current Issues in Free Speech Before the U.S. Supreme Court*, Constitutional Rights & Remedies Program, February 13, 2020

*Impeachment Through History: High Crimes & Misdemeanors, the Process, & Potential Consequences*, American Constitution Society Western Regional Convening, University of Denver, October 25, 2019

**AWARDS**

University of Denver, University Lecturer Award, 2018

PETA Justice for Animals Award, 2018

Robert B. Yegge Excellence in Teaching Award, 2011

Outstanding Faculty Member, University of Denver Sturm College of Law, 2007-08, awarded by Student Bar Association

Denver University Law Review Faculty Appreciation Award, 2004

Professor of the Year, University of Denver College of Law, 1998-99. Co-recipient selected by students for excellence in law teaching

Colorado Trial Lawyers Association Award for the Outstanding Brief of 1997, *Williams v. City and County of Denver*

American Civil Liberties Union of Colorado, Edward Sherman Award for Outstanding Cooperating Attorney, 1997

## **PROFESSIONAL AFFILIATIONS**

The Journal of Free Speech Law (peer reviewed journal), Editorial Board Member

Association of American Law Schools

AALS Scholarly Papers Committee, 2011-12 (appointed to committee to select winner of the annual scholarly paper competition)

Chair, Civil Rights Section 1998-99

Executive Committee Member, Civil Rights Section (1994-2001) and Federal Courts Section, 2000-2001

Member, Board of Directors and Legal Panel, Civil Rights Education and Enforcement Center

Member, Board of Advisors, American Constitution Society, Colorado Lawyers Chapter

Member, American Civil Liberties Union of Colorado Legal Panel

## **SUPREME COURT AND FEDERAL COURT OF APPEALS LITIGATION (in capacity as legal scholar amicus curiae)**

*Stewart v. City of Euclid*, No. 20-951 (U.S.), Brief of Amici Curiae in Support of Petitioner

*Butler v. Board of County Com'rs for San Miguel County*, No. 19-285 (U.S.), Brief of Amici Curiae First Amendment Scholars in Support of Petitioner

*Walker v. Farnan*, No. 17-53, Brief for Professors of Constitutional Law, Federal Courts, Criminal Procedure, and Criminal Law as Amici Curiae Supporting Petitioner

*People for the Ethical Treatment of Animals, Inc. v. Stein*, 737 Fed.Appx. 122 (4th Cir. 2017), Brief of Professors Alan Chen, Erwin Chemerinsky, Eric Fink, Justin Pidot, John F. Preis, & Alexander A. Reinert As Amici Curiae in Support of Plaintiffs-Appellants

*Hernandez v. Mesa*, No. 15-118, Brief of Eleven Law Professors as Amicus Curiae in Support of Petitioner

*Fields v. City of Philadelphia*, Third Circuit. Brief of First Amendment Law Professors in Support of Plaintiff-Appellant, 862 F.3d 353 (3d. Cir 2017).

*Lane v. Franks*, No. 13-483, Brief of Law Professors as Amicus Curiae in Support of Petitioner

*McCullen v. Coakley*, No. 12-1168, Brief of Eugene Volokh, Richard W. Garnett, Michael Stokes Paulsen, Timothy Zick, William E. Lee, Alan K. Chen, & Ronald J. Krotoszynski, Jr. as Amici Curiae in Support of Petitioners

*Ashcroft v. Al-Kidd*, No. 10-98, Brief of Legal Scholars as Amici Curiae in Support of Respondent

*Snyder v. Phelps*, No. 09-751, Brief of Amici Curiae Scholars of First Amendment Law in Support of Respondent Phelps

### **SELECTED LITIGATION (as legal counsel)**

#### **United States Supreme Court and Federal Courts of Appeals**

*Animal Legal Defense Fund v. Kelly*, 434 F. Supp. 3d 974 (D. Kansas 2020). Successful challenge to Kansas “ag-gag” law as violation of First and Fourteenth Amendments (currently on appeal to the Tenth Circuit).

