



Northern  
California

August 19, 2021

VIA ELECTRONIC MAIL

Marie V. Hall  
Living Smart Foundation  
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Carmichael, CA 95609  
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admin@livingsmartmarket.com

**Re: Free Expression Activities at Historic Folsom Farmers Market**

Dear Ms. Hall:

I am writing this letter on behalf of the American Civil Liberties Union of Northern California ("ACLU"). It has come to the ACLU's attention that the Historic Folsom Farmers Market ("Market") is interfering with the First Amendment rights of a nonpartisan environmental group known as Extinction Rebellion. Upon review of the Market's actions at the Historic Folsom Plaza, we feel compelled to advise you that the Market and the City of Folsom must not infringe the rights of any individuals or nonpartisan groups, such as Extinction Rebellion, to engage in constitutionally protected speech on public property during the Market's operating hours.

We understand that the events giving rise to this letter are as follows: On Saturday May 22, 2021, John Hagar, along with fellow members of Extinction Rebellion, attended the Market to educate the public about its mission, distribute informational materials, and promote climate justice. Upon arriving at the Market, the group met with Market managers and advised them that Extinction Rebellion was a peaceful activist group. The managers reportedly asked that the group set up their table outside of the section in which Market vendors had paid for booth spaces. The group complied and set up on the periphery, just beyond the specified vendor area. Individual members, some carrying flags displaying the Extinction Rebellion logo, then walked through the Market, talked to those in the public plaza, and handed out informational materials to anyone who seemed interested. The group also conducted a peaceful "die-in" demonstration around their table for about ten minutes.

We further understand that, at some point, one of the Market managers approached the group to express that he did not like how the group was walking through the Market and speaking with the public. The manager apparently suggested that the group's conduct was problematic because the flags that the members were displaying could be mistaken as emblems of other groups like "Antifa" or "Neo-Nazis."

As the Extinction Rebellion group members were leaving, this same manager reportedly presented them with the attached form letter and advised the group that, in the future, it could not set up within fifty feet of the Market's entrances or exits. The letter stated that the Market is operated by Living Smart, a Tax Exempt 501(c)(3) Non-Profit Foundation, and therefore it could not "allow political organizations to participate in the market as this can be construed as an endorsement and/or involvement within the political process and would therefore be in violation of the Federal mandate of which we are bound."<sup>1</sup> The letter further explained:

Under the Internal Revenue Code, all section 501(c)(3) organizations are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office. Contributions to political campaign funds or public statements of position (verbal or written) made on behalf of the organization in favor of or in opposition to any candidate for public office clearly violate(s) the prohibition against political campaign activity.

But critically, here, the application of the Living Smart Foundation's letter and the "50-foot perimeter" policy to a nonpartisan group such as Extinction Rebellion is improper and risks violating federal and state protections for free expression activities. Extinction Rebellion does not endorse or oppose any candidates or parties in its advocacy for environmental justice. It also does not collect or furnish any contributions to political campaigns. As stated on its website, Extinction Rebellion is a "decentralized, international and politically non-partisan movement using non-violent direct action and civil disobedience to persuade governments to act justly on the Climate and Ecological Emergency."<sup>2</sup> The flyers, posters, stickers, and flags used or distributed by the group at the Market were correspondingly nonpartisan and apolitical. Rather, these materials explained the climate action goals of Extinction Rebellion and provided resources for the community to learn more about the organization's local chapter and objectives.

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<sup>1</sup> Pursuant to the Internal Revenue code, "the term 'political organization' means a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." 26 U.S.C. § 527(e)(1). The Code, in turn, defines an "exempt function" as "the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization . . . ." *Id.* § 527(e)(2).

<sup>2</sup> Extinction Rebellion: About Us, *available at* <https://rebellion.global/about-us>.

The fact that the Market is managed by the Living Smart Foundation does not make it free to promulgate rules or otherwise limit free speech activities in such a way as to violate First Amendment protections. When the activities of a private organization are sufficiently tied to the activities of the government, then these activities will be deemed “state action” and constitutional standards must be met.

In particular, the United States Supreme Court has identified the following factors as indicating when the activities of a non-governmental entity will be considered state action: **First**, if the government and a private entity can be seen as joint venturers, then that entity can be subject to constitutional restraint because of its “symbiotic relationship” with the government. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 356-59 (1974). A symbiotic relationship will be found when the activities of a private entity become so entangled with the government that its actions appear to have the authorization of the State. *See Evans v. Newton*, 382 U.S. 296 (1966). **Second**, if a government encourages or sanctions the practices of a private entity, it will be considered state action. Such a determination is made by “sifting the facts and weighing the circumstances” to find sufficient connections and entanglements between the private entity and the government. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). That a private entity benefits from its location within a government facility, or that its proximity to public property gives the impression of government involvement, are factors bringing the entity within the ambit of federal and state constitutional restraints.

