



Iowa

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Calvin Kinney
Mayor, City of Essex
412 Iowa Ave.
P.O. Box 428
Essex IA 51638
CC: Mahlon Sorensen, City Attorney

September 2, 2023

Re: Essex Labor Day Parade; Shenandoah Pride

Mr. Sorensen:

We are writing to you on behalf of the American Civil Liberties Union of Iowa (ACLU of Iowa) and Shenandoah Pride. The ACLU of Iowa is a statewide nonprofit and nonpartisan organization with thousands of Iowa members that is dedicated to the principles of liberty and equality embodied in the United States and Iowa Constitutions. As part of its mission, the ACLU of Iowa works to preserve the freedoms of speech and expression guaranteed by the First Amendment and the Iowa Constitution's article I, section 7. Along with our efforts in the courts and legislature, we promote these freedoms through public education and advocacy by, among other things, providing legal information letters such as this one to local governments potentially considering action that would infringe upon these basic constitutional rights.

Shenandoah Pride is an organization dedicated to the inclusion and affirmation of lesbian, gay, bisexual, transgender, queer and questioning (LGBTQ+) individuals in the City of Shenandoah, Iowa and neighboring communities. Shenandoah Pride celebrates those identifying as LGBTQ+ and their allies by hosting and participating in community events. We understand the City of Essex, Iowa (the City), is one such community, and that the City has organized and is facilitating a parade on September 4, 2023, to celebrate the community and Labor Day. Months ago, Shenandoah Pride properly notified the City of its intent to participate in the Labor Day Parade.

On August 31, the Mayor of Essex, Calvin Kinney, on behalf of the City, sent this email:

Out of concern for the safety of the public and that of Essex Labor Day parade participants, the City of Essex has determined not to allow parade participants geared toward the promotion of, or opposition to, the politically charged topic of gender and/or sexual identification/orientation.

This parade will not be used for and will not allow sexual identification or sexual

orientation agendas for, or against, to be promoted.

As the City's attorney, we immediately contacted you upon learning of this policy and the impending infringement on the rights of Shenandoah Pride. You confirmed for us that there was no credible security threat of which you were aware, let alone one justifying the prohibition made by Mayor Kinney, but, nevertheless, told us that the City would not change its position and would prohibit Shenandoah Pride from participating in the parade. On September 1, the City Council for the City of Essex held a special meeting to discuss the prohibition; again, the City failed, or was prevented by Mayor Kinney, to change course.

Both the U.S. Constitution's First Amendment and the Iowa Constitution's article I, section 7, protect and secure the right of organizations like Shenandoah Pride to express their views in public forums such as the Labor Day Parade. *See Gay-Lesbian-Bisexual-Transgender Pride/Twin Cities v. Minneapolis Park and Recreation Bd.*, 721 F. Supp. 2d 866, 873-34 (D. Minn. 2010) (noting undisputed expressive activity and identifying quintessential public fora such as streets); *State v. Milner*, 571 N.W.2d 7, 12 (“[T]he Iowa Constitution generally imposes the same restrictions on the regulation of speech as does the federal constitution.”). No government, state or local, has the authority to infringe upon these fundamental freedoms of speech and association based on the content of the expression or the viewpoint of those speaking it. *See U.S. v. Alvarez*, 567 U.S. 709, 716-17 (2012) (“[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” (Quoting *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002))). When it comes to content-neutral restrictions of expressive behavior based on security concerns, such justifications are subject to “judicial common sense” and may not be a pretext for underlying discrimination. *See Liberty and Prosperity 1776, Inc. v. Corzine*, 720 F. Supp. 2d 622, 635 (D. N.J. 2010); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (explaining doctrine of content-neutral speech restrictions).

It is obvious from Mayor Kinney's email that the City¹ is prohibiting Shenandoah Pride from participating in the Labor Day Parade because it disagrees with its position on the rights of LGBTQ+ persons. That the policy purports to apply equally to groups in “opposition to . . . gender and/or sexual identification/orientation” does not render it neutral, particularly, though not only, because there is no such opposition group that has requested to participate in the Parade. *See Animal Legal Defense Fund v. Reynolds*, 297 F. Supp. 3d 901, 925 (S.D. Iowa 2018) (noting the government need not explicitly “single[] out a subset of messages for disfavor based on the views expressed” to be found viewpoint-based); *see also Reed v. Town of Gilbert, Ariz.*, 567 U.S. 155, 163, 169 (2015) (stating a regulation of speech is content-based when “a law

¹ We understand the Labor Day Parade is facilitated, in part, by the Essex Community Club. The ACLU of Iowa supports the right of private persons and groups to control their expressive activities. *See, e.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB)*, 515 U.S. 557, 573 (1995) (holding private sponsors of St. Patrick's Day Parade could not be required to allow an Irish-American gay, lesbian, and bisexual group to participate). However, the character of a restriction on other's speech is fundamentally different if done, not by a private group, but by the government. *See id.* at 565-66 (concluding issue not preserved for review); *see also Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*, 531 U.S. 288, 295 (2001) (identifying circumstances where ostensibly private action is attributable to the state). The First Amendment will not allow a state actor, acting directly or in coordination with a private group given state authority, to infringe upon the right of free speech. *See Wicksham v. City of Columbia*, 481 F.3d 591, 597-98 (8th Cir. 2007) (holding city accountable for speech restrictions imposed at air show sponsored by private corporation). In this case, the restriction is attributable to the City of Essex; accordingly, it is state action subject to the First Amendment.

applies to a particular speech because of the topic discussed or the idea or message expressed” and noting “it is well established that “[t]he First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic” (quoting *Consolidated Edison Co. of N.Y. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 530, 537 (1980)). Moreover, the expressed “concern for the safety of the public” reeks of pretext when no credible security threat has been identified, nor, even if it had, when no alternatives to outright prohibition of speech have been explored, such as increasing police presence to ensure Shenandoah Pride members’ safety. To be clear, the safety of parade participants and viewers is the responsibility of the City.

We urge the City of Essex to rescind its prohibition and permit Shenandoah Pride to join the Labor Day Parade. Failing to do so will violate the rights of its citizens, potentially expose it to substantial liability, and be an injustice to the constitutional rights of every person and every group to participate in its public events.

If you have any questions, please contact me directly at [REDACTED]

Sincerely,



Sharon Wegner, AT0012415
ACLU of Iowa Foundation Inc.
505 Fifth Avenue, Ste. 808
Des Moines, IA 50309-2317

[REDACTED]

SENT VIA FAX & EMAIL