ACLU
AMERICAN CIVIL LIBERTIES UNION of NORTH CAROLINA FOUNDATION

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January 27, 2012

VIA ELECTRONIC AND U.S. MAIL
Guilford County Board of Commissioners
Post Office Box 3427
Greensboro, NC 27402

Re: Constitutional Concerns about Proposed Policy Regarding Citizen Multi-Media Presentations at Board of Commissioners' Meetings

Dear Commissioners,

The American Civil Liberties Union of North Carolina Legal Foundation ("ACLU-NCLF") was contacted last week by Guilford County resident Jodi Riddleberger, on behalf of a local group called Conservatives for Guilford County ("C4gc"). Ms. Riddleberger has requested our assistance in connection with a recent decision by the Guilford County Board of Commissioners ("the Board") to ban any and all multi-media presentations during prescribed public comment periods of Board meetings. After conducting an initial investigation, we have concerns that your Board is violating Ms. Riddleberger's rights under the Free Speech Clause of the First Amendment to the United States Constitution.

Factual Background

Based on our investigation, it appears that on October 20, 2011, Ms. Riddleberger addressed the Board during the three-minute public comment period. Ms. Riddleberger played a video as part of that presentation. After the presentation ended, Chairman Alston indicated his displeasure with the video as an "unpaid commercial for candidates" and remarked that from that point forward, the County should try to "screen videos" for content.

There is no indication that Chairman Alston, or any other board member, had ever before advocated that the Board should screen videos played as part of a public presentation. Additionally, it appears to be undisputed that Chairman Alston has made repeated derogatory comments specifically targeting C4gc.

On November 3, 2011, during a work session, the Board voted to ban multi-media presentations during public comment period. It appears that the Board did not seek or permit public input before this vote. During that work session, Chairman Alston indicated that groups (such as the library) that sought to show videos during Board meetings could ask to be placed on the agenda.

The next day, on November 4, 2011, Ms. Riddleberger contacted the County to request copies of the rules and regulations regarding the procedure for adding an item to the Board's regular meeting agenda. Ms. Riddleberger also requested both old and new rules for "speaker[s] from the floor" during public comment period. On November 7, 2011, the Board's Clerk responded and informed Ms. Riddleberger that she would provide the information "as soon as I can." No information was subsequently provided.

On November 21, 2011, Ms. Riddleberger again contacted the Board via email, making a written request:

> to be a part of the Commissioners December 1st agenda. I have a video to show of their decision to ban Multi-media from the speakers from the floor portion of the meetings. I would like them to revisit the issue and consider reversing their vote for censorship, at their next regular scheduled meeting.

The next day, the deputy clerk responded, stating as follows:

> The staff met this morning with the Chairman to set the agenda for the December 1st meeting and the Chairman considered your request to add your video presentation to the agenda. At this time, he has decided against the request to add the presentation to the Dec. 1st agenda. He suggested you could bring forward your request to revisit the issue at the Speakers from the Floor portion of the meeting if you still wish to pursue it. Thank you.

Ms. Riddleberger spoke at the December 1, 2011 meeting during the public comment period, but she was not permitted to show her video footage of the work session on November 3rd, during which the Board enacted the multi-media presentation ban. It appears that the Chairman and the staff made the decision to deny Ms. Riddleberger's request to be placed on the December 1, 2011 agenda without conferring with other Board members.

At a Board retreat on January 10, 2012, County Attorney Mark Payne presented a proposed new policy related to placing items on meeting agendas. Under this proposed policy, a new sentence was added that states: "The guiding principle for any item to be placed on the agenda is whether it is necessary or assists the Board in performing its duties." Further, Mr. Payne recommended changes to the Board's Rules of Procedure, including a new provision that creates an "Agenda Review Committee," which provides:

> The Agenda Review Committee shall consist of the Chair, Vice-Chair and any board member so designated by the Chair. It is not necessary for a quorum of the committee to be present in order to take action in the decision to place or not place items on the agenda for full Board consideration.

Under this new provision, it appears that the Chair could appoint as many individuals to the Agenda Review Committee as needed to ensure that the Chair makes the ultimate decision on agenda items. Further, as a quorum is not needed, it appears that the Chair could make unilateral decisions on agenda items.

I spoke with Mr. Payne earlier this week about some of my concerns related to the Board's past treatment of Ms. Riddleberger. Mr. Payne forwarded me the proposed new policy and revisions to the procedural rules. As set forth below, the new policy and the rule revisions only add to my concerns about the recent actions taken by the Board.

Legal Analysis

"The First Amendment affords the broadest protection to political expression in order to sustain the unfettered interchange of ideas to bring about political and social change and promote the will of the people." *Bach v. Sch. Bd. of Virginia Beach*, 139 F. Supp. 2d 738, 743 (E.D. Va. 2001) (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)). The United States Supreme Court has repeatedly explained that "it is a prized American privilege to speak one's mind . . . on all public institutions, and this opportunity is to be afforded for vigorous advocacy no less than abstract discussion." *New York Times v. Sullivan,* 376 U.S. 254, 269 (1964). Notably, this right "includes the ability to question the fitness of the community leaders . . . especially in a forum created specifically to foster discussion" about the community. *Bach*, 139 F. Supp. 2d at 743 (citing *Leventhal v. Vista Unified Sch. Dist.*, 973 F. Supp. 951, 953-54 (S.D. Cal. 1997)); *see also Collinson v. Gott*, 895 F.2d 994, 1000 (4th Cir. 1990) (Phillips, J., concurring) ("Speech at public meetings called by government officials for discussion of matters of public concern is entitled to normal first amendment protections against general restrictions or *ad hoc* parliamentary rulings by presiding officials.").

