February 22, 2021

Gaston County Board of Commissioners
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Dear Chairman Keigher and Gaston County Board of Commissioners:

We write to raise legal concerns about the recently proposed Resolutions to Amend the Gaston County Code of Ordinances, Chapter 8, Article IV, that would create a permitting or "notification" process for certain gatherings held on county-owned property or on any public street or sidewalk within the county. We understand that the version considered in late January ("January Ordinance") has been revised, but both the original and revised versions are overbroad restraints on speech and invite arbitrary and discriminatory enforcement in violation of the First Amendment of the U.S. Constitution and Article I, Sections 12 and 14 of the North Carolina Constitution.

The newly proposed ordinance ("February Ordinance") requires advance notification and official approval for public assemblies "of 25 or more people reasonably anticipated to obstruct the normal flow of traffic on county property," including County Courthouse property. But the government's authority to restrict speech on county property is limited by the Constitution. The government may not "transform the character" of traditional public forums such as sidewalks, public squares, and parks simply by statute. *See United States v. Grace*, 461 U.S. 171, 180 (1983). Indeed, the U.S. Supreme Court has found that the sidewalks surrounding the U.S. Supreme Court are traditional public fora that must remain open to protests and assemblies. *See id.* at 179. And if that holds true for the highest court in the land, then the sidewalks and areas surrounding public

buildings in Gaston County certainly must remain open to constitutionally protected gatherings as well.

While reasonable time-place-manner restrictions may apply to traditional public forums, such restrictions must be (1) "justified without reference to the content of the regulated speech," (2) "serve a significant governmental interest," and (3) "leave open ample alternative channels for communication of the information." *Heffron v. Int'l Soc. for Krishna Consciousness, Inc*., 452 U.S. 640, 648 (1981) (internal quotation and citation omitted). Ordinances that provide too much discretion to enforcement authorities to limit gatherings are "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." *See Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130–31 (1992).

I. Both Proposed Ordinances Give Too Much Discretion to the "Approving" or "Permitting" Official to Deny Proposed Events.

A permitting ordinance is unconstitutional if it does not include "narrow, objective, and definite standards to guide the licensing authority." *See Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 150–51 (1969). The January Ordinance proposed a permitting scheme; the February Ordinance reframed the permitting requirement as a "notification" requirement, but that reframing does not change the legal analysis. Even a notification procedure can stifle protected speech: "The simple knowledge that one must inform the government of his desire to speak and must fill out appropriate forms and comply with applicable regulations discourages citizens from speaking freely." *See NAACP, Western Region v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984). And in any case, the February Ordinance still authorizes the "Approving Official" to "revoke approval" of a notified event, suggesting that the February Ordinance would function in much the same way as a permitting scheme. Consequently, because this authority to revoke approval would be completely standardless—and thus unconstitutional—the February Ordinance should be

revised to create a "shall-issue" approval scheme in which the approving official is disallowed from "denying" approval.

To the extent that the February Ordinance creates a "shall-issue" approval scheme, it would be a significant improvement on the January Ordinance. That ordinance contained provisions that were so discretionary that they invited permitting officials to consider the content of a permit applicant's speech. Although the January Ordinance disallowed permitting officials from considering "the content of the views expressed," several provisions had "the potential for becoming a means of suppressing a particular point of view." *See Forsyth*, 505 U.S. at 130–31 (internal citation omitted). For example, section (c)(10) of the January Ordinance allowed a permitting official to consider whether the "proposed event would present an *unreasonable* danger to the public health or safety." In determining what an "unreasonable" danger might be, a permitting official might impermissibly examine the purpose of the protest to estimate the public's response. *Cf. Thomas v. Chicago Park Dist.*, 534 U.S. 316, 324 (2002) (approving of such an "unreasonable danger" standard in a decidedly content-neutral permit scheme that applied to all events and activities, not just protests). Similarly, to determine whether an event would "*substantially* or *unnecessarily* interfere with traffic" under section (c)(11), a permitting official might impermissibly consider his or her own subjective views about the necessity of the protest.

Sections (c)(10) and (c)(11) of the January Ordinance also impermissibly conditioned approval of an event on the potential reaction of the public by inviting the permitting official to consider the prospective response to an event. It is unconstitutional for permitting officials to restrict speech out of fear of a potentially violent reaction. *Berger v. Battaglia*, 779 F.2d 992, 1001 (4th Cir. 1985) ("The most persistent and insidious threats to first amendment rights has been that posed by the 'heckler's veto,' imposed by the successful importuning of government to curtail 'offensive' speech at peril of suffering disruptions of public order."). *See generally Edwards v. South Carolina*, 372 U.S. 229 (1963); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949). Section (c)(13) similarly violated this principle by allowing the permitting official to consider whether

there would be "sufficient law enforcement and traffic control officers to adequately protect participants and non-participants." Such a provision effectively codifies the "heckler's veto"—that is, the more people who might respond to a lawful mass gathering, the more difficult it will be to get that gathering approved in the first place.[1]

Thus, we discourage the commissioners from re-considering these problematic provisions in the January Ordinance. If the commissioners believe that the interests purportedly advanced by the proposed "notification" requirement outweigh the burdens such a requirement will inevitably impose on county residents' constitutional rights, then the February Ordinance should either provide for a shall-issue approval scheme or allow for the denial or revocation of a permit only in accordance with clear, non-discretionary criteria.

