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Mayor & City Council
Marion City Hall
1225 6th Avenue
Marion, IA 52302

Copy: Donald C. Hoskins
City Attorney
Marion City Hall
1225 6th Avenue
Marion, IA 52302

January 17, 2017

Re: City of Marion’s Unconstitutional Demonstration/Speech Permitting Ordinance

Dear Honorable Mayor and City Council Members, and Mr. Hoskins:

I am writing on behalf of Rick Stewart, a concerned citizen who contacted the ACLU of Iowa after he was prevented from standing and displaying political signs in a public median in Marion, Iowa. On the early evening of September 23, 2016, Mr. Stewart was holding a sign in support of presidential candidate Gary Johnson while standing on a median containing a pedestrian crosswalk located at the center of 7th Avenue in Marion, Iowa leading to the corner of the city square park. We have included some Google Earth images of the location with this letter. At around 6:25 p.m., Mr. Stewart was approached by Sergeant Holland of the Marion City Police Department. Sgt. Holland presented Mr. Stewart with a copy of Marion City Code section 42.08, titled “Parades, Marches, Walks, and Demonstrations.”

Sgt. Holland told Mr. Stewart that he could not continue his political demonstration until he obtained a permit in accordance with section 42.08. Mr. Stewart asked if he could continue to display his sign if he moved his demonstration away from the median to the sidewalk along the roads. Sgt. Holland told Mr. Stewart that he simply could not display any political sign without a permit. Mr. Stewart respectfully discontinued his demonstration to avoid a confrontation with Sgt. Holland or risk a legal citation.

Mr. Stewart informed the City of Marion of the incident by e-mail and received a reply from then-Acting Police Chief, Lieutenant Scott Elam. In his September 29, 2016 e-mail response, Acting Chief Elam correctly stated that the government may impose reasonable time, place, and manner restrictions on speech. However, in crafting its regulations the government must take care to conform to constitutional requirements. The relevant portion of the City Code reads:

It is unlawful for any parade, demonstration, march or rally of any kind or nature to be held upon the public street, sidewalk or public ground unless a permit is first obtained. The application for permit shall be filed with the Clerk and shall contain

a description of the proposed activities, their duration and location within the City. If a parade or march is contemplated, then the route shall be shown in detail. The correct name of the sponsoring organization shall be set out in the application along with the name and address of all officers and directors or owners or partners, depending upon the type of legal organization. The application must be filed within the city not less than seventy-two (72) hours before the proposed activity.

Marion, Iowa, Municipal Code § 42.08(1). This ordinance flatly prohibits constitutionally protected speech that takes place in a traditional public forum—the city street or sidewalk¹—unless a permit is not obtained seventy-two (72) hours in advance. Section 42.08 is a facially unconstitutional prior restraint on free speech in a public forum and as-applied, it is also a content-based restriction on his core political speech, in violation of the First Amendment to the United States Constitution and article 1, section 7 of the Iowa Constitution.

As applied to Mr. Stewart, Sgt. Holland’s statement that he was barred from holding any political sign without a permit on public sidewalks was a content-based restriction that cannot be justified under *Reed v. Town of Gilbert*.² On sidewalks, which are traditional public fora, and where pedestrians are allowed to freely come and go, any permit requirement that would otherwise prohibit political speech when the speaker is not obstructing other pedestrians or interfering with traffic is definitely unduly burdensome under the First Amendment. We live in a free society, and the City cannot single out the speech of those with political messages or any other type of speech because some would find it offensive or disagree.³ A person’s speech, otherwise allowed in a traditional public forum such as a public sidewalk, cannot be restricted merely because it is political or he uses a sign to express it. Simply put, the city may not create ban political speech without

¹ “Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and . . . for the purposes of assembly, communicating thoughts between citizens and discussing public questions.” *Hague v. CIO*, 307 U.S. 496, 515 (1939).

² 135 S.Ct. 2218, 2227 (2015). In *Reed*, the Supreme Court explained that regulation of speech that “draws distinctions based on the message a speaker conveys” is content-based, and thus can only survive if it meets the high hurdle of strict scrutiny. There, the Court held that an ordinance distinguishing between temporary directional signs and other types of signs was content-based. The ordinance did not survive strict scrutiny, because the city could not show how differentiating between temporary directional signs and other types of signs furthered a compelling government interest or was narrowly tailored to the reasons the city had for restricting signs.

In the Eighth Circuit, see also *Rogers v. Bryant*, 4:16 *Rodgers v. Bryant*, recently invalidating Arkansas’s anti-loitering/anti-panhandling law, Ark. Code Ann. § 5-71-213(a) (3), which outlawed the act of asking for money, food or other charity any time and any place, including in public fora. A written order from the Court is available at <http://www.acluarkansas.org/contentitemdocuments/373.pdf>.

³ *McCullen v. Coakley*, 134 S.Ct. 2518, 2529 (2014).

a permit on public sidewalks or median crosswalks where pedestrians are entitled to be.

