IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

SARAH BODDY NORRIS et al., *Plaintiffs*, v. CITY OF ASHEVILLE et al., *Defendants*.	No. 1:23-cv-103 MR-WCM

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

In recent years, the City of Asheville ("the City") has seen an unprecedented increase in the number of people experiencing homelessness. The growing cost of housing coupled with the lack of accessible shelters in the City has meant that unhoused people often rely on public spaces like City parks to set up tents and seek shelter. In December 2021, the Asheville Police Department ("APD") conducted several sweeps to dismantle homeless encampments, despite the lack of shelters and available beds in the City. In response, several community members came together to participate in demonstrations against the City's treatment of unhoused people and to demand that the City allow unhoused people to camp in public spaces. Plaintiffs are among a group of activists, advocates, and volunteers attending these demonstrations. They have also supported Asheville's unhoused population by distributing food and supplies and providing funds. The City has responded to Plaintiffs' activities by banning them from the public parks that

had served as the sites of Plaintiffs' volunteer work and efforts to publicly advocate for the just, humane treatment of unhoused people. These bans, and the processes by which they are imposed, violate Plaintiffs' rights under the U.S. Constitution. Plaintiffs respectfully ask this Court to enter a preliminary injunction enjoining Defendants from continuing to impose park bans on Plaintiffs and from continuing to enforce their Park Ban Policy.

STATEMENT OF FACTS

I. The Park Ban Policy

A City of Asheville Administrative Policy, titled "Restricted Access to City Parks" ("the Park Ban Policy" or "the Policy") provides that a person's access to City parks[1] may be limited through a restricted access notice ("park ban") based on an *observed* violation of an Asheville Parks and Recreation Department ("APR") park rule, APR "program rule", City ordinance, State law, or federal law "while in a City park or on City property."[2] The policy does not require an underlying citation, ticket, charge, indictment, or conviction to ban an individual from City parks. Nor does it require any documentation of the alleged violation for a ban to be issued.[3] Under the Policy, a wide range of city officials have the authority to issue a park ban.[4] An alleged violation of any APR park rule or APR program

[1] The policy describes parks as "[a]ny publicly owned, leased, operated or maintained land which is designated as a Park or Recreation facility as defined by Section 12-27 of the City code." Doc 6-1 at 1. Parks include town-square style community spaces, public trails and paths, greenways, sports parks, outdoor pools, amphitheaters, skateparks, community centers, and other public spaces maintained by APR. *See* Asheville Parks & Recreation, Parks https://www.ashevillenc.gov/department/parks-recreation/parks/ (Last Updated on May 9, 2023).
[2] Doc. 6-1, Park Ban Policy at 1-2 (emphasis added).
[3] *See generally id.*
[4] *Id.* at 2.

rule may result in a six-month ban.[5] An alleged violation of any City ordinance or the commission of any offense punishable as a misdemeanor may result in a ban of one year.[6] The alleged commission of any offense punishable as a felony under federal or state law, repeated violation of park rules, and/or repeated commission of misdemeanor offenses may result in a ban of three years.[7] The Policy does not require that banned individuals receive notice of the ban. Instead, notice "*may* be issued by an employee of [APR] or the [APD]."[8]

Park bans issued pursuant to the Policy are effective immediately upon issuance. Individuals subject to a park ban are not entitled to a pre-deprivation hearing under the Policy. The Policy states that a banned individual may appeal the decision, in writing to the Director of APR, within fourteen days of the date of the park ban notice.[9] The APR Director must then schedule a post-deprivation hearing within fourteen days of receipt of the written appeal.[10] The APR Director or their designee preside over the hearing and "hear whatever relevant evidence" an appellant may wish to present.[11] However, under the Policy, an appellant has no right to discovery, to know who made the "observations" on which the ban is based, or to examine the evidence presented by APD or APR officials in support of the ban.[12] The APR Director is required to issue and serve a written decision on an appeal

[5] *Id.* A comprehensive collection of park rules and program rules are not available on the City's website or other publicly available forum. Ex. 1, Maffetore Decl. ¶ 8.
[6] *Id.*
[7] *Id.*
[8] *Id.* (emphasis added).
[9] *Id.* at 3.
[10] *Id.*
[11] *Id.*
[12] *Id.*

within fourteen days after the appeals hearing.[13] This decision is final and there is no way to appeal the decision. An individual's park ban remains in effect throughout the appeals process.[14] If a banned person successfully appeals the ban, they can only return to City parks after receiving written confirmation from the APR Director that their access is restored.[15] If a banned person enters a City park or commits another violation under the policy their park ban is automatically extended by one year in addition to any extension of their park ban based on the violation.[16] The banned person may also be criminally charged with trespass.[17]

II. Asheville's Issuance of Park Bans to Fifteen Peaceful Protesters

Plaintiffs are fifteen individuals involved in volunteer, advocacy, and mutual aid activities to support unhoused people in Asheville.[18] Asheville, like many other cities, has experienced rising costs of living[19] that have exacerbated an affordable housing crisis for the City's residents.[20] Unhoused people in Asheville often depend on city parks as spaces