The following are examples of the substantial entanglement of the Historic Folsom Farmers Market and the City, which reveal that the conduct in question can be construed as “state action” and thus subject to the First Amendment:

- The Market appears to be part of the City. The Market’s name, the “Historic Folsom Farmers Market,” reinforces this impression;
- The Market is housed in the Historic Folsom Plaza— public property generally dedicated to public use, including constitutionally protected speech;
- The Market is advertised as being “open to the public on Saturdays, from 6:00 am to 3:00 pm all year round”;
- The Market includes informational tables promoting other City events among the vendor booths; and
- The City has issued a permit for the Market’s use of the Historic Folsom Plaza.

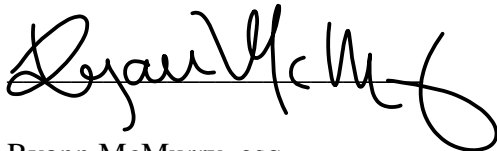
Even if the Market were somehow deemed a private enterprise taking place on private property, its officials would still have to follow federal and state constitutional guidelines protecting speech and expressive conduct because the Market is so freely open to the public. Indeed, the California Supreme Court has emphasized that, when private property owners operate commercial ventures in which the general public is invited to congregate, these enterprises may be deemed public forums for free speech purposes, and regulations of speech must then meet the same constitutional standards applied to the State. *See Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 910 (1979); *see also Fashion Valley Mall, LLC v. Nat’l Labor*

*Relations Bd.*, 42 Cal. 4th 850, 858 (2007) ( “[P]rivate property can constitute a public forum for free speech if it is open to the public in a manner similar to that of public streets and sidewalks.”) (citing *Marsh v. Alabama*, 326 U.S. 501, 502 (1946) and collecting caselaw re same).

Applying these long-standing legal precedents here, the Historic Folsom Farmers Market is indisputably bound by constitutional standards with respect to free speech. The Market is held in a market plaza—the most public of forums particularly reserved for the exercise of speech rights. Furthermore, the Market’s dedicated space for musicians and its inclusion of numerous vendors serve to invite the public to congregate, not merely to purchase goods from a single source, but to interact with the local community.

The ACLU trusts that, based on the foregoing, neither Extinction Rebellion nor any other nonpartisan group or individual wishing to exercise rights protected under the First Amendment will be prevented from doing so at the Historic Folsom Farmers Market in the future. Thank you for your attention to this matter and feel free to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Ryann McMurry". The signature is fluid and cursive, with a long horizontal line extending from the end.

Ryann McMurry, esq.

Legal Fellow

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Enclosure

cc: Elaine Andersen, City Manager, City of Folsom (eandersen@folsom.com)  
Allen D’Anneio, Historic Folsom Market Manager (adanneo@bemoneysmartusa.org)  
John Hagar, Extinction Rebellion (johnhagar@xramerica.org)



**Eat Healthy, Buy Local!  
Certified Farmers Markets**

**Supporting Farmers, Youth, Small Businesses & Our Communities**

**IRS Federal Government  
The Restriction of Political Campaign Intervention  
by Section 501(c)(3) Tax-Exempt Organizations**

**Historic Folsom Farmers Market**

To Whom it May Concern:

Living Smart Foundation is registered as a Tax Exempt 501c3 Non-Profit Foundation through the Federal Government. As such, we are bound to operate under the laws required by the Federal Government which states the following:

*"Under the Internal Revenue Code, all section 501(c)(3) organizations are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office. Contributions to political campaign funds or public statements of position (verbal or written) made on behalf of the organization in favor of or in opposition to any candidate for public office clearly violate(s) the prohibition against political campaign activity. Violating this prohibition may result in denial or revocation of tax-exempt status and the imposition of certain excise taxes."*

The Historic Folsom Farmers Market is organized, managed and run by Living Smart Foundation. Living Smart Foundation rents out the property from the City of Folsom as a private event under contract that includes permits etc., that is open to the public on Saturdays, from 6:00 am to 3:00 pm all year round. During this time we cannot allow political organizations to participate in the market as this can be construed as an endorsement and/or involvement within the political process and would therefore be in violation of the Federal mandate of which we are bound.

The Historic Folsom Farmers Market is being held on public property at the Folsom Plaza, as a private event that is open to the public under the management and control of our 501c3 Non-Profit. We respectfully support all political groups to exercise their freedom of speech rights, but they must do so outside of this event and within no less than 50 feet from the entrances or exits of the event so that Living Smart Foundation will in no way be in violation of this federal law requirement.

We appreciate your attention to this matter and for your cooperation.

Sincerely,

*Marie V. Hall*

Marie V. Hall

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