April 30, 2021

SENT VIA EMAIL

Mayor Bettie J. Parker
Sent to bparker@cityofec.com

Police Chief Eddie Buffaloe
Sent to ebuffaloe@cityofec.com

City Manager Montré Freeman
Sent to mfreeman@cityofec.com

Assistant City Manager Angela Judge
Sent to ajudge@cityofec.com

City Attorney William H. Morgan, Jr.
Sent to wmmorgan@embarqmail.com

Re: Elizabeth City Public Assembly Permit Policy and Curfew

Dear Mayor Parker, Chief Buffaloe, City Manager Freeman, Assistant City Manager Judge, and City Attorney Morgan:

The ACLU of North Carolina, Emancipate North Carolina, and the Lawyers' Committee for Civil Rights Under the Law write to raise legal concerns about Elizabeth

City's "State of Emergency" Declaration and associated new policies, including the requirement that a gathering or protest be authorized in advance by the City Manager via a permit, as well as the ongoing imposition of a curfew that severely restricts movement in Elizabeth City. According to the Elizabeth City website, this permitting scheme — imposed in direct response to peaceful protests against the police killing of Andrew Brown, Jr. — requires "***anyone wishing to protest or gather***" to complete a "Public Assembly Permit Application" identifying themselves at least fifteen (15) days in advance of the protest or gathering. See City's post April 30, 2021 (State of Emergency - Modified Curfew Hours 12 am to 6 am - News & Announcements - Official Website of Elizabeth City, NC (cityofec.com), granting 15 day permit "grace period" but still requiring completion of this form). Moreover, under its unjustified State of Emergency, the City continues to impose a broad curfew of indefinite length that restricts people's freedom of movement in Elizabeth City.

I. The Permitting Scheme Violates the First Amendment

The City's new far-reaching requirement that anyone wishing to protest or gather must apply for a permit violates the First Amendment because it contains no exception for constitutionally-protected spontaneous gatherings, including gatherings in response to breaking news. The events surrounding Mr. Brown's death, including recent decisions related to the release of body camera footage, are prime examples of breaking news. Spontaneous gatherings, even large ones, are protected by the First Amendment and cannot be restricted on the basis that no one has applied for a permit. *See Cox v. City of Charleston*, 416 F.3d 281, 286 (holding permit ordinance unconstitutional in part because it restricted

"[s]pontaneous expression, which is often the most effective kind of expression") (internal marks and citation omitted). This applies both for protests and counter-protests.

Moreover, people generally have a right to protest and gather in traditional public fora like sidewalks, streets, and other public outdoor property without first obtaining a permit, so long as they do not obstruct vehicular or pedestrian traffic or violate other generally applicable laws. The purpose of a permit is to grant broader rights and access than those laws typically provide—for example, to march in the streets or take up an entire sidewalk. The City's blanket permit requirement, which is imposed on all gatherings and protests without regard to the size of the gathering or the nature of protestors' activities, clearly violates the First Amendment. *See*, e.g., *Cox*, 416 F.3d at 284-86 (holding that a blanket permit requirement for all gatherings larger than 10 creates an unconstitutional prior restraint).

It is also deeply troubling that this permitting scheme was implemented in direct response to protests decrying the killing of Andrew Brown Jr. at the hands of police. This suggests that the permitting scheme is not viewpoint- and content-neutral in origin, as required by the Constitution. There was no "emergency" justifying the imposition of a permit or notice requirement on demonstrators. The circumstances around the City's hasty adoption of a sweeping permitting scheme raise concerns that it will be enforced most vigorously against people participating in protests that convey messages that government officials deem offensive or disagreeable.[1]

[1] The permitting scheme is also extremely vague and confusing, in that it provides no information whatsoever as to the criteria or requirements for obtaining a permit other