II. The Proposed Ordinances Do Not Contain a Necessary Exception for Spontaneous Gatherings in Response to Breaking News.

Both proposed ordinances inadequately accommodate spontaneous gatherings that occur in response to breaking news where obtaining a permit in advance is not feasible. Spontaneous gatherings, even large ones, are protected by the First Amendment and cannot be prohibited simply because participants lack a permit. *See, e.g.*, *Cox v. City of Charleston*, 416 F.3d 281, 286 (4th Cir. 2005) (holding permit ordinance unconstitutional in part because it prohibited "[s]pontaneous expression, which is often the most effective kind of expression"). This holds true for protests and counter-protests.

The January Ordinance required that all permit applications for mass gatherings be submitted to a county "permit official" "at least thirty (30) days before the commencement of the

[1] Section (c)(16) in the January Ordinance was also problematic. That section provided different standards for issuing permits for "non-First Amendment protected public assemblies or parades." The term "non-First Amendment protected" is vague and inevitably lends itself to discriminatory enforcement. Furthermore, it is unlikely that any public demonstration, parade, or festival would not fall within the scope of the First Amendment.

event." The February Ordinance lowers this requirement to two (2) business days' advance notice (or 24 hours for a protest). Although this revision is a significant improvement,[2] the February Ordinance still lacks a necessary exception for spontaneous gatherings in response to breaking news.

Under the February Ordinance, when a notification is submitted outside the required advance notice period before a proposed mass gathering, an "Approving Official" is only obligated to "consider" permitting the event if the proposed mass gathering qualifies as a "spontaneous response to a current event" or if "other good and compelling causes are shown"—a determination that is presumably made by the approving official alone. But an obligation to merely consider an event application made in response to breaking current events fails to adequately protect the critical First Amendment right to spontaneous expression. *See Cox*, 416 F.3d at 285. Moreover, the ordinance provides too much discretion to permitting officials to determine what qualifies as a "current event" or "other good and compelling causes."

Accordingly, to protect critical First Amendment rights, any permit or "notification" rules should state clearly that the permit or notification requirement shall not apply to individuals gathering spontaneously in response to breaking news or current events.

[2] A 30-day advance notice requirement would be an impermissible burden on speech. Permitting schemes controlling the time, place, and manner of speech must be narrowly written to not "burden substantially more speech than is necessary to further" the purported government interests at issue. *Ward v. Rock Against Racism*, 491 U.S. 791, 799 (1989). A 30-day notice requirement would be a substantial burden on speech and unnecessary to serve any interests in traffic control or public safety. Several courts have found that permit schemes with far shorter pre-approval periods were unconstitutional under the First Amendment. *See, e.g., American-Arab Anti-Discrimination Comm. V. City of Dearborn*, 418 F.3d 600, 606 (6th Cir. 2005) (30 days' notice unconstitutional); *NAACP, Western Region v. City of Richmond*, 743 F.2d 1346, 1356–57 (9th Cir. 1984) (20 days' notice unconstitutional); *Douglas v. Brownell*, 88 F.3d 1511, 1523–24 (8th Cir. 1996) (5 days' unconstitutional); *Robinson v. Coopwood*, 292 F. Supp. 926, 932 (N.D. Miss. 1968), *judgment aff'd without opinion*, 415 F.2d 1377 (5th Cir. 1969) (1 hour of notice unconstitutional).

III. The "Public Assembly and Regulations" Section of the February Ordinance Creates Numerous Constitutional Issues.

The section of the February Ordinance listing "regulations" that "apply to gatherings of any size," notwithstanding the 25-person threshold, contains numerous constitutionally problematic regulations.

Subsection (e)'s categorical prohibition on public assemblies or protests occurring within 50 feet of a county building is overbroad and unconstitutional. A government entity's ability to restrict speech is "sharply circumscribed" when that speech takes place in a "quintessential public forum" like a public sidewalk or the grounds of a government building. *See Occupy Columbia v. Haley*, 738 F.3d 107, 121, 125 (4th Cir. 2013). The sidewalks and other open outdoor areas surrounding county buildings are almost always considered traditional public fora which must be open to the public for protest and assembly. *See, e.g., Warren v. Fairfax Cty.*, 196 F.3d 186, 189-90 (4th Cir. 1999 (en banc) (pedestrian mall surrounding government buildings, which included a grassy area and sidewalks was a traditional public forum); *see also McCullen v. Coakley*, 573 U.S. 464, 490-97 (2014) (law prohibiting people standing within 35 feet of a reproductive health care facility violated the First Amendment). And while the County's interest in "ensuring all persons' safe and unimpeded ingress and egress to and from" county buildings is certainly a worthy one, the Supreme Court has nonetheless held that it is unconstitutional for government entities to advance such an interest via a blanket ban on all speech within a certain buffer zone when more narrowly tailored alternatives are available, such as imposing penalties on or allowing for the removal of individual protesters who *actually* threaten public safety by blocking the entrance to a county building. *See McCullen v. Coakley*, 573 U.S. 464, 490–93 (2014).

