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Attorneys for Plaintiff Andrew Gause

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

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|---|---|---------------------------|
| <b>ANDREW GAUSE,</b>                              | : |                           |
|   | : |                           |
|   | : |                           |
| Plaintiff,  | : |                           |
|   | : |                           |
| v.  | : | <b>VERIFIED COMPLAINT</b> |
|   | : |                           |
| <b>BOROUGH OF HAWTHORNE,</b>                      | : |                           |
| <b>PATRICK BOTBYL individually and</b>            | : | CIVIL ACTION No. _____    |
| <b>in his official capacity, ROBERT</b>           | : |                           |
| <b>SCULLY individually and in his official</b>    | : |                           |
| <b>capacity, and DONALD TURNER</b>                | : |                           |
| <b>individually and in his official capacity,</b> | : |                           |
|   | : |                           |
| Defendants.                                       | : |                           |

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**PARTIES**

1. Plaintiff, Andrew Gause, owns property in the Borough of Hawthorne at 521 Lafayette Avenue. Mr. Gause is a “person” within the meaning of the Fourteenth Amendment to the United States Constitution as well as within the meaning of 42 U.S.C. §1983 and is and was entitled to those rights guaranteed to all persons within the jurisdiction of the United States. He resides at 49 Payne Avenue, Midland Park, New Jersey.

2. Defendant, Borough of Hawthorne, (hereafter “Borough”), is a government entity created and existing by virtue of the laws of the State of New Jersey. The Borough is empowered, inter alia, pursuant to statute to make, amend, repeal and enforce ordinances to regulate the use of signs in its jurisdiction and to make, amend, repeal and enforce such other ordinances and policies that the Borough may otherwise deem necessary and proper for good government, order and the protection of persons and property and for the preservation of public health, safety and welfare of the municipality and its inhabitants.

3. Defendant Patrick J. Botbyl is and was at all relevant times Mayor of the Borough of Hawthorne. On information and belief, he is a resident of the Borough.

4. Defendant Robert Scully is Acting Chief of Police of the Borough of Hawthorne and at relevant times, he was a police captain on the Borough’s police force.

5. Defendant Donald Turner is and was at all relevant times Code Enforcement Officer of the Borough of Hawthorne.

6. At all times relevant to this Complaint and in all of its actions or omissions to act described in it, the Defendants acted under color of statute, ordinance, regulation, custom and/or usage of the State of New Jersey and the Borough of Hawthorne.

### **JURISDICTION**

7. This action is brought pursuant to 42 U.S.C. §1983 and the United States Constitution.

8. Jurisdiction is founded upon 28 U.S.C. §1331 as this action arises under the Constitution of the United States.

9. Jurisdiction is further founded upon 28 U.S.C. §§1343(a)(3) and (4), as the plaintiffs seek to redress the deprivation, under color of state law, statute, regulation, custom and usage, rights, privileges or immunities secured by the Constitution of the United States and to recover damages or secure equitable or other relief under an Act of Congress providing for the protection of civil rights

10. This action is also brought pursuant to 42 U.S.C. §§2201 and 2202 for the purpose of obtaining a declaration of the rights and other legal relationships of the parties and such further, necessary or proper relief may follow from any declaratory judgment granted to the plaintiffs.

11. This action is also brought pursuant to 28 U.S.C. §1367 as the plaintiffs have asserted other claims that are related to claims in the action within this Court's original jurisdiction which form a part of the same case or controversy under Article III of the United States Constitution.

### **FACTUAL BACKGROUND**

#### **Hawthorne Sign Ordinance**

12. Some time prior to February 2008, the Borough adopted Chapter 225, Article XIII of its Code providing for regulation of signage. Attached to the complaint as Exhibit A is a print-out of the ordinances Hawthorne makes available on its website, [www.hawthornenj.org](http://www.hawthornenj.org). Attached to the complaint as Exhibit B is a copy of a notice of an amendment to the ordinance regarding political signs.

