

# APPEALS COURT RULES THAT TOWN'S BAN ON UNION'S INFLATABLE RAT DID NOT VIOLATE THE FIRST AMENDMENT

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A United States Circuit Court of Appeals has ruled that a Wisconsin Town did not violate the First Amendment rights of a labor union by ordering it to take down an inflatable rat from a median. Although the union claimed that the Town was discriminating against its message, the court sided with the Town, which argued that the rat was removed for traffic safety reasons.

## Background:

When Local 330 of the Construction and General Laborers' Union found out that a masonry company performing services at a local Toyota dealership in the Town of Grand Chute, Wisconsin would not be paying area standard wages and benefits, it decided to stage an information picket close to the dealership site. Exercising its First Amendment rights, Union members installed "Scabby the Rat" (an inflatable balloon recognized for both his symbolic meaning as well as his size), in a median directly across from the dealership, along the frontage road for a major local thoroughfare.

After two days of being inflated, the Town's Code Enforcement Officer told the Local's president that Scabby would need to be deflated because it violated the Town's sign ordinance. The Union deflated Scabby and filed a lawsuit in district court. Local 330 claimed that because the ordinance distinguished among signs on the basis of content (that is, that the Town was discriminating against the message that Scabby was trying to convey), the Union's First Amendment rights were violated.

Litigation ensued, during which time the Town passed a new sign ordinance in 2015. Having lost at the district court level, the Union appealed to the Seventh Circuit Court of Appeals, arguing that past enforcement of the 2014 ordinance and the potential future enforcement of the 2015 sign ordinance amount to violations of the its First Amendment rights. The Union claimed that the sign ordinance did not place any limits on the Code Enforcement Officer's discretionary authority and that the Town engaged in selective enforcement of the ordinance.

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### Past enforcement of the 2014 sign ordinance:

While acknowledging that "...there is no doubt that a union's use of Scabby to protest employer practices is a form of expression protected by the First Amendment," the Appellate Court agreed with the district court that the town's sign ordinance was "comprehensive and content-neutral." The sign ordinance banned anything on the public right of way that could obstruct vision or distract motorists. In addition, the Union had sufficient alternative means of conveying its message. Enforcement by the Code Enforcement Officer (based upon the facts presented) was systematic and not selective.

### Potential enforcement of the 2015 sign ordinance:

Noting the key differences that exist between the 2014 and the 2015 versions of the sign ordinance and the potential questions that they raise, the Court concluded that "... the district court should not have addressed the 2015 Ordinance at all. The Union's allegations about protests it *might* have conducted are too speculative to create a concrete dispute."

### Takeaway

While local governments are prohibited from banning signs based on their content, they have every right to regulate and restrict signs based on their size, location, and other physical features that could pose a risk to public safety or affect the character of the community. In other words, although a town cannot ban large inflatable rats (which convey a particular message involving non-unionized workers), a town can ban all large inflatable signs, or prohibit the use of such signs in certain locations, like public right-of-ways, which pose traffic safety risks.

If you have any questions about this case or any other First Amendment law issue, please contact any of our attorneys in this practice. If you received this alert from a third party or from visiting our website, and would like to be added to our Media Law & First Amendment mailing lists or any other of our mailing lists, please visit us at: <https://forms.hodgsonruss.net/sign-up-for-email-and-other-communications..html>