January 19, 2023

Via Electronic Mail

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Jefferson Parker
President

Chantal Stevens
Executive Director

Dear Mr. McGirt, Mr. Branham, Mr. Maddux, Mr. Zack and Ms. Campbell,

We write to you on behalf of our clients, fourteen individuals[1] who have been banned from public parks. These individuals were charged with felony littering after engaging in a protest at Aston Park and were soon

[1] Abigail Temoshchuk-Reynolds, Amy Hamilton, Elizabeth Flickinger, Elsa Enstrom, Erica Deaton, Gina Dickhaus, Julia Weber, Kara Roberts, Kathryn Hudson, Nicole Martinez, Nicole Matute Villagran, Nora Watkins, Pageant Nevel, Sarah Boddy Norris.

after issued restricted access notices banning them from all Asheville parks based on their felony littering charges. To this day, some of our clients have not received notice of these bans and have only discovered the existence of the bans through the discovery process in their criminal cases. Those who did receive notice were given a cursory hearing where all of their bans were upheld. These policies and practices violate both the First Amendment and the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and Article I, Sections 12, 14 and 19 of the North Carolina Constitution. We respectfully request that the City of Asheville promptly rescind the park bans that have been issued against our clients and take immediate action to revise this policy. We further request that you take all reasonable steps to preserve and retain all records potentially relevant to this matter, including but not limited to all electronically stored information within your possession, custody, or control, including emails, instant messages, voicemails, recordings and other communications regardless of their format. If you are not represented by the city attorney, please share this letter and our request with your attorney at your earliest convenience.

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I. Factual Background

Our clients are fourteen individuals who volunteer with a mutual aid organization to distribute food and supplies to Asheville's unhoused population. Starting in January 2022, they were charged with felony littering under N.C.G.S. § 14-399 in connection with a protest and demonstration related to their volunteer work. Notably, felony littering is an extremely rare charge and, according to North Carolina Judicial Branch reports, in the past ten years there has been only one felony littering case in Buncombe County.[2] Most of our clients' criminal cases remain pending.

In February 2022, several of our clients started receiving "restricted access notices," banning them from all city parks and recreation facilities for a period of three years. These notices were issued pursuant to a city policy enacted in 2017, "Restricted Access to City Parks" (referred to hereinafter as the "Park Ban Policy"). The Park Ban Policy allows the Asheville Police Department ("APD") and, in certain circumstances, parks department officials, to ban individuals from city parks based on an observed violation of a park rule or on an arrest/citation for violation of a city, state or federal law while in a city park or on city property. Restricted

[2] *Felony Case Activity Report*, NORTH CAROLINA JUDICIAL BRANCH, https://www.nccourts.gov/documents/publications/felony-case-activity-report (last modified July 8, 2022).

access notices based on an alleged felony carry a mandatory three-year ban from all city parks and recreational facilities. Individuals who violate the ban are subject to arrest and prosecution for trespassing and an automatic one-year extension of the ban. Despite these harsh penalties, no formal charge or indictment—much less a conviction—is required in order to issue a ban under the park ban policy. The text of the policy contains no provision for lifting the ban even if the underlying charge is dismissed or otherwise found unsubstantiated; nor does it contain an exception for the banned individual to request permission to enter a park to engage in protected First Amendment activities.

The procedure to contest a notice issued under the Park Ban Policy has proven wholly inadequate to protect the rights of Asheville residents, when provided at all. The policy provides for an opportunity to appeal the ban to the Parks and Recreation Director within fourteen days of receiving a notice, but the ban is immediately effective upon issuance and remains in effect during the pendency of the appeal. The Director's decision on appeal is final. Several of our clients inquired about the process to appeal the ban, but Parks and Recreation staff indicated that they were unaware of the requirements to appeal the bans and provided our clients with inconsistent information. Ten of our clients who were given notice that they had been banned from city parks appealed the bans and attended a hearing before the Parks and Recreation Department. The hearings were approximately ten to thirty minutes long and were presided over by representatives from the city attorney's office, the Parks and Recreation Department, and APD. Our clients were not permitted to ask questions or view the evidence against them. When one client's defense attorney asked whether the policy allows for a ban to be implemented upon the accusation of violating the rule or if it requires actual violation of the rule, Deputy City Attorney Maddux responded that they would not be answering questions at the hearing. As noted earlier, the language of the Park Ban Policy does not require a formal conviction or even a charge or indictment for an issuance of a park ban. Ten of the clients who were given notice and appealed had their park bans upheld. A few of our clients were never issued restricted access notices and were only made aware that they were banned from parks through the discovery process in their pending criminal cases. These individuals were deprived of any notice and effectively were not provided with any process to appeal the bans.