13. According to Chapter 225, Article XIII, section 225-84 of the Code, the Borough requires a sign erection permit for all signs, unless excepted. Among the subset of signs that do not require permits are a number of temporary signs, including signs offering real estate to be sold or leased (subject to certain restrictions on their size), church announcement boards, and restaurant menus.

Ch. 225, Art. XIII, § 225-89.

14. The code specifies that political signs may be displayed “provided that no such sign may be displayed sooner than 32 days before any election and all such signs must be removed within 7 days after any election.” § 225-89(M).

15. Violators of section 225-89(M) are subject to fines up to \$1000 per day and are subject to forced removal of the sign by the Zoning Administrator at the violator’s expense. § 225-96(A).

16. Section 225-89(M) effectively bans all signs bearing political messages on private property for at least nine months of the year.

#### **Plaintiff’s Lawn Signs**

17. On or about December 15, 2007, Andrew Gause placed two signs on property he owns at 521 Lafayette Avenue in Hawthorne, New Jersey. Mr. Gause’s property is mixed use: he uses the first floor for his business office and rents the second floor to a residential tenant. The signs are approximately 17 inches by 24 inches (2.83 square feet) and they expressed his support for the presidential candidacy of Republican Ron Paul. The sign listed a number of issues in one font and in a larger font read: “Ron Paul / President ‘08”. A photograph of the sign is attached as Exhibit C.

18. New Jersey’s presidential primary was held on Tuesday, February 5, 2008. To comply with the ordinance, Mr. Gause would have had to remove his signs by February 12, 2008. Mr Gause continued to display the signs on his property after February 12, 2008.

19. Mr. Gause sought to show his continued support for Ron Paul through the 2008 presidential primary season, which continued through Tuesday, June 3, 2008. Ron Paul continued to actively

campaign for the Republican Party Preseidential nomination and his campaign received strong support nationwide. For example, Paul garnered 21% of the vote in the Montana primary held on June 3, 2008. See, e.g., Charles S. Johnson, *State GOP leader: Time to unite*, The Missoulian, June 20, 2008, available at <http://www.missoulian.com/articles/2008/06/20/news/local/news05.txt> (last accessed June 24, 2008).

20. During the week of February 19th, 2008, the Defendants and their agents, came to Plaintiff's business and directed him to remove his political signs. He also received a call that week from the Borough Council President regarding the signs. Mr. Gause advised the representatives that he would not remove his signs pursuant to his rights under the First Amendment. A copy of e-mail exchanges regarding Plaintiff's signs is attached as Exhibit D.

21. On or about February 20, 2008, Defendant Mayor Botbyl directed Defendant Officer Turner to "arrange to have the business owner [Mr. Gause] remove the signs today so it does not become an issue at the council meeting tonight." Defendant Mayor Botbyl also spoke to Defendant Chief Scully and asked him to enforce Hawthorne's sign ordinance by issuing a summons. See Exhibit D. On information and belief, during the February 20, 2008, Borough Council meeting, Defendant Mayor Botbyl stated that signs must be removed seven days after the election.

22. On February 26, 2008, Mr. Gause was issued a summons by Code Enforcement Officer Donald Turner for violating Borough Ordinance 225-89-M. A copy of the summons is attached as Exhibit E. Shortly thereafter, Mr. Gause removed his signs.

23. Mr. Gause obtained counsel to defend the citation. His counsel identified the constitutional infirmities of the ordinance to the municipal prosecutor. A copy of the letter from Plaintiff's counsel

is attached as Exhibit F. The complaint against Mr. Gause was dismissed by the municipal judge on March 31, 2008. A copy of a letter advising Plaintiff of the dismissal is attached as Exhibit G.

24. Mr. Gause attended the Borough Council meeting on March 5, 2008, and used the public comment period to explain to the Council that he believed the ordinance and its enforcement violated the First Amendment to the United States Constitution. At that time, Mr. Gause handed a copy of a power point presentation to the Council and the Borough's attorney that explained the flaws in the ordinance.

