

EXHIBIT A



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July 7, 2020

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VIA EMAIL

Rob Case
Municipal Attorney, City of Selah
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Re: Alejandro Fabian and Selah's Chalk Art

Mr. Case:

I write in response to your letter dated June 30, 2020, threatening to prosecute our clients, Alejandro Fabian and members of his household, if they continue to create Black Lives Matter chalk art on the public streets or sidewalks of the City of Selah, including the street on which they live.

If your letter sought to curb tensions in the Selah community, it has failed. In fact, it laid bare the City's disregard for its own laws and basic constitutional principles by threatening its own citizens with criminal prosecution for drawing with chalk—something people, including children, have done for decades with relative impunity. Rather than acknowledge that the Selah municipal code does not prohibit chalk art as “unauthorized graffiti,” you have doubled down on the City's unlawful and unconstitutional practices by switching trains to a more serious violation that is punishable with jail time and a significant fine: Criminal Mischief in the Third Degree.

As we explain below, chalk art that conveys a political message is *especially protected* speech, its installation on a public street or sidewalk does not violate any city or state law, and using criminal statutes to threaten those who do or would create it violates the First Amendment.

Mr. Fabian Did Not Create Any Chalk Art in Front of His Home

To be clear, we sent our letter to Chief Hayes on behalf of Mr. Fabian (as recipient of the Chief's letter) and the rest of the household. It bears repeating that Mr. Fabian did not create any chalk art at the premises cited. The fact that the City's Chief of Police couldn't even address his letter to the appropriate recipient demonstrates how wholly lacking was his office's investigation into the facts at hand. In the event the City tried to make good on its threat to refer Mr. Fabian to the Municipal Court for citation under the City's Graffiti statute, or to prosecute him for violation of the City's criminal mischief law, it would be the City's burden of proof to show that Mr. Fabian was responsible for the chalk art in question, which he was not. The naked threats in the Chief's and your letters do not contain a single probative fact suggesting that the City would have probable cause to prosecute Mr. Fabian for any crime.

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Although Mr. Fabian did not create the chalk art in front of his home, the Chief's threats of referral for prosecution of chalk art as "unauthorized graffiti," and your subsequent escalation of threats, including statements that were reported nationally by the press, have effectively chilled not only Mr. Fabian's speech, but also speech of the greater Selah community. This runs afoul of the First Amendment. See *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (noting that the threat of enforcement of a statute which imposes criminal sanctions may "deter or 'chill' constitutionally protected speech" of third parties). Moreover, the City's removal of the chalk art (three times in three days and four times since June 12, 2020) alone infringed upon the First Amendment rights of those who together created that art.

The Chalk Art Does Not Violate Any City Ordinances or State Law

As a threshold matter, the chalk art in question does not violate any City ordinance.

The City initially accused Mr. Fabian of violating Selah Municipal Code § 6.10 in a letter from the Chief of Police, dated June 18, 2020. After we wrote to Chief Hayes on behalf of Mr. Fabian and his family noting that section 6.10 does not apply to chalk art, we received your June 30 response. In that letter, you apparently concede the challenges of enforcing Section 6.10 against persons who draw images or words with water-soluble chalk, as it was not addressed. Instead, you escalated the issue by alleging that Mr. Fabian (or whomever drew the images on that street) had committed *Criminal Mischief in the Third Degree*, which is a gross misdemeanor under Selah Municipal Code § 6.02.020, punishable by nearly one year in jail and a \$5,000 fine.

Again, the City has overstepped, because chalk art does not violate Section 6.02.020, either.

Selah Municipal Code § 6.02.020 adopts by reference RCW 9A.48.090. You specifically claim that Mr. Fabian violated subsection (1)(b) of RCW 9A.48.090, which provides that a person who writes or marks on either "any public or private building or other structure" or on "any real or personal property owned by any other person" is guilty of malicious mischief in the third degree.