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[13] *Id.*
[14] *See generally id.*
[15] *Id.* at 3.
[16] *Id.*
[17] *Id.*; *see* N.C. Gen. Stat §§ 14-159.12-13.
[18] Ex. 2, Norris Decl. ¶ 6; Ex. 3, Temoshchuk-Reynolds Decl. ¶ 5; Ex. 4, Bergdahl Decl. ¶ 8; Ex. 5, Hamilton Decl. ¶ 4; Ex. 6, Flickinger Decl. ¶¶ 3, 5-6; Ex. 7, Enstrom Decl. ¶ 6; Ex. 8, Deaton Decl. ¶ 3; Ex. 9, Dickhaus Decl. ¶¶ 5-6; Ex. 10, Weber Decl. ¶ 3; Ex. 11, Roberts Decl. ¶ 5; Ex. 12, Hudson Decl. ¶ 4; Ex. 13, Martinez Decl. ¶ 4; Ex. 14, Matute-Villagrana Decl. ¶ 3; Ex. 15, Watkins Decl. ¶ 3; Ex. 16, Nevel Decl. ¶¶ 3-5.
[19] Charles Perez, *Asheville has Highest Cost of Living of North Carolina Cities, Report Says*, ABC 13 NEWS (Oct. 31, 2022), https://wlos.com/news/local/asheville-cost-of-living-north-carolina-cities-report-c2er-council-of-community-economic-research.
[20] John Boyle, *Report: Asheville Area Rents up 25% Over the Past Year, Most Expensive in NC*, ASHEVILLE CITIZEN TIMES (Jan. 31, 2022), https://www.citizen-

where they can go to engage in the basic necessities of life, such as eating, using public toilet facilities, and resting. Plaintiffs believe strongly that unhoused people have a right to live, and to meet their basic needs in public spaces like parks.[21] Plaintiffs have committed themselves to providing support, such as meals and other logistical assistance for unhoused people in Asheville.[22] All Plaintiffs have participated in providing this assistance, as well as in demonstrations related to Asheville's treatment of unhoused people.

In December 2021, Plaintiffs and other community members gathered for a series of peaceful demonstrations in protest of the City's treatment, and in particular its criminalization, of unhoused people.[23] These protests started on December 19, 2021 and ended on December 25, 2021.[24] During these demonstrations, community members protested and created art together in protest of the City's actions and its policies aimed at eradicating unhoused people from public spaces.[25] Plaintiffs' participation in these protests varied from participating in art builds, to bringing pizzas for participants, to stopping by and sharing blankets and coloring books with unhoused individuals.[26]

Starting January 2022, all fifteen Plaintiffs were charged with felony littering under

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times.com/story/news/local/2022/01/31/asheville-nc-rents-rise-most-expensive-city-live-north-carolina-apartment-list/9256946002/.

[21] Ex. 3 ¶ 7; Ex. 6 ¶ 6; Ex. 10, ¶ 3; Ex. 16 ¶ 6.
[22] Ex. 2 ¶¶ 6-7, 13; Ex. 3 ¶¶ 5, 7; Ex. 4 ¶ 8; Ex. 5 ¶¶ 4-5; Ex. 6 ¶¶ 3, 5-7; Ex. 7 ¶¶ 6-7; Ex. 8 ¶¶ 3-4; Ex. 9 ¶¶ 5-6, 8; Ex. 10 ¶ 3; Ex. 11 ¶¶ 5-6; Ex. 12 ¶ 4; Ex. 13 ¶¶ 4-5; Ex. 15 ¶ 3; Ex. 16 ¶¶ 4-6.
[23] Ex. 2 ¶ 7; Ex. 3 ¶ 7; Ex. 4 ¶¶ 8-9; Ex. 5 ¶ 5; Ex. 6 ¶ 7; Ex. 7 ¶ 7; Ex. 8 ¶ 4; Ex. 9 ¶ 8; Ex. 10 ¶ 4; Ex. 11 ¶ 6; Ex. 12 ¶ 5; Ex. 13 ¶ 6; Ex. 14 ¶ 3; Ex. 15 ¶ 4; Ex. 16 ¶ 6.
[24] *Id.*
[25] *Id.*
[26] Ex. 4 ¶ 9; Ex. 11 ¶ 6; Ex. 6 ¶ 7; Ex. 12 ¶ 5.

N.C. Gen. Stat. § 14-399 by the APD in connection with their participation in the December 2021 protests.[27] Some Plaintiffs only found out about their felony littering charges when they received their park ban notices.[28]

Under N.C. Gen. Stat. § 14-399(a), "littering" occurs when a person or entity "intentionally or recklessly throw[s], scatter[s,] spill[s] or place[s] or intentionally or recklessly cause[s] to be blown, scattered, spilled, thrown or placed or otherwise dispose[s] of any litter upon any public property or private property not owned by the person," except when the litter is deposited in a space designated for litter (like a dump or garbage receptacle). To qualify as "felony littering," the individual's littering must have exceeded 500 pounds of waste, taken place for commercial purposes, or involved hazardous waste. *Id.* § 14-399(e). By APD's own account, the demonstrations resulted in 2,000 pounds of litter,[29] but each of the sixteen[30] protesters charged with felony littering was charged with bringing over 500 pounds of litter to the park.[31] The materials Plaintiffs are accused of having littered were associated with their protest activities or to assist unhoused people living in parks and did not exceed 500 pounds per Plaintiff.[32] Felony littering is an extremely rare charge. Up until Plaintiffs' January 2022 charges, there has only been one