These park bans have impacted our clients' ability to continue their volunteer work, to carry out job responsibilities in the childcare and education fields, and access public spaces in the city to recreate, assemble, and carry out political and social protest and speech. Park bans issued to our clients who are parents and caretakers have effectively caused our

clients' children, parents, and friends to be banned from the parks as well when in our clients' company.

II. The City of Asheville's Park Ban Policy Violates the U.S. and North Carolina Constitutions

The park ban policy raises serious constitutional concerns. First, our clients and others who have had the park ban policy used against them are not being afforded adequate procedural protections in violation of the United States Constitution and the North Carolina Constitution. The Due Process Clause guarantees "[n]o State shall . . . deprive any person of life, liberty or property, without due process of law[.]" U.S. Const. amend. XIV, § 1; *see also* N.C. Const. art. I, Sec. 19.

Notice and an opportunity to be heard are the hallmarks of procedural due process. *See Mora v. City Of Gaithersburg, MD*, 519 F.3d 216, 230 (4th Cir. 2008). Here, the City of Asheville has been deficient in providing both. As discussed earlier, two of our clients were not provided any kind of notice and were only made aware of the park bans through the discovery process in their criminal cases. The city also failed to provide adequate procedural protections to even those of our clients who received notice. The Supreme Court has established a three-factor balancing test to assess whether an individual has received due process in administrative proceedings, weighing: (1) a private interest affected by government action; (2) the risk of an erroneous deprivation with the procedures presently used; and (3) the government's interest, including the function involved and the fiscal and administrative burdens associated with additional procedures." *United States v. White*, 927 F.3d 257, 264 (4th Cir. 2019) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

As to the first factor, the interest affected by the City of Asheville is significant: courts across the country have explicitly recognized access to city parks as a liberty interest protected by the Constitution.[3] Indeed, the

[3] *See Catron v. City of St. Petersburg*, 658 F.3d 1260, 1266 (11th Cir. 2011) ("Plaintiffs have a constitutionally protected liberty interest to be in parks or on other city lands of their choosing that are open to the public generally." (citing *City of Chicago v. Morales*, 527 U.S. 41 (1999))); *Kennedy v. City Of Cincinnati*, 595 F.3d 327, 330 (6th Cir. 2010) (holding that plaintiff "possessed a clearly established constitutionally-protected liberty interest not to be banned from all City recreational property"); *Anthony v. Texas*, 209 S.W.3d 296, 307-08 (Tex. 2006) (holding that plaintiff "clearly had a liberty interest" in accessing a public park); *City of New York v. Andrews*, 186 Misc. 2d 533, 545 (N.Y. Sup. Ct. 2000) ("The Federal Constitution . . . protects a person's right to

Third and Sixth Circuits have gone even further, finding that there is a fundamental due process right to access public spaces.[4] Examining the second factor, the Park Ban Policy lacks several fundamental safeguards against the risk of erroneous deprivation. Our clients were not afforded a pre-deprivation hearing or any other meaningful opportunity to challenge the bans before they were imposed. During the hearing that ten of our clients were provided, they were not given an opportunity to view the evidence against them and were not able to cross-examine witnesses. They do not have the ability to seek review and relief from the ban at any time after the initial fourteen-day window for appeal, even if the underlying criminal allegation or alleged rule violation is later withdrawn or found to be unsubstantiated. The policy also does not provide any exception to the ban to exercise their First Amendment rights.

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The third factor, the government's interest in easing its administrative burden, also weighs against the Park Ban Policy's constitutionality. The City of Asheville may have an interest in addressing safety risks in parks, but this interest can be accomplished in other ways and does not justify the park bans without adequate pre-deprivation process. Here, our clients were not provided a pre-deprivation process and the process they were provided after the bans were already imposed was deficient. The City of Asheville has publicly stated that it is "exploring ways to balance [the] compassionate act [of food distribution to unhoused persons] with a safe environment."[5] If the city is indeed committed to finding safe ways for people working with unhoused populations to engage in food and mutual aid distribution, it should not effectuate bans preventing these same people from doing this work.

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remain in the public area of his or her choice, and to loiter there for innocent purposes, according to inclination."); *Yeakle v. City of Portland*, 322 F. Supp. 2d 1119 (D. Or. 2004).