The City's interpretation of RCW 9A.48.090 is wrong. The chalk art at issue was drawn on a *public street* and therefore does not fall within the scope of RCW 9A.48.090. A public street is not a "building" or "structure" under the Code. See RCW 9A.48.010(1)(a) (defining "building" by reference to RCW 9A.04.110(5), which includes "structure" used for lodging); see also *Bledsoe v. Ferry Cty.*, No. 2:19-cv-00227, 2020 WL 376611, at *2 (E.D. Wash. Jan. 23, 2020) (casting doubt on claim that chalk art on a public walkway was on a "building" or "structure" under RCW 9A.48.090(1)(b)). Neither is a public street owned by "any other person." See RCW 9A.04.110(17) (defining "person" as "any natural person, and where relevant, a corporation, joint stock association, or an unincorporated association"); see also *Bledsoe*, 2020 WL 376611, at *2 (also casting doubt on claim that the public walkway was owned by a "person" as

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defined by this statute, in the similar circumstances of adjudicating a dispute over chalk art containing protected political speech).¹

The City's Selective Targeting of Chalk Art Is Unconstitutional

Even if RCW 9A.48.090 could be construed to include chalk drawings on public streets, representatives of the City have publicly misinterpreted RCW 9A.48.090 in both word and deed to selectively target political speech. Despite your protests to the contrary, the evidence indicates that the law has not been enforced in a content-neutral manner.

It is a basic constitutional principle that “[c]ontent-based restrictions on speech are presumptively unconstitutional.” *Foti v. City of Menlo Park*, 146 F.3d 629, 637 (9th Cir. 1998), *as amended on denial of reh'g* (July 29, 1998) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)). Content-based discrimination includes discrimination based on viewpoint and subject matter. *See R.A.V.*, 505 U.S. at 391 (“[t]he First Amendment does not permit [a city] to impose special prohibitions on those speakers who express views on disfavored subjects”); *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 165 (2015) (“[a] law that is content based on its face is subject to strict scrutiny regardless of the gov’t’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech”). The statements of Selah’s City Manager, and the actions of its police officers, Police Chief, and Public Works Department provide compelling evidence that its residents have experienced, and are continuing to experience, content-based restrictions on their speech.²

For example, City Manager Don Wayman stated in media interviews that the City permits non-political markings, such as hopscotch squares, on its streets.³ Indeed, though the City claims to be “very aggressive in eradicating graffiti,” its claim is belied by the yet-untouched “Congrats 2020 SHS” chalk drawing or the multitude of children’s chalk drawings of hearts, butterflies, hopscotch, and flowers along the walking path at Volunteer Park. The fact that these familiar and commonplace examples remain untouched (or have gone unnoticed altogether) only underscores the problem. *See Foti v. City of Menlo Park*, 146 F.3d at 639 (“It is well-established that the First Amendment affords the greatest protection to purposeful speech while allowing more regulation of incidental speech.”). Furthermore, the City’s distinction between permissible drawings made by children or for play on the one hand, and impermissible

¹ It is worth noting that RCW 9A.48.070 (first degree) and RCW 9A.48.080 (second degree) *do* address criminal mischief with respect to “property of the state [or as applied here ‘the City’], a political subdivision thereof, or a . . . mode of public transportation,” but RCW 9A.48.090 does not. If the legislature had intended the reach of RCW 9A.48.090 to include property owned by a political entity like the City of Selah, or a mode of public transportation like a public street, it would have so stated.

² Your letter repeatedly refers to these writings and drawings as “unauthorized graffiti,” which as noted in our prior letter, they are not.

³ *See* Emily Goodell, *City of Selah repeatedly erases children’s Black Lives Matter chalk art, labels it graffiti*, KAPP-KVEW (June 19, 2020), <https://www.yaktrine.com/city-of-selah-repeatedly-erased-childrens-black-lives-matter-chalk-art/>. And, even if, as your letter unfoundedly argues, the press misconstrued his statements, this statement is true: the City does not aggressively target or clean children’s drawings or hopscotch squares. It never has.

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drawings/writings which contain messages, or which draw complaints on the other hand, only strengthens our contention that the City is making its erasure decisions based on the *viewpoint* of speech expressed.

Statements by public officials reveal that it was the content of the political speech—not the location or the form of expression—that prompted the City’s removal actions and threat of enforcement. Mr. Wayman, in his official capacity as City Manager, has publicly criticized the Black Lives Matter movement as “a neo-Marxist organization” engaging in “communist indoctrination,” and has alleged that Black Lives Matter slogans are “based on falsehood” and sound “threatening.”⁴ While we agree with you that Mr. Wayman and other City Council members, in their individual capacity, have protected rights to speak just like other Selah residents, City Officials cannot wield their official enforcement powers to selectively enforce the laws against those with whom they disagree. It is our understanding that the City Manager directs the efforts of the Public Works Department, which is responsible for pressure-washing streets and sidewalks. Thus, regardless of the propriety of Mr. Wayman providing these views, his comments raise concerns that the City workers under his direction and control prioritized cleaning certain speech because it expresses support for the Black Lives Matter movement. The fact that the City has not erased other chalk art unrelated to Black Lives Matter—and has admitted this publicly—further indicates that the City selectively censors political speech in violation of the First Amendment.⁵