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[27] Several plaintiffs had an additional related charge tacked on to the felony littering charge.
[28] Ex. 2 ¶ 9; Ex. 7 ¶ 8; Ex. 12 ¶ 8; Ex. 14 ¶ 4.
[29] Sarah Honosky, *Grand Jury Indicts 16 People Charged with Felony Littering in Asheville's Aston Park*, ASHEVILLE CITIZEN TIMES (Aug. 5, 2022), https://www.citizen-times.com/story/news/local/2022/08/05/jury-indicts-asheville-mutual-aid-volunteers-felony-littering/10235737002/.
[30] Fifteen of these protesters are Plaintiffs in this lawsuit.
[31] *See. e.g.*, Ex. 2-B, Norris Felony Indictment.
[32] Ex. 2 ¶ 7; Ex. 3 ¶ 7; Ex. 4 ¶¶ 8-9; Ex. 5 ¶ 5; Ex. 6 ¶ 7; Ex. 7 ¶ 7; Ex. 8 ¶ 4; Ex. 9 ¶ 8; Ex. 10 ¶ 4; Ex. 11 ¶ 6; Ex. 12 ¶ 5; Ex. 13 ¶ 6; Ex. 14 ¶ 3; Ex. 15 ¶ 4; Ex. 16 ¶ 6.

charge of felony littering brought in Buncombe County over the past ten years.[33]

Despite the fact that they had yet to be convicted of felony littering or any related criminal charge, several Plaintiffs received notices in March 2022 informing them that, effective December 25, 2021, they had been banned from all APR facilities for three years based on their felony littering charges.[34] These notices were issued pursuant to the Policy and appear to have been sent by APD Sargeant Scott Fry, with the approval of Defendant Zack.[35]

Plaintiffs Deaton and Nevel did not receive any notice that park bans had been issued against them.[36] Plaintiff Nevel did not learn about their ban until June 2022 after documents disclosed in other Plaintiffs' pending criminal cases listed them among those banned.[37] Plaintiff Deaton did not learn about her ban until December 2022 when her defense attorney informed her that she was likely banned.[38] Because they received no notice, Plaintiffs Deaton and Nevel had no opportunity to appeal their bans.[39] For months,

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[33] *Felony Case Activity Report*, N.C. JUD. BRANCH, https://www.nccourts.gov/documents/publications/felony-case-activity-report (last modified Oct. 9, 2023).

[34] Ex. 2 ¶ 8; Ex. 3 ¶ 9; Ex. 5 ¶ 8; Ex. 6 ¶ 9; Ex. 7 ¶ 8; Ex. 9 ¶ 10; Ex. 10 ¶ 6; Ex. 11 ¶ 8; Ex. 12 ¶ 7; Ex. 13 ¶ 8; Ex. 14 ¶ 4; *see also*, Ex. 17 at 10, List of Banned Individuals. Separate from these park ban notices, upon arrest, APD issued conditions of release to Plaintiffs Norris, Enstrom, Weber, and Temoshchuk-Reynolds that included that they not return to Aston Park property. Ex. 2 ¶ 10; Ex. 7 ¶ 9; Ex. 10 ¶ 5; Ex. 3 ¶ 8. APD did not include this condition of release for any other Plaintiffs.

[35] Ex. 18, Emails from Lenora Jones at 7.

[36] Ex. 16 ¶ 8; Ex. 8 ¶ 6.

[37] Ex. 16. ¶ 8

[38] Ex. 8 ¶ 6.

[39] *Id.*; Ex. 16 ¶ 8.

Deaton and Nevel continued to visit parks until they learned about their bans, thereby risking arrest and prosecution for trespassing, as well as extensions of their bans.[40] Plaintiff Bergdahl also did not receive notice that a park ban had been issued against them.[41] On March 20, 2023, Plaintiffs' counsel informed Plaintiff Bergdahl that they had obtained a copy of the City's list of banned individuals through a public records request and that Plaintiff Bergdahl was on the list.[42] Because they received no notice, Plaintiff Bergdahl was not provided with an opportunity to a hearing to appeal their ban. Plaintiff Bergdahl, whose employment requires them to be in parks, was regularly in city parks from December 2021 to March 20, 2023.[43] During this time Bergdahl risked arrest and prosecution for trespassing, as well as an extension of their park ban.[44]

Plaintiffs Norris, Temoshchuk-Reynolds, Hamilton, Flickinger, Enstrom, Dickhaus, Hudson, Martinez, and Matute-Villagrana reached out to APR to appeal their bans.[45] APR and APD staff were unaware of the process, and APR staff who communicated with Plaintiffs were unable to provide clear instructions on how to appeal the park bans.[46] Plaintiff Roberts and Weber received notice of the park ban but were unable to appeal the ban.[47] Plaintiff Weber reached out to APR to appeal her ban on April 6, 2022 but was told

