INSTITUTE FOR JUSTICE

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Via Email

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Re: Westfield's Unconstitutional Sign Ordinance, Westfield Town Code § 32-4(i)

Mayor Brindle, Town Council Members, and Administrator Gildea:

My name is Ben Field, and I am an attorney at the Institute for Justice (IJ), a national public-interest law firm that fights in defense of people's constitutional rights, including the right to free speech. One area of particular interest for IJ is protecting political speech, and IJ has successfully challenged several unconstitutional restrictions on political speech, including at the Supreme Court, in federal circuit courts, and in state courts. IJ has also successfully challenged unconstitutional sign code restrictions in courts

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across the country, including in the Fourth, Sixth, Eighth, and Ninth Circuits. We also work with cities to amend unconstitutional sign laws to avoid the need for litigation.

I am writing because IJ has concerns with the Town of Westfield's public-property sign regulation, Westfield Town Code § 32-4(i). This provision appears to give Town officials unbridled discretion to permit or prohibit signs on public property, opening the door to unconstitutional content and viewpoint discrimination. Indeed, we have been in touch with a Town resident and have seen evidence that the ordinance has in fact been used selectively to restrict disfavored viewpoints.

Westfield should amend its Town Code to eliminate its standardless permit requirement for "signs, posters, or other material" on public land. Doing so would not merely be good policy, it is also what the Constitution requires because the ordinance as currently written almost certainly violates the First Amendment.

The Westfield Town Code gives Town officials unbridled discretion to allow or forbid signs and posters on public property based on officials' agreement with the message.

Westfield Town Code § 32-4(i) provides that "Upon all public lands and improvements as described herein, it shall be unlawful for any person to . . . Post, exhibit, or otherwise display any signs, posters, or other material without the express permission of the governing body, board of education, or any agency of the Town." Section 32-1, in turn, defines the "[p]ublic property and buildings referred to in this chapter" to "include all property owned by the Town and by the board of education of the Town, except for public streets, roads, or highways." The definition expressly includes "public parks." Taken together, these provisions apply a blanket prohibition on "signs, posters, or other material" on public land—including public parks—without prior permission by Town officials.

In practice, this gives Town officials unbridled discretion to favor certain messages and to disfavor others. Section 32-4(i) requires "the express permission of the governing body, board of education, or any agency of the Town." But it places no guardrails on how those Town officials may exercise their discretion in granting that permission. Nor does it require Town officials to make any record of their permission or to provide reasons for granting or denying permission. From our review of the Town Code, no other provisions cabin officials' discretion or otherwise give residents a mechanism to challenge a decision or to demand an explanation.

In effect, then, Section 32-4(i) empowers Town officials to grant or deny permission to display signs and posters without any limitation on their discretion, and it does not even require that they explain themselves. This opens the door to Town officials exercising their discretion to favor certain content and viewpoints and to disfavor messages they dislike.

Experience suggests that Westfield officials have applied the public-property sign ordinance to favor certain messages and to suppress other disfavored messages.

We have been in touch with Westfield resident Shawn Mullen, and his experience suggests that Town officials have abused the discretion granted them by Section 32-4(i) to engage in content- and viewpoint-based discrimination in the sorts of signs and posters allowed on public property.

From Mr. Mullen's account and supporting documentation he has provided, it appears that when he was a candidate for Town Council in the fall of 2021, he had a table with small campaign signs and literature in a public park during an event he co-sponsored. An incumbent candidate in the same election from the opposing party ordered event organizers to remove those signs and called the police. The police then ordered Mr. Mullen and his fellow campaigners to pack up their signs and literature, citing Section 32-4(i).

The police report for this incident (CAD# 21-25362) confirms Mr. Mullen's account, indicating that Councilman Michael Dardia stated that "the Republican party candidates for the Township of Wesfield have a table and signs set up inside the park and he state[d] it is 'illegal' for them to have their signs on public property and would like an officer to respond and tell the individuals to remove their signs." The officer on the scene "explained the town ordinance"—seeming to refer to Section 32-4(i)—and "explained that without a permit those items are prohibited[.]"

We have seen substantial evidence that Section 32-4(i) is not enforced consistently, or at all—except against Mr. Mullen and his ticket-mates. In fact, it appears that signs and political literature are regularly present on Westfield public property and in Westfield's parks. That includes signs and posters advocating the election of candidates, just like Mr. Mullen was displaying. We have also seen many pictures of signs and posters on Westfield public property advocating political positions such as support for gun control, police reform, and pro-choice abortion policy.

All told, this evidence gives the impression that Section 32-4(i) is *not* enforced against signs, posters, and literature supporting candidates and public-policy positions affiliated with the Democratic Party. But it *was* enforced against Republican candidates for office in the 2021 election. If that impression is accurate, it reflects an especially egregious form of content and viewpoint discrimination. Of course, we would be just as concerned if the political valence were reversed and the Town were favoring conservative viewpoints over liberal ones. Our concern is not whose ox is being gored. Rather, we defend the principled position that *all* constitutionally protected speech must be allowed by the government, and that the government must maintain assiduous neutrality in enforcing the law rather than favoring preferred viewpoints.