That the City removes chalk art that is the subject of a citizen complaint does not prove that the City applies the law even-handedly, especially if (as we believe is likely the case) your office only receives complaints regarding certain viewpoints. Targeting certain viewpoints, even if based on citizen complaints, still constitutes content-based discrimination in violation of the First Amendment. See *Rosenbaum v. City & Cty. of S.F.*, 484 F.3d 1142 (9th Cir. 2007). If the City were serious about protecting the constitutional rights of its citizens, perhaps it could focus on helping *complainants* understand the value of free expression instead of sending the water cavalry out to mute the offending messages before they “further inflam[e] tensions in our community.”

Your own letter demonstrates the City’s viewpoint discrimination. You wrote: “Selah is not Seattle. In Selah the laws will be enforced” in direct response to our demand that “the City of Selah and its Police Department . . . stop erasing chalk art reflecting political viewpoints with which particular officials (or members of the community) disagree . . .” apparently confirming what we’ve said all along: that the City of Selah is bent on using these inapplicable laws as a guise to silence the political speech of its residents by erasing their chalk writings.

⁴ *Id.*

⁵ Your letter strangely asks why we stopped short of telling the City where people have drawn chalk art that has gone unreported and uncleaned. The reason is simple: complaint-based targeting of street cleaning is the primary reason this constitutional problem exists. It is not an appropriate public policy to schedule street cleaning of chalk drawings based on citizen complaints, especially where it is reasonably clear that complaints are content-oriented, except in extraordinary circumstances where the interests promoted by removal of the chalk outweigh the constitutional rights to expression. Furthermore, we are gathering and preserving evidence of the City’s present behavior and owe no such obligation to the City.

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And, while addressing the topic of enforcing laws, I remind you that the Constitution of the United States—not Selah’s municipal ordinances—is the supreme law of the land. U.S. CONST. ART. VI, Clause 2. So, yes, we absolutely expect that the law should be enforced in Selah, including the protections of the First Amendment to the Constitution. The right to free speech extends to all Americans, whether they live in Seattle or Selah. Regardless of the personal views of City officials, or other citizens who complain, on the Black Lives Matter movement, the City has no right to censor or retaliate against those who engage in protected political speech in Selah.

The City’s Threat to Prosecute Mr. Fabian Is an Unconstitutional Retaliation That Has Chilled the Speech of Many Selah Residents

The City’s threat to prosecute Mr. Fabian and members of his household under RCW 9A.48.090—a violation punishable by almost one year of jail time—for their alleged chalking of Black Lives Matter is itself an unconstitutional retaliation for their alleged political views. It is well-settled that government officials violate the First Amendment when they retaliate against individuals for exercising their right to free speech. See *Hartman v. Moore*, 547 U.S. 250 (2006); *Ariz. Students’ Ass’n v. Ariz. Bd. Of Regents*, 824 F.3d 858, 867 (9th Cir. 2016).

As discussed above, Mr. Wayman’s well-documented hostility against Black Lives Matter and the City’s record of selectively enforcing the chalking ban suggest that Mr. Fabian’s alleged speech supporting Black Lives Matter was a substantial motivating factor in the City’s decision to threaten to prosecute him. See *Ariz. Students’ Ass’n*, 824 F.3d at 858 (quoting *O’Brien v. Welty*, 818 F.3d 920, 933–34 (9th Cir. 2016)). Indeed, Chief Hayes’s own letter admits that he wrote only after receiving multiple complaints from neighbors about the content of the chalk art on the Fabian/Perez side-street.

The threat of prosecution is, under normal circumstances, sufficient to establish a claim of retaliation; here, this threat carries with it the deadly risk of contracting COVID-19 in the Yakima County Jail, where nearly 20 percent of the inmate population recently tested positive for the virus.⁶ The Fabian/Perez household is terrified to continue to speak out for fear that the City will make good on its unlawful threats to prosecute them. Indeed, since writing the City, we have received multiple reports that others in the City are afraid to engage in any form of political speech (let alone chalk-based speech), given the retaliatory climate your response has created. For example, I received a report of grandparents who confirmed that the City’s threats to prosecute anyone who chalking the street caused them fear that if their grandchildren drew on their sidewalk with street chalk, they could be prosecuted for violating this law. And, if you respond to this by assuring me that “this isn’t the type of chalking that is illegal,” then what kind of chalking is illegal, other than that whose content the City deems worthy of erasure?

