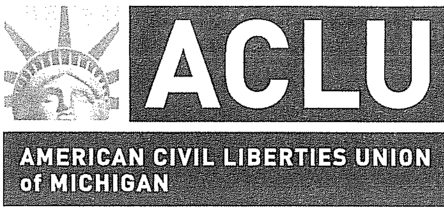

American Civil Liberties Union

American Civil Liberties Union Fund of Michigan

State Headquarters
2966 Woodward Avenue
Detroit, MI 48201-3035
Phone 313.578.6800
Fax 313.578.6811
E-mail: aclu@aclumich.org
www.aclumich.org

Legislative Office
P.O. Box 18022
Lansing, MI 48901-8022
Phone 517.372.8503
Fax 517.372.5121
E-mail: lansing@aclumich.org
www.aclumich.org

August 17, 2010

Shea Charles, City Manager
City of Howell
611 East Grand River
Howell, Michigan 48843
citymanager@cityofhowell.org
(517) 546-6030 (fax)

VIA EMAIL, FACSIMILE
AND FIRST CLASS MAIL

Re: Howell's Noise Control Ordinance Unconstitutionally Prohibits Protected Speech

Dear Mr. Charles:

The American Civil Liberties Union of Michigan represents Mr. Joseph Flanders, a lifelong Howell resident and musician. This spring, Mr. Flanders decided to share his music with the residents of Howell outside of Dairy Queen. Mr. Flanders had obtained the explicit permission of the owner of the store, and by all accounts the customers uniformly enjoyed his performances. Nevertheless, in early June the Howell police ordered Mr. Flanders to stop performing, informing him that he was violating the noise ordinance and needed a permit. When Mr. Flanders attempted to obtain a permit, however, he was notified by the City Manager that he would not be able to do so. The ACLU has since confirmed with multiple city officials that there is no method through which an individual can obtain a permit to perform music on the streets of Howell.

There is no question that the City has violated Mr. Flanders' constitutional rights and will continue to do so as long as he is prohibited from playing music in public. The City's lack of a permit process coupled with its noise ordinance effectively imposes a complete ban on musical performances. The United States Supreme Court has explicitly held that the Constitution prohibits such censorship because "[m]usic, as a form of expression and communication, is protected under the First Amendment." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). We urge you to repeal the unconstitutional portions of the noise ordinance so that Mr. Flanders and others will not be denied their fundamental constitutional rights in the future. We also urge you to provide assurances that Mr. Flanders will not be punished for exercising his First Amendment right to play music on the sidewalk.

Mr. Flanders' Experience

After graduating from Howell High School and working for many years as a tool and die maker, Mr. Flanders was forced to go onto disability due to complications from pneumonia. Since that time, sharing his music with others has been an important source of enjoyment for him. This spring, Mr. Flanders approached the owner of Dairy Queen, Mr. Bobby Chuba, to ask if he could play his instruments outside of the shop in the evening to entertain the customers who

Kary L. Moss, Esq. | Executive Director **Ralph Simpson, Esq.** | President **Mark Granzotto, Esq.** | General Counsel

were waiting in line. Mr. Chuba's unequivocal response was "absolutely." For nearly three months, Mr. Flanders performed at Dairy Queen approximately twice a week.

The customer feedback that Mr. Flanders and Mr. Chuba received was uniformly positive. Moreover, Mr. Flanders did not use any amplification and Mr. Chuba confirmed that the cars on the street create more noise than Mr. Flanders. Nevertheless, on June 9, two police officers ordered Mr. Flanders to end his performance, warning him that he was breaking the Howell noise ordinance. In relevant part, the Ordinance reads as follows:

> Each of the following acts is hereby declared to be unlawful and is prohibited . . .
>
> Radios and Musical Instruments: **The playing of any** television set, radio, phonograph or any **musical instrument** in such a manner or with such volume, particularly during the hours between 11:00 p.m. and 7:00 a.m. of the following day, or at any time or place **so as to annoy or disturb** the quiet, comfort or repose of persons in any office or in any dwelling, hotel or other type of residence, or of **any person in the vicinity**;
>
> Shouting and Whistling: Yelling, shouting, hooting, whistling or **singing** or the making of any loud noise on the public streets between the hours of 11:00 p.m. and 7:00 a.m. of the following day, **or the making of any such noise at any time so as to annoy or disturb** the quiet, comfort or repose of persons in any office or in any dwelling, hotel or other type of residence, or of **any person in the vicinity**.
>
> Howell Code, Sec. 652.06(b)(2) and (3) (emphasis added).
>
> ********
>
> None of the [noise restrictions described above] shall apply to or be enforced against . . . .
>
> Christmas Music and Chimes by Permit: The use of stationary amplifiers or loudspeakers by any person for the transmission of Christmas music and chimes when authorized by a permit issued upon the authority of the City Council; all permits so issued shall specify the hours and dates upon which the use of any amplifier or loudspeaker is authorized, and the use thereof shall be limited to the times specified in the permit.
>
> Howell Code, Sec. 652.06(c)(4).