[40] Ex. 8 ¶ 6; Ex. 16 ¶¶ 8-9.
[41] Ex. 4 ¶ 11.
[42] *Id.*; Ex. 17. at 10.
[43] Ex. 4 ¶ 11.
[44] *Id.*
[45] Ex. 2 ¶ 12; Ex. 3 ¶ 10; Ex. 5 ¶ 9; Ex. 6 ¶¶ 11-12; Ex. 7 ¶ 9; Ex. 9 ¶ 11; Ex. 12 ¶¶ 8, 10; Ex. 13 ¶ 9; Ex. 14 ¶ 6.
[46] *See generally* Ex. 18.
[47] Ex. 11 ¶ 8; Ex. 10 ¶ 7.

she had missed the deadline to appeal the park ban.[48]

Plaintiffs Norris, Temoshchuk-Reynolds, Hamilton, Flickinger, Enstrom, Dickhaus, Hudson, Martinez, Matute-Villagrana, and Watkins all timely appealed.[49] Their hearings were cursory—many were approximately five minutes long—and were presided over by Deputy City Attorney John Maddux, APR Director Tyrell McGirt, APD Police Captain Mike Lamb, APD Officer Sam DeGrave, and APR Program Manager, Christy Bass.[50] On March 25, 2022, prior to any of Plaintiffs' hearings, APD Captain Lamb reached out to Defendant McGirt and requested that Defendant McGirt uphold Plaintiffs' bans.[51] Defendant McGirt responded to APD Captain Lamb stating: "My decision is to uphold the [park bans]."[52] At their hearings, Plaintiffs were not permitted to ask questions and had no opportunity to review any evidence that city officials relied on as the basis for banning them.[53] Some Plaintiffs presented evidence of their minimal involvement in the protests; some also noted that they had at that point only been charged with a misdemeanor, warranting a shorter park ban.[54] Shortly after the hearings, Defendant McGirt sent all ten plaintiffs who appealed their bans identical short form letters upholding the bans.[55] In these

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[48] Ex. 10 ¶ 7.
[49] Ex. 2 ¶ 12; Ex. 3 ¶ 10; Ex. 5 ¶ 9; Ex. 6 ¶ 13; Ex. 7 ¶ 10; Ex. 9 ¶ 11; Ex. 12 ¶ 10; Ex. 13 ¶ 10; Ex. 14 ¶ 6; Ex. 15 ¶ 9.
[50] *Id.*
[51] *See* Doc. 6-3, March 25, 2022 Email to McGirt.
[52] *Id.*
[53] Ex. 2 ¶ 12; Ex. 5 ¶ 9; Ex. 14 ¶ 7; Ex. 15 ¶ 9.
[54] *See. e.g.* Ex. 14 ¶ 7.
[55] Ex. 2-C, Norris Appeal Denial Ex.3-A, Temoshchuk-Reynolds Appeal Denial; Ex. 5-B, Hamilton Appeal Denial; Ex. 6-A, Flickinger Appeal Denial, Ex. 7-B, Enstrom Appeal Denial; Ex. 9-B, Dickhaus Appeal Denial; Ex. 12-B, Hudson Appeal Denial; Ex. 13-A,

letters, Defendant McGirt did not include findings, reasoning, or any evidence in support of upholding the bans.[56]

In January 2023 Plaintiffs Temoshchuk-Reynolds and Enstrom pled to lesser misdemeanor charges of conspiracy to commit felony littering rather than go to trial on the felony littering charges and take the risk of jeopardizing their employment.[57] Despite their pleas to misdemeanor charges, Plaintiffs Temoshchuk-Reynolds and Enstrom's three-year bans from the park were not reduced to one year.[58] On April 11, 2023 Plaintiff Bergdahl also pled to a lesser misdemeanor charge of conspiracy to commit felony littering rather than go to trial on their felony littering charge.[59] Shortly after this, Plaintiff Bergdahl contacted Defendant McGirt to request an appeal process and that their ban be lifted because of their misdemeanor plea, which according to the policy would have made them eligible for a one-year ban.[60] On April 28, 2023, Defendant McGirt denied this request.[61]

The park bans have had a serious impact on Plaintiffs' professional and personal lives. Plaintiffs' park bans have impacted their ability to continue volunteer work, to carry out job and family responsibilities, to move through the city and to access public spaces in

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Martinez Appeal Denial; Ex. 14-B, Matute-Villagrana Appeal Denial; Ex. 15-A, Watkins Appeal Denial.

[56] *Id.*

[57] Ex. 3 ¶ 12; Ex. 7 ¶ 12.

[58] *Id.*

[59] Ex. 4 ¶ 12.

[60] *Id.* ¶ 13.

[61] *Id.* ¶ 14.

Asheville to recreate, assemble, and carry out political and social protest and speech.[62]

Because of the bans, Plaintiffs have had to relocate their activities distributing food, supplies, and providing aid at parks to locations that are significantly less convenient and suited to interacting with unhoused people.[63] Moreover, they have been unable to enter parks to inform unhoused people of the changed location of these aid activities.[64] These forced changes have severely impacted Plaintiffs' ability to reach the unhoused people they are committed to supporting.[65]

Plaintiffs have also been unable to use Asheville's greenway system, which extends more than thirty miles across the City. Several Plaintiffs relied on parks and greenways to get around the City safely and efficiently on foot and via bicycles.[66] Since the ban, Plaintiffs have had to change routes they would normally take to get around the City.[67]