*Animal Legal Defense Fund v. Reynolds*, 353 F.Supp.3d 812 (S.D. Iowa 2019). Successful challenge to Iowa “ag-gag” law as violation of First and Fourteenth Amendments (currently on appeal to the Eighth Circuit).

*Evans v. Sandy City, et al.*, 2019 WL 4054819 (10th Cir.), Principal author of Brief of Amici Curiae the ACLU Foundation of Colorado, the ACLU of Kansas Foundation, the ACLU of New Mexico Foundation, the ACLU of Oklahoma Foundation, and the ACLU of Utah Foundation in Support of Plaintiff-Appellant's Petition for Rehearing En Banc

*Colorado Independent v. District Court for the Eighteenth Judicial Dist. of Colorado*, No. 18-404 (U.S. 2018), Brief of Scholars of Law and Journalism as Amici Curiae in Support of Petitioner.

*Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018). Successful challenge to Idaho “ag-gag” law as violation of First and Fourteenth Amendments.

*Lockett v. Fallin*, 841 F.3d 1098 (10th Cir. 2016) (argued), *cert. denied* 137 S.Ct. 2298 (2017). Civil rights claim on behalf of inmate challenging lethal injection execution as violation of Eighth Amendment.

*Western Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017). Principal Author of Brief of Amici Curiae First Amendment Legal Scholars in Support of Plaintiffs-Appellants and Supporting Reversal.

*Headwaters Forest Defense v. County of Humboldt*, 240 F.3d 1185 (9th Cir. 2000), *cert. granted, judgment vacated and remanded for reconsideration*, 534 U.S. 801 (2001), *amended opinion reinstating judgment*, 276 F.3d 1125 (9th Cir.), *cert. denied*, 537 U.S. 1000 (2002). Civil rights action against police officers who used pepper spray on peaceful, political protestors as violation of Fourth Amendment.

*Williams v. City and County of Denver*, 99 F.3d 1009 (10th Cir. 1996). Amicus brief for Colorado Trial Lawyers Association in case claiming violations of Due Process Clause by police officer and municipality for death of innocent bystander during officer's high-speed chase.

### **Federal District Courts**

*Animal Legal Defense Fund v. Reynolds*, No. 4:19-cv-124 (S.D. Iowa). Pending challenge to second Iowa "ag-gag" law as violation of First and Fourteenth Amendments.

*Animal Legal Defense Fund v. Herbert*, 263 F.Supp.3d 1193 (D. Utah 2017). Successful challenge to Utah "ag-gag" law as violation of First and Fourteenth Amendments.

*Ketcham v. National Park Service*, 2016 WL 4269037 (D. Wyo.). Challenge to federal agency's denial of public and media access to observe culling of bison as violation of First Amendment.

*Lane v. Owens*, No. 03-B-1544 (PAC) (D. Colo. 2004). Civil rights action on behalf of public school students and teachers in Colorado challenging Colorado law requiring daily recitation of Pledge of Allegiance in all public schools as violation of First Amendment.

### **State Courts**

*Hickenlooper v. Freedom from Religion Foundation, Inc.*, Colorado Supreme Court. Principal author of amicus curiae brief for the American Civil Liberties Union, the ACLU of Colorado, and Americans United for Separation of Church and State before the Colorado Supreme Court. 338 P.2d 1002 (Colo. 2014).

*Churchill v. University of Colorado*, Colorado Supreme Court. Principal author of amicus curiae brief for the American Civil Liberties Union and the ACLU of Colorado before the Colorado Supreme Court. 285 P.3d 986 (Colo. 2012).

## **ADMINISTRATIVE SERVICE**

University Strategic Planning for Research Task Force, Scholarship, 2009-2014.

Higher Learning Commission (HLC) Accreditation Steering Committee, & HLC Acquisition, Discovery, and Application of Knowledge Working Group, 2008-2010.

Associate Provost for Research Search Committee, 2009-10.