In order to avoid any problems, Mr. Flanders immediately stopped playing and went home. Within a week, he went to apply for a permit, believing that this would allow him to continue to perform without further interruption by the police. He was told that it was impossible to obtain a permit and that he could not play music.

Mr. Flanders' instruments have been silenced for the past two months. This, in turn, has caused an outpouring of support from the Howell community. Numerous residents have expressed their concerns and called upon the City to reconsider its position, emphasizing that "the city is wrong," and "is treading on constitutional rights." Leah Boyd, *Changing His Tune,*

Music Man Will Fight City Rules, LivingstonDaily.com, June 17, 2010.[1] One resident has gone so far as to offer to pay Mr. Flanders' fines if he wants to continue playing on the street. Leah Boyd, *Street Musician: I'll Play by the City's Rules*, LivingstonDaily.com, June 15, 2010.[2]

Constitutional Protection for Musical Performances on Public Sidewalks

The Supreme Court has made clear that "music is one of the oldest forms of human expression," and as such, it must be afforded constitutional protections under the First Amendment. *Ward*, 491 U.S. at 791; *see also Horton v. City of St. Augustine*, 272 F.3d 1318 (11th Cir. 2001); *Davenport v City of Alexandria, Va*, 710 F2d 148 (4th Cir.1983); *Lionhart v. Foster*, 100 F. Supp. 2d 383 (E.D. La. 1999). When the government burdens an individual's right to engage in such protected 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).

In order to overcome this hurdle, the government must demonstrate that a content-based regulation is the *least* restrictive means of achieving a *compelling* government interest. *Reno v. ACLU,* 521 U.S. 844, 874 (1997). Even if an ordinance is content neutral, the government may impose only reasonable time, place and manner regulations that are 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). Under this standard, a regulation that prohibits sound levels in public places that are not demonstrably disruptive is unconstitutional. *See Lionhart*, 100 F.Supp.2d at 387. After all, as noted by the courts, "there is probably no more appropriate place for reasonably amplified speech than the streets and sidewalks of a downtown business district." *Reeves v. McConn*, 631 F.2d 377, 384 (5th Cir. 1980).

Finally, under the Fourteenth Amendment's void-for-vagueness doctrine, the government must define an offense with sufficient definiteness to provide notice to ordinary people of the prohibited conduct and to establish minimal guidelines to govern law enforcement. *Kolender v. Lawson,* 461 U.S. 352, 358 (1983).

As demonstrated below, the Howell ordinance is unconstitutional for three reasons. First, it is a content-based restriction on speech because it bans all music on sidewalks except for Christmas music. Second, even if it were a content neutral ordinance, a ban on playing music on sidewalks is not a reasonable, time, place and matter regulation. Finally, the ban on "annoying"

---

[1] News Archive, https://secure.pqarchiver.com/livingstondaily/access/2061230681.html?FMT=FT&FMTS=ABS:FT&date=Jun+17%2C+2010&author=Leah+Boyd&pub=Livingston+County+Daily+Press+%26+Argus&edition=&startpage=n%2Fa&desc=Changing+his+tune%2C+music+man+will+fight+city+rules+(with+video) (last visited August 12, 2010).

[2] News Archive, https://secure.pqarchiver.com/livingstondaily/access/2059252441.html?FMT=FT&FMTS=ABS:FT&date=Jun+15%2C+2010&author=Leah+Boyd&pub=Livingston+County+Daily+Press+%26+Argus&edition=&startpage=n%2Fa&desc=Street+musician%3A+I%27ll+play+by+city%27s+rules (last visited August 12, 2010).

and "disturbing" music is void for vagueness because it does not provide sufficient notice of what music is banned and it encourages arbitrary and discriminatory enforcement.