Plaintiffs have also been deterred by the threat of further penalties and potential criminal charges from going to city council meetings that are held at APR facilities. On January 25, 2023, the City of Asheville and Buncombe County held a joint meeting at Harrah's Cherokee Center, an APR facility, to hear the results of a needs assessment report which included recommendations to improve the community's response to homelessness. Plaintiffs, as advocates, organizers, and volunteers serving the unhoused community, are

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[62] Ex. 2 ¶¶ 13-22, 24; Ex. 3 ¶¶ 12-14; Ex. 4 ¶¶ 15-16; Ex. 5 ¶¶ 11-13; Ex. 6 ¶¶ 15-16; Ex. 7 ¶¶ 13-15; Ex. 8 ¶¶ 7-9; Ex. 9 ¶¶ 15-17; Ex. 10 ¶¶ 10-15; Ex. 11 ¶¶ 10-11; Ex. 12 ¶¶ 13-18; Ex. 13 ¶¶ 14-17; Ex. 14 ¶ 11; Ex. 15 ¶ 12; Ex. 16 ¶¶ 10-13.
[63] Ex. 2 ¶ 13; Ex. 6 ¶ 15; Ex. 16 ¶ 10.
[64] Ex. 2 ¶ 13; Ex. 6 ¶ 15.
[65] *Id.*
[66] Ex. 2 ¶¶ 16-17; Ex.3 ¶ 13; Ex. 7 ¶ 15; Ex. 8 ¶ 7; Ex. 9 ¶ 17; Ex. 10 ¶ 13; Ex. 12 ¶ 14.
[67] *Id.*

key stakeholders on issues affecting the unhoused community but because of their park bans were unable to attend this meeting.[68]

Plaintiffs who hold jobs that require them to be in parks or accompany others to parks have lost employment, have had to inform their employers that they are unable to do that part of their jobs or have had to turn down certain job opportunities.[69] For Plaintiffs who are students, the bans have impacted Plaintiffs' ability to fully participate in educational events held on APR property.[70] Plaintiffs have also been unable to take their children to the park.[71] For Plaintiffs who are the sole caretaker of their children, the bans have effectively extended to their children.[72]

If their current bans expired or were rescinded, all Plaintiffs who currently reside in Asheville would return to the parks to engage in the protesting, mutual aid, recreation, and employment activities discussed above.[73] Plaintiffs who are not currently living in Asheville still visit the city and would return to parks during these visits.[74] Plaintiffs fear they will be subjected to future bans as a result of their protest and mutual aid activities, or simply if a city official claims to observe them violating a wide range of rules and laws.[75]

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[68] *See, e.g.,* Ex. 2 ¶ 14.
[69] Ex. 4 ¶ 15; Ex. 7 ¶ 13; Ex. 12 ¶ 16; Ex. 13 ¶ 15; Ex. 16 ¶ 11.
[70] Ex. 2 ¶ 20; Ex. 10 ¶ 11.
[71] *Id.* ¶¶ 16, 18-19, 24; Ex. 5 ¶ 11; Ex. 8 ¶¶ 7-8.
[72] Ex. 5 ¶ 11; Ex. 8 ¶¶ 7-8.
[73] Ex. 2 ¶ 25; Ex. 3 ¶ 14; Ex. 4 ¶ 17; Ex. 5 ¶ 17; Ex. 6 ¶ 18; Ex. 7 ¶ 16; Ex. 8 ¶ 11; Ex. 9 ¶ 19; Ex. 10 ¶ 18; Ex. 12 ¶ 20; Ex. 13 ¶ 19; Ex. 16 ¶ 13.
[74] Ex. 11 ¶ 12; Ex. 14 ¶ 12; Ex. 15 ¶ 15.
[75] *See. e.g.*, Ex. 2 ¶ 22; Ex. 3 ¶ 14.

ARGUMENT

Plaintiffs seek preliminary relief enjoining Defendants to rescind their park bans and against enforcement of the Policy against Plaintiffs. A preliminary injunction is warranted where plaintiffs are (1) likely to succeed on the merits of their claim, (2) will likely suffer irreparable harm without preliminary relief, (3) the balance of hardships weighs in their favor, and (4) the injunction is in the public interest. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014).

I. The Plaintiffs Are Likely to Succeed on the Merits

Plaintiffs seek a preliminary injunction based on their claim that the Policy violates their right to procedural due process and their claim that the Policy is void for vagueness under the due process clause of the United States Constitution.

A. The Policy Violates the Plaintiffs' Rights to Procedural Due Process Under the Fourteenth Amendment

On its face, the Policy, violates Plaintiffs' and other Ashevillians' rights to due process because it (1) immediately bans individuals from city parks for lengthy periods based on unproven and unattributed "observed" violations of law or a park rule; (2) does not require that banned individuaqwls be notified of the bans imposed on them; and, (3) fails to provide meaningful opportunity for them to contest the ban.[76] The Policy, as applied to Plaintiffs Norris, Temoshcuk-Reynolds, Hamilton, Flickinger, Enstrom, Dickhaus, Hudson, Martinez, Matute-Villagrana, and Nevel, also violates their rights to due process because Plaintiffs who were able to appeal their ban were provided an inadequate sham

[76] Doc. 6 ¶¶ 81-93.

post-deprivation hearing. Where a liberty or property interest is at stake, due process requires fair notice and a meaningful opportunity to be heard. *Mora v. City Of Gaithersburg*, 519 F.3d 216, 230 (4th Cir. 2008). Ordinarily due process requires an opportunity for a hearing prior to the deprivation of a significant property or liberty interest. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978) (citations omitted); *see also Fuentes v. Shevin*, 407 U.S. 67, 82 (1972).

