

February 26, 2009

Merlin Mowrey, President of Village Council

Kevin Cornish, Village Manager

Village of Clinton

119 East Michigan Ave

Clinton, Michigan 49236

(517) 456-6350 (fax)

VIA FIRST CLASS MAIL AND FACSIMILE

Re: Constitutionally Protected Political Speech in Clinton

Dear Mr. Mowrey and Mr. Cornish:

The American Civil Liberties of Michigan represents Gershom Avery, who was arrested by Clinton police officers and charged with a crime for seeking petition signatures during the 2007 Clinton Fall Festival. The general provisions of the municipal permit ordinance that have been interpreted to criminalize the act of seeking petition signatures in the village without a permit are unconstitutional, as is the special provision that governs the permit process during the Fall Festival. In a free society, a citizen need not ask permission from the government to speak out or petition on a public sidewalk about matters of public interest. Nor can the government authorize a private entity to effectively prohibit all forms of political speech throughout the entire village. As set forth below, we urge you to amend or repeal the unconstitutional portions of the municipal permit ordinance so that Mr. Avery and others will not be denied their fundamental constitutional rights in the future.

The Village of Clinton's Municipal Permit Ordinance

The Village of Clinton's municipal permit ordinance currently empowers the police to require "any person seen soliciting, canvassing, peddling or conducting transient trades to produce a permit that authorizes such activities." *See* Sec. 11-64 of the ordinance, which is attached in its entirety as Exhibit A. The police chief is generally responsible for overseeing the permit process, and can deny an application for any number of discretionary, subjective reasons such as any activity that he deems to be "contrary to the health, morals, safety or welfare of the public." *See* Sec. 11-67.

During the Fall Festival, the permit process becomes even more arbitrary. All previously issued permits become ineffective during this weekend. *See* Sec. 11-54. Instead, individuals must apply to the Clinton Fall Festival Organization, which, in turn, recommends to the Village of Clinton a list of organizations and individuals who should receive a permit for the duration of that year's Fall Festival. *See* Sec 11-56. Notably, the Fall Festival Organization's authority to recommend or reject permit requests extends beyond the Fall Festival's grounds to cover all of Clinton. In other words, no person can solicit or canvass anywhere in the village during the Fall Festival without the Fall Festival Organization's permission. There are no enumerated standards to guide the Fall Festival Organization's recommendations and the Village of Clinton does not appear to retain any discretion to deviate from the list that the Fall Festival Organization provides.

Mr. Avery's Experience at Clinton Fall Festival

Mr. Avery is a political activist who has worked with various non-profit organizations to advocate for social change. In the fall of 2007, he worked with the Michigan Coalition for Compassionate Care to collect signatures to place the Medical Marijuana ballot proposal on the November 2008 ballot. After receiving positive feedback from some local businessmen, he decided to attend the Fall Festival to petition for signatures.

On Friday, September 28, 2007, Mr. Avery obtained approximately sixty signatures over the course of a few hours at the Fall Festival. He returned to Clinton early the next afternoon and was quickly approached by a police officer who ordered him to stop soliciting. Mr. Avery explained that he was not soliciting for business but rather petitioning for political signatures and emphasized that there was a significant constitutional difference between the two activities. The officer told him that he was still "going to enforce the ordinance," and issued Mr. Avery a ticket for violating the municipal permit ordinance.

Mr. Avery then attempted to move outside of Clinton's limits so that he could continue petitioning. Crossing the river, Mr. Avery stood on the far side of a "Welcome to Clinton" sign. Nevertheless, an officer soon stopped him and explained that Mr. Avery needed to travel more than a mile farther to be outside of Clinton's limits. The officer then informed Mr. Avery that he either needed to obey the municipal permit ordinance and stop petitioning or go to jail. Mr. Avery knew the officer was acting outside of his responsibility and viewed this as an opportunity to stand up for his rights. Unwilling to waive his constitutional right to engage in protected speech, Mr. Avery was arrested and held for \$200 bond. The clipboard containing the signatures that Mr. Avery had collected was placed in a heat sealed bag. It was later returned to him after he posted bond.