In traditional public fora, regulations on speech are subject to strict scrutiny and must be narrowly tailored to achieve a compelling government interest.⁴ A prior restraint is a government regulation which requires a speaker to acquire a permit or license before speaking.⁵ Prior restraints bear “a heavy presumption against [their] constitutional validity.”⁶ While cities may impose permitting requirements on those wishing to hold a march, parade, or rally in the form of valid time, place, and manner restrictions,⁷ such schemes must meet certain constitutional requirements.⁸ A constitutional licensing scheme will not delegate overbroad discretion to the licensing officer, decisions to grant permits will not be based on the content of the message being communicated by the applicant-demonstrators, the regulation will be narrowly tailored to serve a significant government interest, and the regulation will leave open ample alternatives for communication.⁹

Mr. Stewart does not contend that Marion has delegated overbroad discretion to its licensing official, or that the ordinance is content-based on its face. He does contend, however, that the ordinance is not narrowly tailored to serve a significant government interest and that it fails to leave open ample alternatives for communication. What’s more, law enforcement’s application of that ordinance to him such as to bar his holding a sign expressing political speech in the absence that he was obstructing passersby or traffic was an unconstitutional infringement of his First Amendment free speech rights under *Reed*.

In *Douglas v. Brownell*, a group of demonstrators challenged the constitutionality of a residential parade permit ordinance enacted by the city of Clive, Iowa, which required demonstrators to obtain a permit five days in advance of a demonstration.¹⁰ In *Douglas*, the court noted that “Timing is of the essence in politics . . . [W]hen an event occurs, it is often necessary

⁴ *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

⁵ *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (noting that an “ordinance requiring a permit and a fee before authorizing public speaking, parades, or assemblies in ‘the archetype of a traditional public forum,’ is a prior restraint on speech.”)

⁶ *Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980).

⁷ See *Cox v. New Hampshire*, 312 U.S. 569, 574–576 (1941).

⁸ *Forsyth Co.*, 505 U.S. at 130.

⁹ *United States v. Grace*, 461 U.S. 171, 177 (1983); *Frisby*, 487 U.S. at 481.

¹⁰ *Douglas v. Brownell*, 88 F.3d 1511, 1514, 1523 (8th Cir. 1996).

to have one's voice heard promptly, if it is to be considered at all."¹¹ The parade ordinance required demonstrators to obtain a written permit from the Chief of Police at least five days in advance of the planned parade.¹² The City argued that it had limited resources and a small police force.¹³ The demonstrators responded that the ordinance lacked narrow tailoring.¹⁴ For small groups, such as theirs, a permit requirement was simply not justified—such a small group was not a significant safety risk, and police officers are often dispatched on short notice in other situations, regardless of limited resources.¹⁵ The Eighth Circuit agreed with the demonstrators, noting that for small groups, concerns regarding the disruption of use of the public sidewalks and streets are minimal.

Like the ordinance in *Douglas*, Marion's ordinance lacks narrow tailoring. First, a seventy-two hour notice requirement is unnecessary to achieve a compelling government interest, and "restricts a substantial amount of speech" than necessary.¹⁶ Further, applying the permit requirements of section 42.08 to such small groups of persons (in that case, three or more) is not necessary to protect any compelling government interests.¹⁷ As such, proper review of the regulation of Mr. Stewart's speech in this case is subject to strict scrutiny, and wholly prohibiting speakers from engaging in protected speech in traditional public fora, such as sidewalks, cannot pass constitutional muster.

The First Amendment to the U.S. Constitution and article 1, section 7 of the Iowa Constitution protect our rights to freedom of speech and association. If we were to pursue litigation, we believe the court would strike section 42.08(1) as unconstitutional in violation of these constitutional protections on its face, and find that as applied, law enforcement violated Mr. Stewart's right to engage in political speech in speech in traditional public fora.

As such, we demand that the City of Marion immediately cease enforcement of section 42.08(1) of the Marion Municipal Code, and within thirty days, enact the following amendments

¹¹ *Id.* (citing *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 163 (1969)).

¹² *Douglas*, 88 F.3d at 1523.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*; see also *Grossman v. City of Portland*, 33 F.3d 1200 (9th Cir. 1994) (noting that city ordinances that had participant requirements of at least 50 people "appear much more narrowly tailored"); *NAACP v. City of Richmond*, 743 F.2d 1346 (9th Cir. 1984); *Rosen v. Port of Portland*, 641 F.2d 1243, 1248 n.8 (9th Cir. 1981) (stating that "even a 24-hour notice requirement was not narrowly tailored for regulating small groups").

¹⁶ *Douglas*, 88 F.3d at 1523–24.

¹⁷ *Id.* at 1524.

to said section:

1. Define “parade, demonstration, or rally of any kind” to include only groups of fifty or more persons, and no less. Permits may never be required from groups of any size when they do not burden pedestrian or vehicle traffic.
2. Eliminate the seventy-two hour prior notice requirement in its entirety. In addition, any permitting deadlines must include exceptions for spontaneous protests or demonstrations.

Mr. Stewart is considering litigation if the City fails to comply with these requests. Please respond by Friday, January 20, 2017 stating the City has immediately ceased enforcement of section 42.08(1), and stating the City’s intention to amend the Ordinance in accordance with this request.

We look forward to hearing from you and working constructively with you to reform Marion’s parade, demonstration, march, and rally permitting ordinance.

Please contact me by email at rita.bettis@aclu-ia.org or by phone at (515) 207-0567 with any questions you may have.

Very truly yours,



Rita Bettis, *Legal Director*

Enclosure: Google Earth images of the incident location.