To assess whether there is a due process violation, courts weigh three factors: (1) the "private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used," and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

1. Plaintiffs have constitutionally-protected liberty interests implicated by their park bans and the Policy

The Policy on its face and as applied to Plaintiffs implicates several liberty interests: the loss of liberty, the right to access and use public parks for First Amendment rights, the right to intrastate travel, and property interests.

First, the consequences for violating a park ban are arrest and criminal sanctions for trespassing, implicating the loss of liberty. *See* N.C. Gen. Stat. §§ 14-159.12-13. This threatened loss of liberty is especially extreme given that Defendants' policy does not require any underlying conviction or any formal determination of guilt, nor does the Policy

require that notice be provided to Plaintiffs.[77]

Second, Plaintiffs have a fundamental right to intrastate travel that is restricted by the Policy. Several circuits have recognized this fundamental right. *See, e.g., Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002) ("[W]e hold that the Constitution protects a right to travel locally through public spaces and roadways."); *Williams v. Town of Greenburgh*, 535 F.3d 71, 75 (2d Cir. 2008) (holding that fundamental right to travel within a state protects movement between places on public thoroughfares); *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944 (9th Cir. 1997) ("Citizens have a fundamental right of free movement ...." (citation omitted)); *Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir. 1990) ("[T]he right to move freely about one's neighborhood or town, even by automobile, is indeed implicit in the concept of ordered liberty and deeply rooted in the Nation's history," therefore a fundamental right. (cleaned up)). The North Carolina Supreme Court has also partially recognized fundamental federal and state constitutional rights to intrastate travel on public thoroughfares like the APR greenways at issue in this case, describing this right as "a right of function . . . to carry on daily activities." *Standley v. Town of Woodfin*, 362 N.C. 328, 331 (2008).; *see also State v. Dobbins*, 277 N.C. 484, 499 (1971) (holding that "the right to travel on the public streets is a fundamental segment of liberty" and banning such travel "requires substantially more justification" than would otherwise be required for state action).

Third, Plaintiffs have a liberty interest in accessing city parks—an interest that has

[77] *See generally* Doc. 6-1.

been recognized by courts across the country. *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").

Plaintiffs also have a strong liberty interest in their right to access and use public parks on the same terms as others because the park ban implicates their First Amendment right to gather and protest in traditional public forums. "[P]arks . . . have immemorially been held in trust for the use of the public and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939); *see also White Coat Waste Project v. Greater Richmond Transit Co.*, 35 F.4th 179, 196 (4th Cir. 2022) ("Traditional public forums are public places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, and governments have limited leeway to restrict speech in such forums." (cleaned up)).

Fourth, Plaintiffs Bergdahl, Enstrom, Weber, Martinez, and Nevel also have property interests in accessing parks to perform aspects of their paid employment or to participate in publicly available economic activities.[78] A person's means of support enjoys

[78] Ex. 4 ¶¶ 5-7, 15; Ex. 7 ¶ 13; Ex. 12 ¶ 16; Ex. 13 ¶ 15; Ex. 16 ¶ 11.

heightened significance as a property interest. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 539 (1985); *Bell v. Burson*, 402 U.S. 535, 539 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

Accordingly, Plaintiffs have established several significant constitutionally-protected property and liberty interests—and at least one fundamental liberty interest.

2. The Policy results in a high risk that Ashevillians will be erroneously deprived of liberty and property.

Procedural due process requires an opportunity to be heard *before* the state deprives an individual of a constitutionally protected liberty or property interest. "[A]t a minimum the [Due Process Clause] require[s] that deprivation of life, liberty or property by adjudication be *preceded* by notice and opportunity for hearing appropriate to the nature of the case." *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (emphasis added) (citation omitted). Ordinarily, due process requires an opportunity for "some kind of hearing" prior to the deprivation of a significant property interest. *Memphis Light, Gas & Water Div.*, 436 U.S. at 19 (citations omitted); *see also*, *Fuentes*, 407 U.S. at 82; *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) ("We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." (cleaned up)). The situations where pre-deprivation process can be dispensed with must be "unusual" – the simple fact that the provision of a prior hearing "imposes some costs in time, effort, and expense . . . cannot outweigh the constitutional right" to a prior hearing. *Fuentes*, 407 U.S. at 90 n.22. This is because, "[i]f

the right to notice and a hearing is to serve its full purpose . . . it is clear that it must be granted at a time when the deprivation can still be prevented." *Id*. at 81.

The Policy, on its face, does not require a pre-deprivation hearing.[79] Plaintiffs were banned from parks effective December 25, 2021, before any of them had even received notice of their bans.[80] This Policy deprives Plaintiffs of their protected liberty interests in their right to access public property without risk of arrest, their fundamental right to intrastate travel, access to public land, and their fundamental First Amendment rights to assemble and protest without affording the prior hearing required by the due process clause...