On Sunday, September 30, 2007, Mr. Avery approached the United Church of Christ in Clinton to enlist aid from Pastor Tom Uphouse. Although he simply came to speak with the Pastor, several officers quickly arrived at the scene. They explained that they had received complaints that Mr. Avery was seeking signatures and informed him that they could take him to jail immediately. Mr. Avery showed the officers that his clipboard was still contained in the heat sealed bag to prove that he had not been canvassing for signatures. Nevertheless, the officers informed him that they would arrest him on the spot if he asked for the Pastor's signature.

Ultimately, Mr. Avery was allowed to speak to the Pastor only after he had placed the sealed clipboard in his car.

The prosecutor quickly moved to drop the criminal charges for Mr. Avery's violation of the municipal permit ordinance. The motion was granted in the interest of justice and the charges were dropped.

Constitutional Protection for Petitioning on Public Sidewalks and Streets

The Supreme Court has made clear that the solicitation of signatures for a petition is constitutionally protected speech because it involves interactive communication concerning political change. *See Meyer v. Grant*, 486 U.S. 414, 421-22 & n.5 (1988); *see also Toledo Area AFL-CIO Council v. Pizza*, 153 F.3d 307, 316-17 (6th Cir. 1998) (describing the circulation of a petition for a ballot initiative as "core political speech"). When the government burdens an individual's right to engage in such political speech within traditional public forums such as the streets and sidewalks, "it faces a 'well nigh insurmountable obstacle' to justify it." *Citizens for Tax Reform v. Deters*, 518 F.3d 375, 378 (6th Cir. 2008). To overcome this hurdle, the regulation must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest and must leave open ample alternatives for communication. *See United States v. Grace*, 461 U.S. 171, 177 (1983).¹

A regulation that restrains speech before it occurs, such as a permitting system, bears an additional "heavy presumption against its constitutional validity." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). The Supreme Court routinely rejects permitting schemes because they represent such a "dramatic departure from our national heritage and constitutional tradition," and are "offensive not only to the values protected by the First Amendment, but to the very notion of a free society." *Watchtower Bible and Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 166 (2002). This presumption of unconstitutionality is even greater when the government applies its permit requirements to regulate the speech of an individual citizen rather than a large group. *See American-Arab Anti-Discrimination Committee v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005).

It is quite possible that the drafters of the municipal permit ordinance did not intend to regulate individuals like Mr. Avery. On its face, the ordinance is internally inconsistent with respect to whether a permit is required to engage in *political*, rather than commercial, speech. On the one hand, the ordinance only requires that "peddler[s], solicitor[s] or transient trader[s]" obtain a permit. Sec. 11-54. As defined by the ordinance, this list refers to "any individual . . . taking or attempting to sell or tak[ing] order[s] for sale of goods." Sec. 11-51. Obviously, petitioning for signatures does not fall within this definition. Nevertheless, the ordinance goes on to require "solicitors, canvassers, peddlers and transient traders" to exhibit their permits, and to authorize "any police officer of the village to require any person seen soliciting, canvassing, peddling or conducting transient trades . . . to produce [their] permit." Sec. 11-63, 11-64 (emphasis added). The term "canvass" is never defined within the ordinance. Unfortunately, this ambiguity has provided the opportunity for constitutionally problematic interpretations. Mr. Avery's experience illustrates that Clinton police officers and the Fall Festival Organization can,

¹ Content-based regulations must meet the stricter "compelling interest" test. *Id.*

and do, use the ordinance to regulate political speech within public forums. Below, we outline the numerous constitutional problems with such an application.

As it is Currently Written, the General Permit Requirements of the Ordinance can be Interpreted to Authorize Unconstitutional Applications

Political activists do not need a permit to petition for signatures in a public forum

As noted above, the ambiguous municipal permit ordinance can be read to require an individual to obtain a permit before he can engage in constitutionally protected speech such as the collection of signatures for a ballot initiative. “A requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment.” *Thomas v. Collins*, 323 U.S. 516, 539-40 (1945). Whereas requiring a permit in order to engage in commercial solicitation may not offend the First Amendment, the government generally cannot place this type of prior restraint on the ability to engage in political speech. The Supreme Court has already invalidated an ordinance that required individuals to obtain a permit to engage in door-to-door religious proselytizing. *See generally Watchtower*, 536 U.S. 150. If the government cannot impose a prior restraint on an individual’s right to engage in protected speech on the doorstep of another’s private home, than the Village of Clinton clearly cannot place a similar restraint on an individual’s right to engage in protected speech on its streets and sidewalks, which have “immemorially been held in trust for the use of the public.” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