City of Howell's Noise Ordinance is Unconstitutional Because it is Not a Reasonable Time, Place and Manner Regulation, it is Not Narrowly Tailored to Serve a Significant Governmental Interest, and it Does Not Leave Open Ample Alternatives

Even if the City has a significant governmental interest in imposing some type of noise ordinance, the Howell ordinance is so broad that does not satisfy any of the requirements of the constitutional test described above. Indeed, courts throughout the country have overturned ordinances that are significantly more narrow than the one at issue here. *See, e.g., Davenport v. City of Alexandria, Virginia,* 748 F.2d 208 (4th Cir.1984); *Reeves v. McConn,* 631 F.2d 377 (5th Cir. 1980); *Lionhart v Foster,* 100 F.Supp.2d 383 (E.D. La. 1999); *Friedrich v City of Chicago,* 619 FSupp 1129 (ND Ill 1985); *Goldstein v. Town of Nantucket,* 477 F.Supp. 606 (1979); *State .v O'Daniels,* 911 So.2d 247 (Fla. Dist. Ct. App. 2005).

As it is currently written, the ordinance prohibits noise throughout the entire city, every day of the year, at all times of the day and at any level of volume that might "annoy or disturb" any person in the vicinity. Given the breadth of this language, the ordinance essentially operates as a complete ban of musical performances throughout the entire City. Courts routinely treat such complete bans with disfavor because they typically extend beyond any reasonable governmental interest to prohibit completely innocent behavior. *See, e.g., Ward*, 491 U.S. at 799 n.7 (noting that a complete ban on handbilling would be unconstitutional); *O'Daniels*, 911 So.2d at 253 (holding that a complete on street performance throughout the city with the exception of eleven locations was unconstitutional). Howell's ordinance poses this exact problem. Under its broad language, children playing hide and go seek, a woman whistling to her dog or an elderly man listening to a radio broadcast of a baseball game at a loud volume, could all be fined.

Mr. Flanders' own experience reflects the unreasonableness of Howell's regulations. The Supreme Court has made clear that it is the nature of a place and the pattern of its normal activities that dictates the extent to which the government may reasonably regulate speech in that location. *Grayned v. City of Rockford,* 408 U.S. 104, 116 (1972). "The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Id.* Here, there is simply no question that Mr. Flanders' unamplified musical performances are completely compatible with the normal activity that occurs outside of an ice cream store throughout the summer. According to the owner of the store, even the cars going down the street make more noise than Mr. Flanders. Thus, because the ordinance burdens substantially more speech than is necessary to further any legitimate government interest, it is unconstitutional and should be amended to comport with the First Amendment.

City of Howell's Noise Ordinance is Unconstitutional Because it is Not Content Neutral

A second reason that the noise ordinance is unconstitutional is that it is a content-based regulation due to the language within its "Exceptions" section. Under this clause, only non-Christmas music is subject to the "annoying" standard described above. Moreover, as indicated by Mr. Flanders' experience, individuals who wish to play non-Christmas music are unable to obtain a permit to do so, whereas this clause clearly indicates that such a process exists for those

who wish to play Christmas music. As per the explicit language of the noise ordinance, the reason for this differential treatment is content-based – Christmas related music receives better treatment, non-Christmas related music receives worst treatment. This is the very definition of content-based regulation.

Ordinances that are not content neutral are subject to the stringent "strict scrutiny" test, under which the government must demonstrate that the regulation is the *least* restrictive means of achieving a *compelling* government interest. *Reno v. ACLU,* 521 U.S. 844, 874 (1997). As described above, the ordinance fails to overcome the reasonableness test for content neutral regulations. It therefore automatically fails the more restrictive strict scrutiny test.

City of Howell's Noise Ordinance is Void for Vagueness

Finally, the City's noise ordinance also violates the Fourteenth Amendment's prohibition against vague laws. In order to comply with the Due Process clause of the Constitution, the government must sufficiently define an offense so that it both (1) provides a person of ordinary intelligence with fair notice of the behavior that it prohibits, and (2) does not encourage arbitrary and discriminatory enforcement. *Kolender*, 461 U.S. at 357-361; *Grayned*, 408 U.S. at 108. Regulations that fail to satisfy this standard "violate the principle that the law give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." *Lionhart,* 100 F.Supp.2d at 389.