[4] *Johnson v. City of Cincinnati*, 310 F.3d 484, 497-98 (6th Cir. 2002) ("[W]e find that the right to travel locally through public spaces and roadways enjoys a unique and protected place in our national heritage. . . .—perhaps more than any other right secured by substantive due process—[it] is an everyday right, a right we depend on to carry out our daily life activities."); *Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir. 1990) (holding that the "right to travel locally through public spaces and roadways" and "move freely about one's neighborhood or town" is one of the unenumerated fundamental rights protected by the Due Process Clause)

[5] Kim Miller, *Clarifying Staff Research into Safe Distribution in City Parks* (Jan. 24, 2022), THE CITY OF ASHEVILLE, https://www.ashevillenc.gov/news/clarifying-staff-research-into-safe-distribution-of-food-in-city-parks/.

The Park Ban Policy is also unconstitutionally vague, in violation of the Due Process Clause of the U.S. Constitution. A government action violates due process when it "take[es] someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015). A government policy "must include sufficient standards to prevent arbitrary and discriminatory enforcement." *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 272 (4th Cir. 2019) (citations omitted). Here, as explained earlier, our clients have experienced discriminatory enforcement of the Park Ban Policy, and the vague terms of the policy leave room for arbitrary and discriminatory application against other parties in the future. The policy allows a broad range of officials to enforce the ban based on mere allegations of an immense range of criminal offenses or rule violations.

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Additionally, the Park Ban Policy must satisfy a heightened standard of clarity because it penalizes individuals for First Amendment-protected conduct and speech. "[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (emphasis added).[6] This heightened standard applies whenever, as here, a vague policy encroaches on "sensitive areas of basic First Amendment freedoms," and "operates to inhibit the exercise of [those] freedoms." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotations omitted), or has "a potentially inhibiting effect on speech." *Cramp v. Bd. Of Pub. Instruction of Orange Cnty.*, 368 U.S. 278, 287 (1961).

Here, this policy suppresses and indeed violates our clients' First Amendment rights. The First Amendment to the United States Constitution, and its counterparts set forth in article I, sections 12 and 14 of the North Carolina Constitution protect the fundamental right to express opinions regarding issues of public importance. Our clients' right to demonstrate and express their opinion about the unhoused population in the city of Asheville and the city's treatment of unhoused people is the kind of speech that is at the "'highest rung of the hierarchy of First Amendment values,' and is entitled to protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458

[6] *See also United States v.Williams*, 553 U.S. 285, 304 (2008); *Reno v. Am. Civil Liberties Union*, 521 U.S.844, 870-74 (1997).

U.S. 886, 913 (1982)). Our clients were participating in a demonstration and protest in Aston Park—activities that are at the core of the First Amendment's protections. Their advocacy on behalf of unhoused individuals and their food distribution work are also protected activities. *See, e.g., Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1245 (11th Cir. 2018) (holding that nonprofit organization's food sharing events in city park were expressive conduct protected by the First Amendment). And indeed, city parks are one of the few public forums in Asheville where city residents are able to carry out First Amendment protected activities. *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 130 S.Ct. 2971, 2984 n. 11, 177 L.Ed.2d 838 (2010) (referring to "traditional public forums, such as ... parks"); *Pleasant Grove City*, 129 S.Ct. at 1129 (noting "a park is a traditional public forum").

Finally, the underlying criminal charge and subsequent park ban were a direct response to our clients' participation in a public art demonstration. The underlying criminal charge, that is being used to effectuate the bans -- felony littering-- is extraordinarily rare. Indeed, there is only one case involving felony littering in Buncombe county in the past ten years. We have strong reason to believe that these park bans are part and parcel to a larger series of actions taken which demonstrate hostility to individuals engaged in advocacy on behalf of the unhoused community in Asheville.

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In light of the inadequate process it affords, the fundamental liberty interests it implicates, and the protected First Amendment activity that it deters, the City of Asheville's Park Ban Policy clearly violates the U.S. and North Carolina constitutions. On behalf of our clients, we request the City of Asheville (1) immediately retract the outstanding park bans that they are facing, (2) promptly revise its Park Ban Policy so that it is in compliance with the U.S. and North Carolina constitutions, and (3) provide training to APD and all Parks and Recreation staff involved in the issuance and enforcement of park bans.

We respectfully request a response by February 9, 2023. If we do not hear from you by that date, we will proceed to consider further legal action without additional notice to you. As outlined above, we expect that you will take all reasonable steps to preserve and retain all records potentially relevant to this matter. We look forward to hearing from you and may be reached by email at mtalukder@acluofnc.org and jmaffetore@acluofnc.org. Thank you for your prompt attention to this matter.

Sincerely,

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