Subsection (f), which prohibits "any participant of a public assembly or parade to harass or intimidate any bystanders," is impermissibly vague because it does not define "harass or intimidate." Many statements may be construed as harassment or intimidation yet are still protected under the First Amendment. To limit speech not protected by the Constitution, the

regulation must only prohibit the use of "fighting words," as recognized in *Cohen v. California*, 403 U.S. 15, 20 (1971).[3]

Subsection (g) leaves too much discretion to the Sheriff and his designees to revoke permits. Courts that have upheld revocation clauses have only done so where permit revocation requires a clear and present danger to public safety. *See United States v. Cinca*, 56 F.3d 1409, 1415 (D.C. Cir. 1995). Here, officials can revoke a permit "at any time." Revoking a permit prior to the event would likely be considered an unconstitutional prior restraint.

Subsection (i)'s categorical ban on structures, enclosures, and tents is also not narrowly tailored to serve a significant government interest. Governments may place reasonable time limits on expression, provided the limits are narrowly tailored to the government's significant interest. *See Cox*, 416 F.3d at 284. To be constitutional, limits on structures must be specific. For example, one court has upheld a county ordinance that specified that staffs and poles used in a protest must be constructed of corrugated material, plastic, or wood, less than 40 inches in height, no greater than three-fourths inch in diameter, and blunt on both ends. The court determined that these specifications were narrowly tailored to the county's interest in public safety. *O'Connell v. City of New Bern, N. Carolina*, 447 F. Supp. 3d 466, 480 (E.D.N.C. 2020). Yet here, the proposed ordinance restricts placement of *any* structure, enclosure, or tent on county property. This restriction is so broad as potentially to exclude podiums, temporary platforms, or literal soapboxes and other structures which do not pose a public safety hazard.

Subsection (j)'s categorical ban on events that occur outside the hours of 6:00 AM and 11:00 PM is also not narrowly tailored. Courts have recognized that certain expressive events that occur outside of these hours hold special power and are worthy of protection because they occur overnight. *See Hodgkins v. Peterson*, 355 F.3d 1048, 1058 (7th Cir. 2004) (listing events such as

[3] Furthermore, subsection (f) singles out the speech of participants for legal restrictions without similarly limiting the speech of bystanders. Bystanders thus remain free to "harass or intimidate" participants in public assemblies or parades under this one-sided restriction.

"[l]ate-night or all-night marches, rallies, and sleep-ins . . . to protest government action or inaction," political campaign rallies, and religious observations occurring in the late evening or early morning like Holy Thursday, Shavout, and late evening prayer during Ramadan). A categorical ban on late night and early morning public assemblies is not constitutional.

Finally, subsection (k)'s broad authorization of "protest zones" impermissibly burdens speech. The Supreme Court has struck down regulations that allow the police to establish or make mid-protest modifications of protest zones where such zones burden more speech than necessary. *See Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 378 (1997) (striking down a regulation that required protestors at abortion facilities to consistently remain 15 feet away from patrons). Forcing protestors to move while in the midst of a gathering would create confusion and uncertainty and places unconstitutional burdens on their expression.

IV. The January Ordinance's Fee Regime Was Likely Unconstitutional and Should Not Be Reconsidered.

The February Ordinance eliminates the January Ordinance's licensing fee section and the discretionary "costs and fees" section, which passed on the costs of event security to applicants. This is an important change. In case the Commissioners should consider reinstating these provisions, they should be aware that these provisions posed serious constitutional concerns.

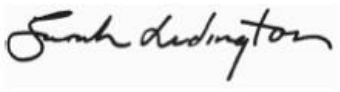
Excessive fees can violate the First Amendment because they operate to suppress the speech of those who cannot afford to apply for a permit. Fees charged must be determined in a fair and non-discriminatory manner. *See Cox v. New Hampshire*, 312 U.S. 569, 577 (1941). Fees should be nominal. *See Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943). Licensing fees are permissible only to the extent necessary to defray administrative expenses. *E. Conn. Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983).

Even parties who can afford to pay an upfront fee may be discouraged by the additional discretionary costs of security. The security costs the county deems necessary could be prohibitively expensive in many cases, and shifting them to organizers of mass gatherings would no doubt stifle valuable and constitutionally protected speech. Such a cost-shifting regime would effectively allow a "heckler's veto," because controversial events will be more expensive to police. *See generally Cent. Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir. 1985) (determining a fee scheme that included the added costs of police protection impermissibly burdened the First Amendment rights of indigent persons who were unable to pay such costs).

* * *

We ask the Gaston County Board of Commissioners to consider the above concerns and make appropriate revisions to any current or future proposals creating a process for obtaining a permit for a mass gathering. Should you wish to discuss this matter further, please contact us at the email addresses listed below.

Sincerely,



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