Chaired and been a member of all major law school committees (Promotion & Tenure, Appointments, Faculty Executive Committee) on multiple occasions.

## **BAR ADMISSIONS**

Admitted California (1985), Illinois (1988), Colorado (certified pro bono counsel since 2014)

United States Supreme Court, United States Court of Appeals for the Seventh, Ninth, and Tenth Circuits, United States District Court for the Northern District of Illinois, United States District Court for the Northern District of California, United District Court for the District of Colorado

[Last updated 5/21]

Chair Exum and members of the Committee:

Thank you for the opportunity to present written testimony. My name is Scott McElroy. I have resided in Phase II of the North End Residential Master Association (“HOA”) in Louisville for almost 6 years. I strongly support the passage of HB 21-1310. It is clear that without such guidance from the State, homeowner associations will continue to unfairly limit the ability of their members to present their views on matters of importance to them.

Until last fall, the North End HOA was largely managed by the developer with limited participation by two homeowners, one of whom has subsequently made it clear that he is opposed to any signs or flags on the basis of aesthetics and to avoid any controversy. Section 8.11 of the applicable HOA covenants provides that except as specifically provided by law, signs or other displays may not be erected or maintained unless approved by the Board of Directors or the Architectural Review Committee (“ARC”). There are many, many US flags flown in the neighborhood. Similar provisions in the covenants, for example, apply to basketball backboards and many have been built throughout the neighborhood. In contrast, other provisions in the covenants provide absolute prohibitions on such things as parking RVs in the neighborhood.

Last summer following the proliferation of social justice flags and signs in the neighborhood, the developer/HOA manager sent out a general notice that flags and signs were not permitted without prior approval. Before that many signs and flags were displayed, urging traffic to slow down or supporting sports teams or high school graduates and many of those continued to be displayed. Beginning last fall, however, and shortly after control of the HOA Board was fully transferred to the homeowners, the newly retained management company for the HOA sent out individual violations repeating that signs and flags without approval from the ARC were not allowed. I submitted my request for approval of my modest social justice banner which was then denied. The formal letter stated that the covenants had to be amended before my request could be allowed. I also received an email from the Board’s Vice President saying that the Board was denying all such requests on the basis of “previous policies” and in the absence of further community input. I appealed the ARC denial and sought to review any documents related to the decision or the establishment of the previous policies. My appeal is still pending. I have received some documents related to violations but none that relate to the establishment of the so-called previous policy. I have been told that I will have to pay to have someone review the developer’s files to obtain any such information. In the meantime, I have continued to fly my banner and there are other signs for Boulder Strong, supporting high school graduates, or urging drivers to slow down (including some posted by the developer) that continue to be displayed. In the meantime, the Board has attempted to survey the community in an email.

This history – which is probably similarly to that of many other HOAs — shows that HOAs simply are not equipped to deal with issues such as this. Our Board, while perhaps well intentioned, is simply incapable of addressing the issues of signs and flags in a fair way. Indeed, they have been candid that this is not what they thought they were signing up for and one member has expressed the view that it would make life easier if someone would provide a clear answer on the issue. In sum, the Board has proven unable to set up a process that fairly and promptly addresses whatever concerns may exist in the neighborhood. Certainly, the Board’s attempts to address the issues have not been transparent. Moreover, the Board has struggled even to read the language of the covenants and has allowed the discussion to be hijacked by vocal opponents of signs and flags who fear anything that might be deemed “offensive.” In these circumstances, legislative intervention to support the right of homeowners to express their views on matters of importance to them is critical and HB 21-1310 should be enacted. Thank you again for your consideration of my views and this history.

## **Testimony on HB 21-1310 (HOA Regulations)**

Chairperson Exum and distinguished members of the Committee, my name is Stan Gelb, from Longmont, CO. I am a concerned citizen writing on my own behalf **in support** of HB 21-1310.

I have never forgotten that, some years ago, in a Colorado city an HOA had threatened a home-owner with legal action because that home-owner was displaying a peace sign wreath on their house during the December holiday season. You read that correctly: An HOA viewed as objectionable a peace sign wreath on a house at Christmas-time!