The police chief cannot have unbridled discretion to determine who is granted a permit

The Supreme Court has affirmed the use of permitting systems to regulate parades and rallies. As an initial matter, individuals who are seeking petition signatures plainly do not fall within this exception to the general prohibition on prior restraints. Moreover, even within this narrow exception the government’s power is strictly circumscribed, as such ordinances still must provide “narrow, objective and definite standard to guide the licensing authority.” *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). The municipal permit ordinance gives the police chief the power to deny a permit based on numerous subjective assessments, including a determination that the activity is “contrary to the health, morals, safety or welfare of the public.” Sec. 11-67. The Supreme Court specifically has held that “a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission . . . according to their own opinions regarding potential effect of the activity in question on the ‘welfare,’ ‘decency,’ or ‘morals,’ of the community.” *Shuttlesworth*, 394 U.S. at 153. Accordingly, even as applied to parades and rallies, the municipal permit ordinance violates the Constitution because it fails to provide adequate guidance for the decision-maker.

As Applied by the Fall Festival Organization and Clinton Police Officers, the Special Permit Requirements for the Fall Festival are Unconstitutional

In a limited number of circumstances, private organizations that hold special events on public property are authorized to regulate speech within the confines of the event. The special permit provision that applies during the Fall Festival does not fall into this narrow group of exceptions.

To begin, the Supreme Court has never authorized a private organization to regulate speech beyond the property used for the special event, let alone throughout an entire municipality. There is absolutely no justification for allowing the Fall Festival Organization to regulate speech that occurs throughout the Village of Clinton during the Fall Festival weekend. This authorization plainly violates the Constitution.

The system established to regulate speech within the Fall Festival grounds is also constitutionally objectionable. On its face, the municipal permit ordinance allows the Fall Festival Organization to determine who will receive a permit without any defined standards to guide its decisions. All of the constitutional concerns with respect to systems of prior restraints that were described above are only heightened in such a situation where a private actor is vested with entirely subjective control. Moreover, it is notable that in practice the Fall Festival Organization appears to use to its authority not simply to place a prior restraint on political speech, but to prohibit such speech altogether. The Fall Festival website proclaims, “it is our policy to have NO political people in any of our festival events.”² This strongly suggests that the Fall Festival Organization will not provide permits to any individual who wishes to engage in political speech, which effectively bans political speech throughout the duration of the Fall Festival. As discussed below, this blanket prohibition is unconstitutional because it is not narrowly tailored to serve a significant government interest.

A blanket prohibition of political speech does not serve a significant government interest

The Village of Clinton does not have a constitutionally-cognizable significant interest in prohibiting political speech during the Fall Festival. Although Clinton has an interest in protecting public safety, there is no indication that petitioning for signatures would or did threaten public order during the Fall Festival. Private organizations have been allowed to regulate speech while hosting parades and partisan political rallies. Because these groups were engaged in activities that were specifically designed to “mak[e] a collective point,” the courts determined that there was a significant government interest in protecting the private organizations’ First Amendment right to retain autonomy over the content of its own message. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995); *Sistrunk v. City of Strongsville*, 99 F.3d 194, 199 (6th Cir. 1996); *see also Parks v. City of Columbus*, 395 F.3d 643, 651 (6th Cir. 2005). Critically, however, this narrow exception does not apply here. The Fall Festival is not designed to “make a collective point,” but rather to provide an “array of Arts and Crafts” and family entertainment.³ “This is not an expressive message, but

² <http://www.clintonfallfestival.com/Frequently%20asked%20questions.htm>.

³ <http://www.clintonfallfestival.com/>.

merely a purpose for the event,” which does not justify censorship of petitioners such as Mr. Avery. *Parks*, 395 F.3d at 651.