25. On March 19, 2008, the Borough's attorney reported that he had researched potential First Amendment violations regarding political signs and determined that the Borough's ordinances did not violate state statutes or federal law. The relevant portions of the minutes of the Council meeting are attached as Exhibit H.

26. Mr. Gause wants to place the signs on his property to express his support for various candidates and political issues during the presidential election season. He has refrained from doing so because he fears that he will be cited and fined.

## **FIRST CAUSE OF ACTION**

### **Violation of the First Amendment to the United States Constitution**

27. Mr. Gause repeats the allegations of the preceding paragraphs as if fully set forth here.

28. Section 225-89(M) is unconstitutional on its face and as applied for reasons that include but are not limited to the following:

- (a) its provisions are unduly vague;
- (b) the ordinance is not narrowly tailored to serve a compelling government interest;

- (c) the ordinance is not narrowly tailored to serve a substantial government interest;
- (d) the ordinance has not left open ample alternative channels of communication;
- (e) the ordinance impermissibly restricts political speech;
- (f) the ordinance burdens substantially more speech than is necessary to further any legitimate government interest;
- (g) the ordinance is an impermissible prior restraint;
- (h) the ordinance is a content-based regulation, preferring commercial speech over political and noncommercial signs.

29. As a consequence of Defendants' enforcement of § 225-89(M), Mr. Gause's right to freedom of expression as guaranteed by the First Amendment to the United States Constitution, as applied to the states by the Fourteenth Amendment, has been violated and, consequently, has caused him damage and injury; and his constitutional rights will continue to be violated unless this Court intervenes.

### **SECOND CAUSE OF ACTION**

#### **Violation of the New Jersey Constitution Article I, Paragraphs 1 and 6**

30. Mr. Gause repeats the allegations of the preceding paragraphs as if fully set forth here.

31. By enforcing §225-89(M), the Defendants have similarly violated Mr. Gause's New Jersey constitutional rights to due process of law and freedom of speech guaranteed by Article I Paragraphs 1 and 6 and has caused him damage and injury. Those rights will continue to be violated unless this Court intervenes.

WHEREFORE, plaintiff, Andrew Gause, demands judgment against the Defendants of Hawthorne, in which the Court:

- (a) temporarily and permanently enjoins and restrains the Borough of Hawthorne, its agents, servants, employees and officials and official entities from applying §225-89(M);
- (b) declares §225-89(M) in violation of the First Amendment of the United States Constitution and Article I, sections 1 and 6 of the New Jersey Constitution;
- (b) awards him compensatory damages;
- (c) awards him reasonable costs and attorney's fees pursuant to 42 U.S.C. §1988; and
- (d) awards him such other and further relief as may be just, necessary and proper.

**AMERICAN CIVIL LIBERTIES UNION  
OF NEW JERSEY**

By     /s/ Jeanne LoCicero      
JEANNE LoCICERO

Dated: June 27, 2008



**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

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**ANDREW GAUSE,**

Plaintiff,

v.

**BOROUGH OF HAWTHORNE,  
PATRICK BOTBYL individually  
and in his official capacity,  
ROBERT SCULLY individually  
and in his official capacity, and  
DONALD TURNER individually  
and in his official capacity,**

Defendants.

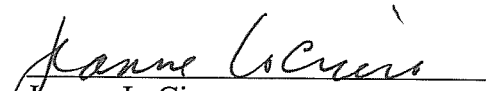
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CIVIL ACTION No. \_\_\_\_\_

**CERTIFICATION PUSUANT TO LOCAL CIVIL RULE 11.2**

JEANNE LOCICERO, of full age, certfies as follows:

1. I am an attorney at law licensed to practice law in the State of New Jersey and am admitted to practice in the District of New Jersey. I am Deputy Legal Director of the American Civil Liberties Union of New Jersey Foundation, counsel to Plaintiff.
2. To my knowledge, the matter in controversy is not subject to any other action in any court and is not subject to any pending arbitration or administrative proceeding.

  
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Jeanne LoCicero

Dated: June 27, 2008