Westfield should amend its public-property sign ordinance, which is almost certainly unconstitutional.

On its face, Section 32-4(i) is unconstitutional. A "long line of [Supreme Court] precedent" reflects "the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship."[1] That would be true even if there were no history of viewpoint discrimination in how Section 32-4(i) has been applied. "[T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused."[2] Speech permit laws that on their face lack any restraint on discretion—like Section 32-4(i)—raise "two major First Amendment risks[:] . . . self-censorship by speakers in order to avoid being denied a license to speak; and the difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied' without standards by which to measure the licensor's action."[3]

To combat those threats, "the Constitution requires that the [Town] establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered."[4] "[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority."[5] Section 32-4(i) violates these First Amendment principles because "[i]t is apparent that the face of the ordinance itself contains no explicit limits on [Town officials'] discretion."[6]

It is especially troubling that the Town imposes its standardless speech-permitting regime in public parks, which are traditional public forums where speech receives high First Amendment protection.[7] "[P]arks . . . have immemorially been held in trust for the

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[1] *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988); *see also id.* at 755–56 (collecting cases).

[2] *Id.* at 757.

[3] *Id.* at 759.

[4] *Id.* at 760.

[5] *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (internal quotation marks omitted).

[6] *City of Lakewood*, 486 U.S. at 769; *see also, e.g.*, *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 165-66 (2002) ("It is offensive" not only to "the First Amendment, but to the very notion of a free society," to demand that "a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so."); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 802 (1988) ("Generally, speakers need not obtain a license to speak.").

[7] *See, e.g.*, *State v. DeAngelo*, 963 A.2d 1200, 1204 (N.J. 2009) ("Public streets, parks, and sidewalks are traditionally public forums that occupy a special position in terms of First Amendment protection, in that the government's ability to restrict expressive activity is very limited." (cleaned up)); *McTernan v. City of York*, 564 F.3d 636, 645 (3d Cir. 2009) ("Speech in a traditional public forum is afforded maximum constitutional protection. Accordingly, government regulation of speech in a traditional public forum is subject to strict scrutiny and will only be upheld if narrowly tailored to serve a compelling governmental interest.").

use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[8]

To be sure, the Town may establish content-neutral time, place, and manner restrictions on speech on public property to serve legitimate interests like preventing excessive noise or avoiding overcrowding through competing uses.[9] However, any such restrictions must be "justified without reference to the content of the regulated speech," they must be "narrowly tailored to serve a significant governmental interest," and they must "leave open ample alternative channels for communication of the information."[10] And even when applying content-neutral time, place, and manner restrictions on speech, the government "may not *condition* that speech on obtaining a license or permit from a government official in that official's boundless discretion."[11] "A government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.' "[12] And if the Town did establish an appropriately narrow and circumscribed content-neutral permitting regime, those permitting rules must not be applied to "censor certain viewpoints."[13]

For these reasons, Westfield should amend its Town Code so that there is no unconstitutional public-property sign restriction that vests unbridled discretion in Town officials. That result could be achieved by lifting the prohibition on signs and posters entirely, or by adding the kind of narrow, objective, and definite standards that the Constitution requires to prevent officials from making content- or viewpoint-based judgments about signs and posters. As noted earlier, IJ has worked with municipal governments in the past to help bring their codes into compliance with the First Amendment. We would be happy to assist the Town of Westfield in doing the same. And I would be happy to discuss this issue with you further. You can reach me by phone at (703) 682-9320 or email at bfield@ij.org.

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[8] *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983) (cleaned up); *see also, e.g.*, *United States v. Marcavage*, 609 F.3d 264, 275 (3d Cir. 2010) ("It is well established that traditional public fora include sidewalks, streets, and parks that the public has historically used for assembly and general communication.").

[9] *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

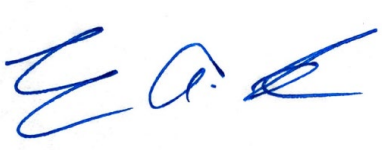
[10] *Id.* (internal quotation marks omitted); *accord, e.g.*, *Marcavage*, 609 F.3d at 279 (similar).

[11] *City of Lakewood*, 486 U.S. at 764.

[12] *Forsyth Cnty.*, 505 U.S. at 130 (quoting *Heffron v. Int'l Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981)).

[13] *City of Lakewood*, 486 U.S. at 764; *accord, e.g. Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829, (1995) ("Viewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."); *Reed v. Town of Gilbert*, 576 U.S. 155, 168–69 (2015) (similar).

Sincerely,



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