The Policy also fails to provide due process because it empowers a broad range of city officials to arbitrarily impose bans as long as three years on the basis of an *observed* violation, provides meager safeguards to protect against an erroneous deprivation.[81] As detailed *supra* p. 3, the Policy does not require that the City provide individuals notice of their bans.[82] Because of this, individuals like Plaintiffs Bergdahl, Deaton, and Nevel (who did not learn of their bans until long after they were imposed),[83] unknowingly risked immediate arrest for trespassing upon entering a public park. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of

[79] *See generally*, Doc. 6-1.
[80] Ex. 17, List of Banned Individuals.
[81] *See* Doc. 6-1 at 2.
[82] *Id.*
[83] Ex. 4 ¶ 11; Ex. 8 ¶ 6; Ex. 16 ¶ 8.

the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). Defendants' optional notice policy does not meet even the barest standard of notice by any definition, and the consequences are dire: if a banned person enters a park without knowledge that they were banned, they are subject to immediate arrest and prosecution for trespassing.[84] N.C. Gen. Stat §§ 14-159.12-13

The Policy is also constitutionally deficient as applied to Plaintiffs. For Plaintiffs who did receive notice of their bans, the appeals process available to them was not meaningful, particularly because Defendant McGirt decided, before any hearings were held, that he would be denying Plaintiffs' claims *regardless of what happened at the hearings*.[85] Plaintiffs who received notice of the bans took pains to understand the unclear process to appeal their bans.[86] They did so thinking that they had a fair opportunity to contest their bans, but the outcome was pre-determined and the appeals process offered was a sham.[87] *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring) (to satisfy due process, a hearing "must be a real one, not a sham or a pretense") (quoting *Palko v. State of Connecticut*, 302 U.S. 319, 327 (1937)); *Ryan v. Ill. Dep't of Child. & Fam. Servs.*, 185 F.3d 751, 762 (7th Cir. 1999) ("A plaintiff who can introduce evidence that the decision has already been made and any hearing would be a sham is entitled to go forward with a procedural due process claim."); *United States*

[84] *See* Doc. 6-1 at 3
[85] Doc. 6-3 (Email of Defendant McGirt).
[86] Ex. 6 ¶¶ 11-12; Ex. 9 ¶ 11; Ex. 13 ¶¶ 9-10; Ex. 14 ¶ 6.
[87] Doc. 6-3

v. Cross, 128 F.3d 145, 148 n.2 (3d Cir. 1997) ("[D]ue process cannot be satisfied when the state provides a 'hearing' at which the judge is not really listening or before which the decision has already been made."). In addition to Defendant McGirt pre-deciding the appeal outcomes, Plaintiffs were also not given the right to ask questions of the officials banning them, or to examine the evidence against them.[88]

3. The City's interests are greatly outweighed by Plaintiffs' liberty interests and the procedural deficiencies contained in the Policy

Thus far in this case, Defendants have failed to identify any government interest that outweighed the procedural deficiencies challenged by Plaintiffs. *See generally* Doc. 8-1. Any conceivable interests would still not outweigh Plaintiffs' liberty interests where Defendants have employed the most threadbare of procedural safeguards. There are no "extraordinary circumstances" under which lack of pre-deprivation hearing could be excused. A pre-deprivation hearing would not be more costly than the post-deprivation hearing that Defendants provided to some of the Plaintiffs. The City's interest in immediate imposition of the park ban is clearly minimal where the Policy does not mandate notice of a park ban and thus banned individuals will often not know that they are supposed to stay out of parks. Regardless of the City's interest, any additional administrative burden "is no greater than the pre-deprivation process already in place to handle a variety of non-criminal violations, such as traffic fines." *Yeakle v. City of Portland*, 322 F. Supp. 2d 1119, 1131. (D. Or. 2004) (finding an ordinance that allowed the City to ban individuals from public parks for 30 days after violation of any law, ordinance, and/or rule, unconstitutional where

[88] Ex. 2 ¶ 12; Ex. 5 ¶ 9; Ex. 14 ¶ 7; Ex. 15 ¶ 9.

no pre-deprivation process was provided).

B. **The Challenged Policy is Unconstitutionally Vague.**

Plaintiffs are equally likely to succeed on their claim that the Policy is unconstitutionally vague. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A government policy may be unconstitutionally vague in one of two ways: (1) when it "tak[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 (2) when it is "so standardless that it invites arbitrary enforcement." *Johnson v. United State*s, 576 U.S. 591, 595 (2015). When First Amendment rights are at stake, an even greater degree of specificity and clarity of laws is required. *Vill. of Hoffman Ests. v. Flipside*, *Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982).

