



September 25, 2013

*Sent via U.S. Mail and Facsimile*

David H. Williams, City Law Director  
City of Defiance  
Municipal Building  
324 Perry St.  
Defiance, OH. 43512  
Fax: (419) 782-3223

AMERICAN CIVIL  
LIBERTIES UNION  
OF OHIO FOUNDATION  
4506 CHESTER AVENUE  
CLEVELAND, OH 44103-3621  
T/216.472.2220  
F/216.472.2210  
WWW.ACLUOHIO.ORG  
contact@acluohio.org



RE: Occupy Defiance Sidewalk Chalk Speech

Dear Mr. Williams,

It has come to the attention of the American Civil Liberties Union of Ohio Foundation that the City of Defiance has prohibited citizens from expressing political messages on public sidewalks through the use of sidewalk chalk. We were informed that on the night of October 26, 2012, several members of the group Occupy Defiance gathered downtown to write messages in chalk on public sidewalks. However, the Defiance Police ordered them to stop and told them that it was illegal to write on the sidewalks with chalk.<sup>1</sup>

We are deeply concerned with the city's position on this issue, as its prohibition of this type of activity violates the First Amendment of the United States Constitution. Moreover, we received a copy of your legal opinion on this issue which states that both Defiance Ordinances 905.05 and 1337.04(a) prohibit writing political messages on city sidewalks with water soluble chalk. Your memorandum is very troubling for several reasons.

First, you claim that Defiance Ordinance 905.05 prohibits Occupy Defiance's activities. Claiming that this ordinance prohibits writing on a sidewalk with chalk heavily depends on overly-broad and overreaching interpretations of the definitions of "painting," "disfigure," and "deface." It is also inappropriate to apply this ordinance to the use of sidewalk chalk because it is clear that Defiance

---

<sup>1</sup> Jacob Gallman, *The Sidewalk Chalk Incident* (Nov. 26, 2012), <http://defiancecitizensforchange.org/2012/11/26/the-chalk-walk-incident/>.

Ordinance 905.05 was not enacted to prevent this type of activity. We are bewildered as to how you concluded that writing on a sidewalk in water soluble chalk is prohibited by an ordinance that was enacted to prevent the city's sidewalks from becoming damaged or disfigured.

Second, you assert that Defiance Ordinance 1337.04(a) also prohibits writing on city sidewalks with water soluble chalk. Defiance Ordinance 1337.04(a) exists under the "Building and Housing Code." The purpose of the Ordinance is laid out in 1337.01, which states, "The purpose of this chapter is to promote public health, safety and welfare by establishing reasonable regulations governing the size, character, location and structural integrity of signs and other advertising structures." This purpose is wholly inconsistent with the activity of writing political messages on a sidewalk with temporary chalk. We do not believe that this constitutes any activity proscribed by Defiance Ordinance 1337.04(a).

Third, no matter which ordinance you may believe Occupy defied, prohibiting them from writing on the sidewalk with extremely temporary, water soluble chalk under either of these Ordinances violates the First Amendment. Indeed, it is a content-based restriction of political speech for which the city lacks a compelling governmental interest.

Public sidewalks are a traditional public forum.<sup>2</sup> They have been "held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."<sup>3</sup> While the freedom to speak on public streets and sidewalks is a fundamental right protected by the First Amendment, it may be subject to reasonable time, place, and manner restrictions.<sup>4</sup> Those restrictions must be narrowly tailored to serve a compelling government interest, must leave open alternative channels of communication, and must not be content based.<sup>5</sup>

The City of Defiance has engaged in at least two instances of content-based speech discrimination, which makes strict scrutiny the proper standard of review. First, Officer Williamson's police report elucidated the city's intent to proscribe and prosecute political speech. His report stated, "I was told that if it was political that they would have to stop." Second, a short time after city officers prohibited Occupy members from using chalk on the sidewalk, the *Defiance Crescent News* featured an image of children drawing on a public sidewalk with chalk. Jacob Gallman, one of the members of Occupy Defiance, asked at a city council meeting why the children were not prohibited from using chalk on the

---

<sup>2</sup> *U.S. v. Grace*, 461 U.S. 171 (1983), *Saieg v. City of Dearborn*, 641 F.3d 727 (6<sup>th</sup> Cir. 2011).

<sup>3</sup> *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

<sup>4</sup> *Id.* at 515-16.