After learning about that event, I had ongoing intent to never buy any house that was subject to the rules of any HOA; that bit of Colorado history is so repulsive to me. When my wife and I moved back to Boulder County nine years ago with intent to buy a house here, we largely refused to even look at houses subject to HOAs.

No doubt HOAs will claim that such restrictions on yard signs and flags are for the purpose of protecting property values. This claim is total nonsense. The presence of junk cars or trashed appliances in yards might impact property values. Mere yard signs and flags have zero impact on property values. Attempt to restrict yard signs and flags are direct attacks on the First Amendment rights of residents.

I ask that this Committee stand with the US Constitution. I urge you to vote YES on HB 21-1310.

Stan Gelb

Carolyn Miller  
Frederick M. Miller, M. D.  
340 Jersey Street  
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Members of the House Transportation and Local Government Committee:

Thank you each and all for hearing my addition to testimony today in strong support of HB-1310. I would have testified in person but am in SLC for the week visiting grandchildren whom I have not seen for some time.

I am a homeowner in "Old Crestmoor," the Crestmoor first filing in east Denver. The 95 homes a short distance west of Lowry in my homeowners' association were built in the early 1940s. I have lived in this home since 1980. Our homeowners' association has long forbidden signs of any kind on the lawns of the 95 homes. The HOA has been told in recent years that they must allow election related signs and have modified the rules to allow political signs for some few weeks before elections mandating that they must be removed within days after the election. They have chosen not to enforce "graduation congratulatory" signs for some few weeks surrounding graduations. They have taken no action regarding the many home-security related signs appearing in recent years.

We are remodeling our home and the project will take about four months. We have placed a general contractor's sign (logo and phone number) in the yard and feel that it is essential so that neighbors and police know where to turn should there be complaints, problems, safety issue or an emergency that might arise during times when we are away from home during the construction. Our HOA is demanding with "threat of enforcement" that we remove the one sign saying that only a sign on a perimeter fence would be permissible (Our project is not surrounded by a perimeter fence). Branded signs on the dumpster in our driveway and on the portable potty in the yard are not objectionable.

We feel that the one sign in the yard is an important/essential safety issue and to demand that we remove it is inappropriate and in fact a violation of our right to choose how to reasonably protect our property and to contribute to our personal safety. The threat of selective enforcement is unfair and a violation of our right to free speech. The sign is not an "advertisement" for the contractor. The page sized permit in the window is not visible from the street. There is no harm caused by the sign. It is less "disruptive" to the neighborhood décor and peace than the other construction related items clearly more visible from the street.

We strongly support passage of HB-1310. Thank you again for "hearing" me this afternoon and for the good work you do for us all.

Respectfully,  
Fred Miller

Good afternoon Chairman Exum and members of the House Transportation and Local Government committee,

Thank you for allowing me to have the opportunity to testify before you today. My name is Jaime Heifner and I am here to ask for your support for HB21-1310.

My family and I have been displaying a Betsy Ross flag for over 5 years now and just recently received a violation letter from our HOA stating that it is not an approved flag because it is not the current United States flag and that we needed to take it down until it is approved. We display that flag as a way to celebrate America in her formative years and we are proud of America and what she stands for and want to teach our children to have those same values. Official United States flags are always considered living, active flags so we believe the Betsy Ross flag should also be protected by the Freedom to Display the American Flag Act of 2005, as other US flags are. I believe that because of the recent controversy over the Betsy Ross flag, that is why we have received that violation letter as we were never told to take it down the 5 years prior to this.

Freedom of speech is important to all Americans and not having the right to display any flag or sign on our own properties takes that right away from all of us. I don't believe my HOA should be able to tell me what I can display on my own property.

I urge you to vote in favor of HB 21-1310 so that our First Amendment will continue to protect freedom of speech, whether it's vocally or just by wanting to display a flag or a sign.