Here, the noise ordinance bans noises that "annoy or disturb the quiet, comfort or repose of persons" in the area. The Supreme Court has already struck down a regulation with nearly identical language. *See Coates v. City of Cincinnati*, 402 U.S. 611 (1971). In *Coates,* the Court analyzed a law that made it a crime for three or more individuals to assemble on public sidewalks and conduct themselves in a manner that was annoying to persons passing by or occupying adjacent buildings. 402 US 612 n1. Holding that the law was void for vagueness, the Court explained

> conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.

Id. at 614. The Court went on to emphasize that "such a prohibition, in addition, contains an obvious invitation to discriminatory enforcement against those who association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens." *Id.* at 616-616. In the decades that have followed, federal and state courts have continued to overturn noise regulations that contain similarly vague language.[3]

---

[3] *See, e.g., Fratiello v. Mancuso*, 653 F.Supp. 775, 790 (D. RI. 1987) (ordinance that prohibited "unnecessary noises or sounds which are physically annoying" was unconstitutionally vague because it did not provide clear notice of what was prohibited); *Tanner v. City of Virginia Beach,* 277 Va. 432, 440 (2009) (ordinance that prohibit "any noise of such character, intensity and duration ... to disturb or annoy the quiet, comfort or repose of reasonable persons" was unconstitutionally vague because it did not contain "ascertainable standards); *Thelen v. State*,

Howell's noise ordinance raises the same concerns that animated the Court's decision in *Coates* nearly forty years ago. Individuals such as Mr. Flanders have no way of knowing what type of noises will "annoy" other persons in the vicinity, and thus are forced to guess at the behavior that is prohibited by the ordinance. Moreover, the subjective standard invites the suppression of unpopular ideas, as persons may be "annoyed" not only by the volume of music but also by the message or subject matter of the music itself. *Coates*, 402 US at 615-616. For example, a Spartans fan may be annoyed by hearing "Hail to the Victors" regardless of the volume at which it is played. And yet, our Constitution makes clear that "public discourse may not be prohibited simply because it may be deemed unnecessary [] or annoying to the listener." *Fratiello*, 653 F.Supp. at 791 (citing *Cohen v. California*, 403 U.S. 15 (1971)). Howell's noise ordinance is unconstitutional because its vague standard allows for this exact form of censorship to occur.

Request to Repeal Ordinance

The courts have consistently protected musical performances in recognition of the fact that governments have sought to limit this fundamental form of expression for centuries due to its impressive persuasive power. *Ward*, 491 U.S. at 790. Unfortunately, as it is currently written, Howell's noise ordinance erroneously carries on this legacy of unlawful censorship. In enforcing this ordinance, the City has violated Mr. Flanders' constitutional rights, prevented him from pursuing his passion for musical performance and denied the residents of Howell the pleasure of enjoying his talents. Performing a musical piece on the street has a different expressive purpose than doing so in an indoor venue – it provides a form of communication between the artist and the public that is not possible in enclosed spaces and reaches people who might not choose to go to a more established venue. *Bery v. City of New York*, 97 F.3d 689, 698 (2nd Cir. 1996). Under the First and Fourteenth Amendments, the sidewalks of Howell must be available for Mr. Flanders to reach his public audience. *Id.* We therefore urge you to repeal the offending sections of Howell's noise ordinance cited above and provide assurance to Mr. Flanders that he will be able to perform in front of Dairy Queen without further interference from the police.

Please call us so we can resolve Mr. Flanders' situation as soon as possible. The denial of First Amendment rights, even for a short period, constitutes "irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), and he has been denied his right to play his guitar outside the Dairy Queen for over eight weeks. As always, it is our desire to address this issue amicably without the need for litigation.

---

272 GA. 81, 82 (2000) (ordinance that prohibited "any loud, unnecessary or unusual sound or noise, which either annoys, disturbs, injures or endangers, the comfort, repose, health, peace or safety" of others was unconstitutionally vague because "the adjectives 'unnecessary' and 'unusual' modifying the noun 'noises' are inherently vague and elastic and require men of common intelligence to guess at their meaning" and "the same may be said of the verb annoys"); *Nichols v. City of Gulfport*, 589 So.2d 1280. 1282-1283 (Miss. 1991) (same).

Very truly yours,

Jessie J. Rossman, Staff Attorney
Michael J. Steinberg, Legal Director
Alexandrea Anderson-Tuttle, Legal Intern
American Civil Liberties Union of Michigan
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6823