⁶ See Donald W. Meyers, *Yakima Jail Officials: 73 Inmates Tested Positive for Coronavirus*, Yakima Herald (July 1, 2020), https://www.yakimaherald.com/special_projects/coronavirus/yakima-jail-officials-73-inmates-tested-positive-for-coronavirus/article_d2274eb8-f774-51ef-8cb7-5aeacb051845.html.

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The City's Interpretation of the Law Is Unconstitutional

In any event, the City's deliberate misreading of RCW 9A.48.090 alone violates the First Amendment.

The government's ability to restrict speech is most limited in traditional public fora, areas historically recognized as devoted to public assembly and debate. Streets are traditional public fora. *See Perry*, 460 U.S. at 45; *United States v. Grace*, 461 U.S. at 177.

The government may only regulate expression in a traditional public forum, such as a street, through reasonable time, place, and manner restrictions that (1) are content-neutral, (2) are narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels of communication. *Grace*, 461 U.S. at 177.

The City has yet to articulate any significant government interest in banning chalk art under RCW 9A.48.090.⁷ Moreover, an absolute prohibition on all chalk art is not narrowly tailored and does not leave open ample alternative channels of communication, particularly for those Selah residents for whom chalk art provides an accessible, low cost way of engaging in political debate and expression.⁸ The Supreme Court has repeatedly invalidated total bans on mediums of expression that are easily accessible to people regardless of their financial resources. *See Martin v. Struthers*, 319 U.S. 141 (1943) (striking down a prohibition on the distribution of circulars because circulars were "essential to the poorly financed causes of little people"); *Watchtower Bible and Tract Society v. Stratton*, 536 U.S. 150 (2002) (invalidating a permit requirement for door-to-door proselytizing because canvassing "is a traditionally accepted method of communication for people who lack financial resources").

The City's (mis)interpretation of RCW 9A.48.090 also renders the law substantially overbroad. Although the law is intended to criminalize only the destruction or defacement of public property, according to the City, it also criminalizes peaceful political expression that does not cause property damage. By the City's absurd interpretation, any citizen drawing any chalk art on a public street or sidewalk (whether a children's hopscotch grid or a congratulatory message to the Class of 2020) is, in your words, "criminally culpable" of a gross misdemeanor.

The chilling effect of the City's misguided threats of prosecution has expanded beyond Mr. Fabian and his family apace to the attention this issue has received. Already, people in Selah who wish to engage in this form of expression will not do it, judging the risk of criminal prosecution to be too great. This is precisely

⁷ You describe the safety risk posed by street graffiti in terms of distracting drivers. It is, however, hard to see how erasing chalk art—which is not graffiti—drawn on a dead-end, side street furthers this interest. Regardless, responding piecemeal to chalk art based on select complaints motivated by the political content of the art is far from a narrowly-tailored means to achieve the City's purported interest in safety or beautification.

⁸ Your letter suggests that "[t]he City will likely amend its anti-graffiti code section . . . to add 'water-soluble chalk' to the stated definition of a 'graffiti implement' in that code section. Far from "negat[ing] the textual critique of [our] letter," given the factual circumstances present here, we caution that such an amendment would attract further scrutiny of the motives behind the amendment, and likely demand a separate constitutional challenge to the merits of the amendment.

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the chilling effect our First Amendment jurisprudence is designed to prevent. “The showing that a law punishes a substantial amount of protected free speech, judged in relation to the statute’s plainly legitimate sweep suffices to invalidate all enforcement of that law.” *Hicks*, 539 U.S. at 118–19 (internal citations omitted); *see also City of Houston, Tex. v. Hill*, 482 U.S. 451, 459 (1987) (“[c]riminal statutes must be scrutinized with particular care . . . those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application”). Accordingly, such a broad interpretation of RCW 9A.48.090 would invalidate the City’s enforcement of the law completely.

* * *

Mr. Case, as you well know, the right to political expression lies at the heart of the protections of the First Amendment.

We reiterate our statement made to Chief Hayes: some residents of Selah, including Mr. Fabian and his household, intend to create chalk art in expression of their political views and expect to be left alone.

We respectfully request that the City confirm that it will not interfere with or prevent Selah residents from drawing with chalk on public sidewalks, walkways, or streets in a manner that does not present an unreasonable risk of harm or injury.

We agree with the sentiment expressed in your letter that we do not want to see anyone prosecuted for a crime over this dispute. To that end, I am happy to take you up on your offer to have a constructive discussion together on how best to resolve it.

Name the time, and we will attend.

Sincerely,



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