Again I thank you for giving us the chance to hear us on this very important matter. Have a good afternoon.

Dear Committee Members,

Monday, May 24, 2021

Thank you for allowing me to testify in support of HB-1310. This is more than just a matter of signage it is a matter of inclusion. We have lived in Ken Caryl Valley for over 27 years. During that time we have made friends with two neighbors. My husband and I are one of about six African American families in our community. When walking my dog in our neighborhood I smile and wave and people turn their heads.

We have started a discussion group on racial equality and social justice. There is a group of 10 that meet monthly, however when announcing the meeting times in Next Door (our community online news source), there are cruel responses like, "what do you do stand around, hold hands and drink Kool-Aid?"

Frequently there are comments in Next Door that reference strangers in the neighborhood and describing them as black or African American and stating they have called the police, even though this person has not done anything. One time it happened to be a white families' daughter's husband. My son comes to visit often from North Carolina, I fear for him simply walking around in the neighborhood he grew up in. This was one of the reasons I posted the Black Lives Matter sign. It was evident to me that my son could be another Trayvon Martin or Elijah Cummings.

The HOA sent letters that the sign must be taken down on three separate occasions. They stated I would be fined \$50 a day and a lien would be put against my house if the sign was not removed. It was also stated the sign could not be posted inside my house in the window.

On Sept 10, 2020 I attended a meeting with the HOA to discuss signage, as this had possible life and death consequences for my family. We were given two minutes to speak, while others could comment during our speaking time. Comments such as, "we don't want a sewer of signs in our community, or BLM is a Marxist Organization, what if swastikas were allowed?" None of which make sense. However we do have signs that say, don't let your dog poop in our yard. Or yard signs that say God Bless America. Poster signs during graduation, Children at play. All of these sign are the rights of neighbors to post, just as Black Lives Matter, should be my right to post.

Another man in the neighborhood was asked to take down a sign that supported his child that has autism. The current policy was revised and just a few words were rearranged. And, of course, they still have the final say on what is posted.

Please let me reiterate this is not to support any political cause. We are more than willing to follow the rules on sign size, sign placement etc. as long as we have the right to post a sign that is very meaningful to us.

Thank you for your willingness to read my letter.

Sincerely,

Deborrah Jackson, RN., MPH

House Transportation & Local Government  
 05/25/2021 01:30 PM  
 HB21-1310 HOA Regulation Of Flags & Signs  
 Typed Text of Testimony Submitted

Name, Position, Representing	Typed Text of Testimony
Marcia Rothschild Moellers For Self	<p>I am very pro this bill. I feel that our homes are an extension of our personalities and who we are, and if we are promoting something positive, and that is in support of a demographic of our population, it's a good thing that it shines throughout our properties. I am pro LGBTQIA+, pro women, pro positivity, eco conscious and pro earth, and I feel that by resonating that energy in my home and on the outside, that it is a positive message to the world. I think it's about what you are pro and not anti in negative or hateful language. We are a democratic society based on individual freedoms, but more importantly in this era, it is essential that we are allowed to express ourselves in a positive manner. People may not agree, but if it's not in a demeaning manner about other's choices, then I think that can only lead to good.</p>
Helen Rigmaiden For Self	<p>Hello Committee Members!</p> <p>My name is Helen Rigmaiden, a Colorado native, in my senior years now. I purchased a condo at Windsor Gardens (WG) in 2017. It's a beautiful retirement community of 3500 seniors. We have hundreds of HOA rules including a sign policy which only allow for certain realtor signs to be placed on Saturdays and Sundays only. Political signs are allowed during elections as prescribed by the HOA.</p> <p>I support HB21-1310 because I feel left out of the larger movements going on around our community. As I drive though the single-family neighborhoods and see all the various signs out supporting Love not Hate and supporting the LGBTX community I feel left out because I'm a condo dweller.</p> <p>The political climate took a turn in 2013 when George Zimmerman was found not guilty of killing Travon Martin. It was a tragedy all across the country and out of it the Black Lives Matter movement started and I jumped in to help the young Black people in my community.</p> <p>Now at age 72 I can't get out and protest with the community, so my BLM sign has been my means of protest.</p> <p>Just because we live in apartments or condos, we should still have the right to display our signs and flags especially now. Things have shifted in America and we need to update lots of different laws that I think are outdated. HB21-1310 is one such law that needs to be enacted as soon as possible.</p> <p>I think I have decided I will display my sign at whatever cost. When people ask about who are these BLM people, I say I am Black Lives Matter. My neighbors, mostly white, in my building support me. Many of them purchased BLM signs to put in their windows here at WG. We had a BLM car rally out here on January 2, 2021 to show support for me and my sign. So many of my WG community were in support. Many neighbors made signs of support and many made BLM posters. A white,</p>