<sup>5</sup> *U.S. v. Grace*, 461 U.S. 171, 177 (1983).

sidewalk but Occupy members were. In your memo to city council, you answered his question by stating that:

[t]he children were not engaged in the same conduct and, in fact, do not appear to have violated Codified Ordinance §905.05. The Ordinance does not forbid the use of chalk on sidewalks. I[t] forbids defacing or disfiguring those walks by painting “names”, “words” or “advertisements” on them. Occupy Defiance marked the walks with words. As depicted in the *Defiance Crescent News* photograph, the children did not. They drew colorful pictures. Mr. Gallmann and his associates violated the ordinance. The children did not.<sup>6</sup>

This reasoning is blatant content-based discrimination; it is acceptable for the children to draw colorful pictures on the sidewalks, but not acceptable for the members of Occupy Defiance to write political messages on the sidewalk.

Further, in your memorandum, you claim that “the [c]ity has a legitimate governmental interest in maintaining the appearance of public rights-of-way,”<sup>7</sup> and put forth four reasons as to why it is necessary to prevent Occupy Defiance from chalking city sidewalks. Your reasoning, however, is flawed.

The City of Defiance does not have a compelling interest in protecting sidewalks from evanescent sidewalk chalk. A government may have a compelling interest in protecting sidewalks from permanent disfigurement (to save tax dollars, protect the safety and convenience of public sidewalk users, etc.). However, extremely temporary, water soluble sidewalk chalk does not make a sidewalk unusable or hinder other people’s use of the sidewalk. It does not cause permanent, long-term, or even short-term damage that must be tended to or repaired.

Further, you state that rights-of-way cluttered by private signs threaten the safety of vehicular and pedestrian traffic by drawing attention away from traffic control devices. Ohio courts have held that promoting aesthetics and traffic safety are not compelling enough interests to justify content-based restrictions on speech.<sup>8</sup> Moreover, it is difficult to see how words written on a sidewalk in chalk are truly distracting to drivers or pedestrians.

---

<sup>6</sup> City Law Director David H. Williams, *Requested Opinion—Occupy Defiance/Sidewalk Chalk*, May, 2013

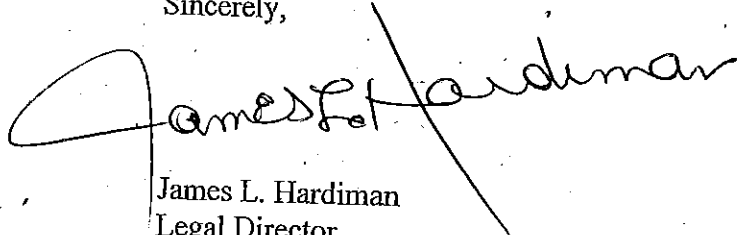
<sup>7</sup> City Law Director David H. Williams, *Requested Opinion—Occupy Defiance/Sidewalk Chalk*, page 7, May, 2013

<sup>8</sup> *City of Tipp City v. Dakin*, 929 N.E.2d 484 (Ohio App. 2d. Dist. 2010), *XXL of Ohio, Inc. v. Broadview Hts.*, 341 F.Supp.2d 765 (N.D. Ohio 2004) (stating, “while the sign ordinance, as a whole, is intended to promote aesthetics and traffic safety, these are not compelling enough interests to justify Tipp City’s content-based permit exemptions.”).

Similarly, you stated that the city could prohibit writing in chalk on sidewalks in order to protect economic development, lighten the burden on adjacent property owners and protect property values. Courts have generally held that none of these is a compelling enough government interest to restrict speech on the basis of content.<sup>9</sup> Ultimately, these arguments hold no real weight as it is extremely unlikely that economic development, the burden on adjacent property owners, or property values would be affected by temporary writings on sidewalks done with water soluble sidewalk chalk.

We strongly encourage you to refrain from prohibiting First Amendment protected expression in the future. Should Occupy Defiance, or any other group or individual, decide to write messages in extremely temporary, water soluble chalk on the sidewalk before this year's Halloween parade or at any other time, we encourage you to respect and abide by the First Amendment. This will prevent the city from becoming involved in expensive and time consuming litigation. Should you have any questions or concerns regarding this letter, please feel free to contact me at your convenience.

Sincerely,



James L. Hardiman  
Legal Director  
Ph-(216) 472-2220  
E-jhardiman@acluohio.org

Cc: Bob Armstrong, Mayor  
Tim Holtsberry, Council President  
Timothy A. Tobias, Chief of Police

---

<sup>9</sup> *XXI of Ohio, Inc.*, 341 F.Supp.2d 765 (N.D. Ohio 2004)