II. Protests Are Not Emergencies.

As a general matter, the City's declaration of a State of Emergency based simply on the fact that protests are imminent or occurring is constitutionally impermissible. "Only when local law enforcement is no longer able to maintain order and protect lives and property may the emergency powers be invoked." *United States v. Chalk*, 441 F.2d 1277, 1280 (4th Cir. 1971). S*ee, e.g., Antietam Battlefield KOA v. Hogan*, No. CV CCB-20-1130, 2020 WL 2556496, at *5, n.15 (D. Md. May 20, 2020) (refusing to apply *Chalk* to an executive order where "civil control had [not] broken down to the point where emergency measures [we]re necessary" (quoting *Chalk*, 441 F.2d at 1281)). "As the Supreme Court has said in the First Amendment context, the government 'must do more than simply posit the existence of the disease sought to be cured.'" *Schleifer by Schleifer v. City of Charlottesville*, 159 F.3d 843, 849 (4th Cir. 1998) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)). "It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* (citing *Turner*, 512 U.S. at 664). *See also Hodgkins v. Peterson*, No. 1:04-CV-569-JDT-TAB, 2004 WL 1854194, at *8 (S.D. Ind. July 23, 2004) ("[I]n every reported federal decision in which a curfew law was upheld against constitutional challenge, substantial evidence was produced by the government to support the law.").

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than completion of the required form. Nor does it explain when applicants can expect to learn whether their application has been approved or denied.

III. The City's Indefinite Curfew in Response to Peaceful Protests is Unconstitutional.

In addition, the Elizabeth City curfew, which currently covers the city for six hours each night, is an overbroad restraint on speech and the right to petition, and invites arbitrary and discriminatory enforcement against people based on their race and/or occupation, in violation of both the U.S. and North Carolina Constitutions.

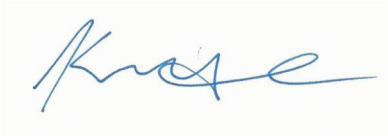
The curfew's blanket restriction on all movement except for travel associated with employment and emergencies within city limits forbids expressive activity at the core of the First Amendment and is not narrowly tailored because the two exemptions do not allow for alternative channels of communication. The curfew also violates the right to assembly and petition under Art. I, Sec. 12 of the North Carolina Constitution, which duplicates "the right to freedom of association embodied within our federal Constitution." *Feltman v. City of Wilson*, 767 S.E.2d 615, 620 (N.C. Ct. App. 2014).

By covering a large swath of lawful conduct, this curfew is overbroad, and also violates the fundamental rights to free movement and access to public spaces. The Due Process Clause of the Fourteenth Amendment protects the "freedom to loiter for innocent purposes" and to "remove from one place to another according to inclination." *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999) (plurality opinion). The current curfew effectively places all Elizabeth City residents, with extremely limited exceptions, under house arrest conditions for six hours a day. Any government restrictions on freedom of movement on public streets must both serve a compelling state interest and be narrowly tailored to accomplish that objective.

By making it unlawful to be present on public streets anywhere in the city — with only limited exceptions — the curfew also gives police too much discretion over whom to arrest, leading to selective enforcement based on race or occupation of people on the streets during the curfew. Indeed, we are hearing reports that members of the media, attorneys, and other individuals plainly engaged in work during the time of the curfew were arrested or threatened with arrest even though they were clearly covered by the employment exception. This broad curfew enables law enforcement to reenact the police abuses that are at the root of the protests.

While the new permitting policy appears to provide a "15 day grace period" during which it presumably will not be enforced, it is patently unconstitutional and should be rescinded immediately to avoid confusion and the unlawful chilling of people's First Amendment rights. We call on City Officials to immediately rescind both the permitting scheme and Mayor's order declaring a city-wide curfew, to cease enforcement of this permitting scheme and curfew, and to respect the Constitutional rights of all community members, including people who protest. Should you wish to discuss this matter further, please contact us at the email addresses listed below.

Sincerely,



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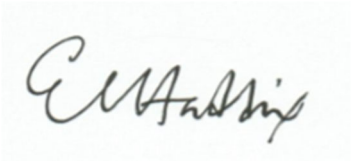

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