	<p>senior in a wheelchair had a sign on plain paper written with an ink pen that said: Welcome BLM! I didn't realize that so many of my neighbors support our movement. It was beautiful. Their show of support gave me great confidence that I had done the right thing.</p> <p>Thank you for your time. I appreciate that there are many ways citizens such as myself can participate in our State's legislative process. Thank you Representatives Cutter and Rodriguez for sponsoring this bill.</p>
<p>William Palmer USN Retired For Self</p>	<p>My HOA struggles with signage policy.</p> <p>Our covenants: "No advertising sign... except "For Rent" or "For Sale" ... per parcel, ...shall be...on the premises... "Political Signs are allowed 45 days prior to... and must be removed within 15 days after..." Size per the county.</p> <p>A charitable group sought donations for Healthcare workers due to COVID. I donated &amp; posted a yard sign.</p> <p>My sign was not an advertising sign The HOA sent a violation and fine notice.</p> <p>We wrote a survey, asked the Board to email it to the neighbors; they refused.</p> <p>With a new board the topic returned. Community was surveyed. ~40% response. 54% favored some signs, based on content. 30% favored all signs. 16% opposed signs. Though more favored some signs, it's discriminatory. As all but 16% favored some or all signs, allowing all is appropriate.</p> <p>One zealot fights passionately to restrict religious &amp; social issue content. That's freedom restricting discrimination.</p> <ul style="list-style-type: none"> <li>- This bill directly improves freedom &amp; reduces discrimination.</li> <li>- Dictating content is discriminatory.</li> <li>- Dictating content violates the Fair Housing and Civil Rights Acts.</li> <li>- Dictating content is wrong-not the American way. (I spent 23 years in the US Military defending freedom. I pledged to fight to my last breath and was in harm's way.)</li> <li>- HOAs are quasi government entities, even if not legally defined as such, making rules others must follow. They can't stifle free expression or discriminate. I bet my life supporting free expression, despite if I like or don't like what others say.</li> <li>- Colorado is enlightened. Set an example based on country's foundation.</li> <li>- Other states have or are enacting similar laws. Do it right.</li> </ul>