A blanket prohibition of political speech is not narrowly tailored

Even if petitioning for signatures during the Fall Festival threatens a significant government interest, the overly broad authority granted to the Fall Festival Organization is not narrowly tailored to serve this interest. Neither public safety nor the desire to retain autonomy over any alleged expressive message requires the complete prohibition of political speech throughout the entire Village of Clinton during the Fall Festival.

There is no reason to extend the Fall Festival Organization’s authority beyond the Fall Festival’s grounds. Petitioning for signatures on the other side of Clinton could not impede the traffic flow in, or disrupt any expressive message communicated by, the Fall Festival. Within the Fall Festival grounds, there is no public-safety justification for requiring individuals to obtain a permit in order to “mingle with the crowd and orally propagate” their political views.” *Heffron*, 452 U.S. at 655; *see also id.* at 643-44 (affirming the constitutionality of an ordinance in part because it did “not prevent organizational representatives from walking about the fairgrounds and communicating the organization’s views with fair patrons in face-to-face discussions”). Any potential traffic and safety concerns raised by the distribution of materials could be more narrowly addressed either by allocating booths on a first-come-first-serve basis and allowing groups to distribute political materials from their booths, or by setting aside an area where political literature could be distributed. *See e.g., Heffron v. Int’l Society for Krishna Consciousness*, 452 U.S. 640 (1981); *Hynes v. Metropolitan Government of Nashville & Davidson County*, 667 F.2d 549 (6th Cir. 1982) ; *Spingola v. Village of Granville*, No. 00-3957, 2002 WL 1491874 (6th Cir. July 11, 2002) (unpub. op.). These alternatives would not interfere with any alleged expressive message of the Fall Festival. Indeed, there is little chance that the public would view petitioning activities as endorsed by the Fall Festival Organization, and to the extent that such a concern exists, the Fall Festival Organization could easily disclaim such activities with a sign or through some other simple mechanism. *Dietrich*, 2008 WL 5049741 at *6.

Request to Revise Ordinance

“[T]he Supreme Court has held that the First Amendment places a high value on the right to engage freely ‘in discussion concerning the need for [political] change,’ including change accomplished through petitions and elections.” *Deters*, 517 F.3d at 379 (alteration in original). We ask that you revise the municipal permit ordinance to comport with the constitutional requirements described above.

The easiest way to revise the general provisions of the municipal permit ordinance is to make clear that the permit requirement only applies to commercial solicitation and does not apply to those who engage in political speech. We recommend that you remove the term “canvassing” from the ordinance and replace the term “soliciting” with “commercial solicitation.” We also recommend that you simultaneously educate local police officers about this revision to ensure that it is applied in practice as well.

The special provision that applies during the Fall Festival also requires several changes. The Fall Festival Organization's authority should not extend outside of the Fall Festival grounds. Thus, individuals should be allowed to petition for signatures beyond the Fall Festival grounds at will. Additionally, individuals should be allowed to discuss their political views throughout the Fall Festival, and should be able to petition for signatures and distribute their literature either at booths that are assigned on a first-come-first-serve basis or within a specially designated section of the Fall Festival grounds.

If the Village of Clinton agrees to amend the ordinance, we would like to work with you to settle the matter of damages suffered by Mr. Avery for his unlawful arrest. It is our desire to resolve this matter amicably without the need for litigation and our main goal is to address the unconstitutional ordinance.

We had hoped to send this letter directly to each member of the Village Council so that they could be alerted to our concerns, but we were informed that we needed to file a FOIA request to obtain their names. Because we were not asking for their personal addresses, we are unclear why such a request is necessary. Nevertheless, in the interest of time, we have decided not to file such a request and instead have included six additional copies of this letter. We would appreciate it if you would distribute these letters to the unnamed council members.

We look forward to your response.

Very truly yours,

Jessie J. Rossman, Staff Attorney
Michael J. Steinberg, Legal Director
American Civil Liberties Union of Michigan
2966 Woodward Avenue
Detroit, MI 48201
(313) 578 – 6800
jrossman@aclumich.org
msteinberg@aclumich.org

cc: Village Council Members (6)

Phillip Erickson, Village Attorney

Gershom Avery