It appears that the County's actions with regard to Ms. Riddleberger, as well as the passage of the ban on multi-media presentations during public comment period constitute violations of the First Amendment. First, we believe that the general requirement that individuals can show videos only if approved and placed on the agenda is an unconstitutional prior restraint on speech. Further, Chairman Alston's specific comments and actions against Ms. Riddleberger suggest that these new rules, while they appear to be content neutral, are a thinly-veiled disguise for impermissible content discrimination, or even viewpoint discrimination.

A North Carolina County Board of Commissioners is required to provide "at least one period for public comment per month at a regular meeting of the Board." N.G. Gen. Stat. § 153A-52.1. The board is permitted to adopt reasonable rules governing the conduct of the public comment period, including, but not limited to, rules (i) fixing the maximum time allotted to each speaker, (ii) providing for the designation of spokespersons for groups of persons supporting or opposing the same positions, (iii) providing for the selection of delegates from groups of persons supporting or opposing the same positions when the number of persons wishing to attend the hearing exceeds the

capacity of the hall, and (iv) providing for the maintenance of order and decorum in the conduct of the hearing. *Id.*

However, restrictions that are "a reaction to the expression itself, not the enforcement of any independent, substantial government interest" are impermissible. *Dayton v. Esrati*, 707 N.E.2d 1140, 1147 (Ohio Ct. App. 1997). Based on our investigation, it appears that the restrictions against multi-media presentations during the public comment period are a direct reaction to Ms. Riddleberger's message, rather than to any independent government interest. Mr. Payne suggested to me that multi-media presentations could and should be banned during the public comment period because they could be perceived as endorsements made by the County. We fail to see how such a presentation could be seen as an endorsement if it is made during a period when the public is permitted to speak on any matter. Further, it is unclear why a video presentation would be any different than an oral presentation in this instance. Finally, even if this were considered a content-neutral time, place, and manner restriction, the County probably cannot show that the restrictions are narrowly tailored to further a substantial government interest. *Am. Legion Post 7 of Durham, N.C. v. City of Durham*, 239 F.3d 601, 609 (4th Cir. 2001); *Clark v. Cmty. for Creative Non-Violence,* 468 U.S. 288, 293 (1984). A simple requirement that any video include a disclaimer noting that it is not sponsored by the County would serve the same purported government interest more narrowly than a complete ban.

Additionally, even if the restrictions in place *could* be considered to be content-neutral, they do not leave open the required "ample, alternative channels for communication." *Am. Legion Post 7*, 239 F.3d at 609; *Clark*, 468 U.S. at 293. Even Board members themselves have openly expressed the value of video presentations by community members. *See* November 3, 2011 Work Session. And in light of the multi-media ban during public comment period, the only way to show a video is to seek approval from the Chairman and his "Agenda Review Committee." Such a requirement is a prior restraint on speech. The Supreme Court has repeatedly cautioned that "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558, 96 S. Ct. 2791, 2802 (1976).

Significantly, the Supreme Court has held that prior restraint is unconstitutional if it leaves unbridled discretion in a government official. *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 130 (1992). 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.'" *Id.* at. 130 (quoting *Heffron v. International Society for Krishna Consciousness, Inc.,* 452 U.S. 640, 649 (1981)). To curtail that risk, any prior restraint on First Amendment rights must contain "narrow, objective, and definite standards to guide the licensing authority." *Forsyth*, 505 U.S. at 131 (internal quotations and citations omitted).

The actions of the Chairman in response to Ms. Riddleberger's request to be placed on the December 1st Agenda, as well as the language of the new proposed policy,

suggest that the Chairman has unbridled discretion to make decisions about who and what material can be placed on the meeting agendas. There appear to be no standards in place to guide the Chairman's actions. That is impermissible under the First Amendment.

Further, the decision to deny Ms. Riddleberger's request to be placed on the December 1st agenda and to show a video that appeared to relate specifically to Board business, while noting that a request by the library would be approved, demonstrates that the Chairman is making these decisions at least based on the content, and maybe the viewpoint, of the message. Content-based discrimination triggers strict scrutiny review – even higher than that for content-neutral regulations as described above. Under strict scrutiny, a regulation must be *necessary* to serve a compelling governmental interest by *the least restrictive means available*. *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 648 (4th Cir.1995); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 955 (1983). It seems unlikely that the County can meet this very heavy burden. Further, "[i]n its practical operation," the Board's actions and proposed policy may "go[] even beyond mere content discrimination, to actual viewpoint discrimination," which is patently unconstitutional under the First Amendment. *R.A.V. v. St. Paul,* 505 U.S. 377, 391 (1992).

Conclusion

If any of the above-described factual background is incorrect, please let us know. Otherwise, for the above reasons, it appears that (1) the actions taken by Chairman Alston; (2) the imposed ban on multi-media presentations during public comment period; and (3) the proposed implementation of a new Agenda Review Committee violate the First Amendment. We urge you to reconsider these actions and reverse the ban on multi-media presentations during public comment period. As noted above, the Board is within its authority to limit presentations to a three-minute period. Further, we believe that a court would find it reasonable to require those who seek to make such presentations to add a disclaimer to the video noting that the County is not endorsing the message. However, the total ban, the unbridled discretion given to the Chair, and Chairman Alston's seemingly content-based or viewpoint-based decisions go too far.

I would appreciate a response to this letter by Friday, February 10, 2012.

Sincerely,

Katherine Lewis Parker
Legal Director

cc: Mark Payne, Guilford County Attorney
Jodi Riddleberger, Conservatives for Guilford County
Seth Cohen, Esq.