	<p>I 100% support the bill. It reduces discrimination modifying existing law.</p> <p>This is an outstanding Bill.</p>
<p>Judy Kelly Against Self</p>	<p>I have concerns about this bill in our community. This is not going to work well. While it is already extremely difficult to regulate flags and signs, the outright prohibitions on these items written into many covenants help communities avoid political conflicts and value determinations. Community associations are not governments and are not state actors, and HB 1310 blurs the line between the rules a private corporation can impose on its members and the fundamental rights a government cannot infringe upon.</p> <p>Current law includes guardrails that limit public policy exceptions to covenants that prohibit signs and flags to allow the display of the American flag, service flags, political signs in narrowly-defined periods. Community associations must take action against discriminatory activities where such action is within the scope of their powers. This law will prevent compliance with anti-discrimination laws, as an association “shall not prohibit or regulate the display of [flags, window signs, or yard signs] on the basis of their subject matter, message, or content.”</p> <p>It is stressful enough when political signs are allowed for elections. Please vote no.</p> <p>Thank you.</p>
<p>Barbara Vollmer For Self</p>	<p>I placed a sign in my window in my patio home community of 134 homes in Denver when the Colorado law allowed political signs. WE BELIEVE, BLACK LIVES MATTER, NO HUMAN IS ILLEGAL, LOVE IS LOVE, WOMEN’S RIGHTS ARE HUMAN RIGHTS, SCIENCE IS REAL, WATER IS LIFE, AND INJUSTICE ANYWHERE IS A THREAT TO JUSTICE EVRYWHERE.</p> <ol style="list-style-type: none"> <li>1. The HOA president emailed me to remove the sign because the HOA did not allow Social Justice Signs.</li> <li>2. I replaced WE BELIEVE with “Elect Biden and Harris because”. The HOA president emailed me again to remove the sign. He emailed that I had posted a political sign. and planned to check with lawyers to find out if I was complying with Colorado law.</li> <li>3. 2 HOA board members called. I was told             <ul style="list-style-type: none"> <li>• I would be fined and the amount would be increased if the sign remained up.</li> <li>• I could be barred from voting at the homeowners’ meetings.</li> </ul> </li> </ol>

	<p>Another explained that when she moved to our development, she was aware that she would need to comply with the HOA rules.</p> <p>4. I kept the sign in my window. The HOA set a letter to remove the sign in one week.</p> <p>I contacted my Colorado legislators and received a helpful call from Senator Rodriguez’s Legislative Aide who was knowledgeable and able to refer me to the ACLU lawyers who also were helpful. When asked, he referred me to the ACLU who were also helpful. I told her I was willing to be a part of legal action.</p> <p>I continued to keep the sign up for the time allowed by Colorado laws for political signs. I anxiously checked my mail daily but I did not receive any additional correspondence from the HOA.</p> <p>My reasons for placing a sign:</p> <ul style="list-style-type: none"> <li>• As COVID had prevented me from participating in social justice demonstrations, I wanted to add my voice with a sign when I was able to do so before the elections.</li> <li>• My next-door neighbors who have adopted two black children. Unfortunately the children have been asked by some why they were walking in our complex.</li> <li>• I wanted to signal support to the many workers of color who are employed by the association and by my neighbors.</li> <li>• Another neighbor, was told to remove a sign similar to mine it by the HOA last summer. in September she presented a petition signed by several neighbors to our HOA to allow social justice signage. The HOA board voted to form a committee to consider her request and modify the HOA bylaws. The committee has yet to be formed.</li> </ul> <p>Thank you for your support of our constitutional free speech.</p>
<p>Jeffrey Feierstein For Self</p>	<p>I never really give much thought to my rights under the first amendment. As sacred and as imperative that right is to our democracy, I never believed any organization could simply strip those rights away because they "disagree" with the content of a sign, or flag, or because the phrase "Black Lives Matters" is uncomfortable. Unfortunately, that is the exact problem happening in communities across our state; especially in Kensington Ridge/Cobblestone Village in Littleton. I have seen an HOA intentionally deceive, disguise and rig rules to discriminate against a family that simply wants to fly a flag stating "Black Lives Matter"; which they do. And support a worthy and positive cause.</p> <p>This singling out of a family has led to confrontation, not discussion. Anger, not understanding. All because they support a cause that many just simply haven’t been educated about. No different than hanging a cross on your door, a star of David in your window, or a Broncos flag in your front yard; no HOA, or organization should ever have the power to suppress a human's right to express their beliefs, or support a cause so important to them. The ability to express those beliefs is exactly what leads to discussion, educated dialogue and a respect between neighbors and a community.</p>

	<p>Esteemed and respected members of this committee, passing BH 21 10 13 will promote inclusivity, promote community, and keep HOAs from regulating and restricting the voices and opinions of the people who call those communities home. The power should not rest in the HOA, but in the in the people and in our constitution, and in our right to continue to proudly express our support for Black Lives Matter. Thank you for your time and consideration.</p>
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