



INSTITUTE FOR JUSTICE

November 14, 2022

**VIA E-MAIL AND USPS**

Town of Conway, New Hampshire  
John Eastman, Town Manager  
David Pandora, Building Inspector/Code Enforcement Officer  
23 Main Street  
Conway, NH 03818

*Re: Leavitt's Country Bakery Wall Painting*

Dear Mr. Eastman and Mr. Pandora:

I write regarding Leavitt's Country Bakery at 564 White Mountain Highway, where local students painted a mural featuring a whimsical landscape with various pastries as mountains. From news coverage and minutes from the Zoning Board of Adjustment, the Institute for Justice has learned that Conway has told Leavitt's that its mural is an illegal sign that must be removed, simply because Leavitt's happens to sell pastries. As explained below, this discrimination against Leavitt's mural violates the First Amendment under U.S. Supreme Court precedent. I therefore request that you allow Leavitt's to keep its mural in its current form.

I am a constitutional attorney at the Institute for Justice, a national nonprofit organization that fights on behalf of those whose rights are threatened by the government. One of the rights that IJ protects is the First Amendment right of individuals and businesses to freely communicate through murals and signs. For over twenty years, IJ has successfully brought suit against sign code restrictions that violate our clients' rights to free speech, including in the U.S. Courts of Appeal for the Fourth,<sup>1</sup> Sixth,<sup>2</sup> Eighth,<sup>3</sup> and Ninth Circuits.<sup>4</sup> We also work with cities to amend their sign codes in order to forestall litigation.<sup>5</sup>

Conway's Zoning Code defines "sign" broadly: "[a]ny device, fixture, placard, structure or attachment thereto that uses color, form, graphic, illumination, symbol, or writing to advertise, announce the purpose of, or identify the purpose of any person or entity, or to communicate information of any kind to the public, whether commercial or noncommercial." Taking this definition on its face, Conway's code would treat all paintings, no matter what they depict, as "signs" that are subject to the size and place restrictions detailed in the Town's Zoning Code at § 190-20.F.

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<sup>1</sup> *Cent. Radio Co., Inc. v. City of Norfolk*, 811 F.3d 625 (4th Cir. 2016).

<sup>2</sup> *Pagan v. Fruchey*, 492 F.3d 766 (6th Cir. 2007).

<sup>3</sup> *Neighborhood Enters., Inc. v. City of St. Louis*, 644 F.3d 728 (8th Cir. 2011).

<sup>4</sup> *Ballen v. City of Redmond*, 466 F.3d 736 (9th Cir. 2006).

<sup>5</sup> *See, e.g., Fears v. City of Sacramento*, Civ. No. 2:13-cv-01667 (E.D. Cal. Aug. 29, 2013).

But it appears that the Town of Conway does *not* consider all paintings in town to be signs. It appears that, in practice, the Town allows—and indeed celebrates—paintings that communicate information of *some* kind. The beautiful paintings at Settlers Green, for instance, communicate information that Conway is a great place to be, with text that says “Welcome to North Conway.” The Zoning Board’s members consider the Settlers Green paintings to be murals that are free from the size and place constraints placed on signs in § 190-20.F. (See the September 21, 2022 Zoning Board of Adjustment meeting minutes at page 4.)

Despite Conway’s apparent support of murals, Conway has treated Leavitt’s painting as a “sign” simply because Leavitt’s is a bakery and its painting depicts mountains made of donuts and pastries. As Conway Zoning Board member Mr. Chalmers put it at the September 21, 2022 Zoning Board meeting, if a painting is “showing what is inside [a] building,” it is a sign subject to restrictions under the zoning ordinance. (See page 5 of the minutes.) As a “sign,” Leavitt’s painting receives worse treatment by Conway than other paintings in Conway, simply because of its content. In this way, the Town of Conway seems to be discriminating against what it perceives as commercial speech; this is unfortunately not surprising given the Town’s explicit disfavoring of commercial speech, as expressed at § 190-20.F.(1) of the Zoning Code’s sign regulations.

Conway’s discrimination against wall paintings based entirely on content is unconstitutional under U.S. Supreme Court precedent, including *Reed v. Town of Gilbert, Arizona*, 576 U.S. 155 (2015). In *Reed* the Supreme Court specifically addressed sign codes, and the Court made clear that municipalities cannot treat signs and other displays differently based upon their content. And here, it is clear that Conway is imposing greater restrictions on certain paintings simply because it believes what those paintings depict is related to what is sold inside. This is flatly unconstitutional under *Reed*. See also *Complete Angler, LLC v. City of Clearwater*, 607 F.Supp.2d 1326 (M.D. Fla. 2009) (striking down restrictions on business mural); *XXL of Ohio, Inc. v. City of Broadview Heights*, 341 F. Supp. 2d 765, 792 (N.D. Ohio 2003)(same).

Nor can Conway constitutionally discriminate against Leavitt’s painting simply because Conway deems it to be commercial speech. In *IMS Health v. Sorrell*, 564 U.S. 552 (2011), the U.S. Supreme Court struck down a Vermont statute that forbade commercial use of certain doctor prescribing information, while allowing various other noncommercial uses. In so doing, the Court made clear that governments may not discriminate against commercial speech simply because it is commercial. And here, Leavitt’s painting of donut mountains does not implicate the Town’s safety and aesthetic interests to any greater extent than the Settlers Green and other murals around Conway. After all, Leavitt’s painting is not unsightly or distracting, nor can it be considered “excessive or unnecessary signage along road corridors,” as detailed in § 190-20.F.(1). Indeed, the painting is small in comparison to other murals in town, does not face a roadway but rather a side parking lot, and is aesthetically pleasing and harmonious with the rest of the Leavitt’s Country Bakery building.

Given all this, Conway should not fear running afoul of the law by allowing Leavitt’s to retain its painting. As written and as enforced, the Town’s sign code provisions are themselves unlawful. Accordingly, Conway should abate all enforcement of its sign code until such time as it can be amended and reformed, as that is what the law under the Constitution requires. And as mentioned

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above, the Institute for Justice has extensive experience working with localities to ensure that their sign codes fully pass constitutional muster.

The Institute for Justice therefore calls on Conway officials to let Leavitt's keep its attractive and well-loved wall painting and to amend the Conway sign code to allow all murals, regardless of content. This won't just help the Town align with the First Amendment of the U.S. Constitution and avoid the possibility of embroiling the Town in litigation. It will also be a benefit because, just like the other murals in town, the Leavitt's mural will be a delight to the citizens of Conway for years to come—especially to the Conway youth who created it.

I would be happy to discuss this with you further. I can be reached at 703-682-9320 or [rfrommer@ij.org](mailto:rfrommer@ij.org) if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to be 'R. Frommer', with a long horizontal flourish extending to the right.

Robert Frommer  
*Senior Attorney*