The Policy is unconstitutionally vague because it does not provide fair notice of the type of conduct that could result in a park ban.[89] The Policy provides that the City may restrict a person's access to a City park if the person violates any of a vast universe of rules and regulations, be it APR park rule, APR "program rule", City ordinance, State law, or Federal law, "while in a City park or on City property."[90] The Policy does not further define "City property." Conceivably, the Policy empowers city officials to issue park bans to individuals who have committed traffic violations on the 404 miles of streets that are maintained by the City of Asheville, or countless other sidewalks, medians, public

[89] *See* Doc. 6-1 at 1-2.
[90] *Id.*

buildings and spaces. A comprehensive collection of park rules and program rules are not available on the City's website or other publicly available forum.[91]

The Policy also invites arbitrary enforcement by empowering a wide range of city officials to impose a park ban for alleged violations of a vast and partially inaccessible universe of rules, regulations, and laws, and without even requiring a conviction, citation, or any other documentation that a violation has taken place.[92]

Notably, the Policy states that a park ban may be issued by "any employee of [APR] or [APD] upon an *observed* violation of any Park rule."[93] The Policy does not specify that the employee issuing the park ban must themselves have observed the violation of the rule—indeed it does not create any parameters on who (or what) must have observed a violation to trigger a ban,[94] Ostensibly, under the Policy an individual's recounted observation (or an individual's recounting of a recounted observation) that a person committed a violation suffices as grounds for a city official to issue a park ban. The Policy also does not contemplate the issuance of a warning before issuing a ban.

Simply put, the Policy leaves too many questions unanswered. The Policy thus runs afoul of the basic due process requirement that a government rule "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).

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[91] Ex. 1 ¶ 8.
[92] Doc. 6-1 at 1-2.
[93] *Id.* at 2.
[94] *Id.*

II. The Plaintiffs Face Irreparable Harm Absent an Injunction

The plaintiffs have suffered and will continue to suffer irreparable harm absent preliminary injunctive relief. As discussed in detail above, the defendants' actions violate the plaintiffs' constitutional rights under the Fourteenth Amendment. As the Fourth Circuit has noted where "there is a likely constitutional violation, the irreparable harm factor is satisfied." *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330, 346 (4th Cir. 2021) (en banc). When a plaintiff seeks preliminary injunctive relief for a constitutional violation, the "claimed irreparable harm is inseparably linked to the likelihood of success on the merits[.]" *WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (cleaned up); *accord Leaders of a Beautiful Struggle*, 2 F.4th at 346 (4th Cir. 2021).

Plaintiffs are also unable to access one of the few public spaces available in Asheville for protest and demonstration.[95] *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("[L]oss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Plaintiffs are unable to attend and speak in city council meetings held in APR facilities.[96] *See Walsh v. Enge*, 154 F. Supp. 3d 1113, 1134 n.13 (D. Or. 2015) (finding Plaintiff "suffered the irreparable injury of having his speech in City Council meetings prospectively suppressed" and enjoining a city ordinance that allowed the city to indefinitely ban speakers from city council chambers for disrupting council

[95] Ex. 2 ¶ 15; Ex. 3 ¶ 13; Ex. 4 ¶ 16; Ex. 5 ¶ 12; Ex. 6 ¶ 16; Ex. 7 ¶ 14; Ex. 8 ¶ 8; Ex. 9 ¶ 19; Ex. 10 ¶ 10; Ex. 12 ¶ 15; Ex. 13 ¶ 14; Ex. 16 ¶ 12.
[96] *See e.g.*, Ex. 2 ¶ 14.

meetings.); *Brown v. City of Jacksonville*, 2006 WL 385085, at *5 (M.D. Fla. 2006) (finding irreparable harm where Plaintiff was barred for three months from attending or speaking at city council meetings after Plaintiff's disruptive behavior).

Because of their bans many Plaintiffs have had to give up their careers, are unable to pursue job opportunities and/or fully complete their current job obligations.[97] *See Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) ("[W]hen the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong is satisfied."); *see also*, *Enyart v. Nat'l Conf. of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1166 (9th Cir. 2011) (finding irreparable harm existed where Plaintiff was unable to "pursue [their] chosen professions.").

III. The Equities Weigh Heavily in the Plaintiffs' Favor and a Preliminary Injunction Will Serve the Public Interest

The balance of equities and the public interest tip decidedly in the Plaintiffs' favor. In evaluating the balance of equities, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted).

Plaintiffs are experiencing ongoing deprivation of their constitutional rights. Defendants, on the other hand, are merely being asked to comply with the law; this is not

[97] Ex. 4 ¶¶ 5-7, 15; Ex. 7 ¶ 13; Ex. 12 ¶ 16; Ex. 13 ¶ 15; Ex. 16 ¶ 11.

a cognizable hardship on a defendant. *Giovanni Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (state not harmed by issuance of preliminary junction to prevent enforcement of unconstitutional restrictions); *see also Messmer v. Harrison,* 2015 WL 1885082, at *2 (W.D.N.C Apr. 24, 2015) (citation omitted). "[I]t is well-established that the public interest favors protecting constitutional rights." *Leaders of a Beautiful Struggle*, 2 F.4th at 346. Any administrative costs associated with affording pre-deprivation hearings are outweighed by the harms to Plaintiffs' abilities to protest, travel throughout the City, keep their jobs, support their families, and meet other critically important basic needs.

IV. The Court should waive the requirement to provide security.

While Rule 65(c) of the Federal Rules of Civil Procedure provides that "a court may issue a preliminary injunction . . . only if the movant gives security," the Fourth Circuit has held that "the district court retains the discretion to set the bond amount as it sees fit or waive the security requirement." *Pashby v. Delia*, 709 F.3d 307, 332 (4th Cir. 2013). The purpose of the security requirement is to ensure that an enjoined party is compensated for harm it suffers as a result of an improper injunction. *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 n.3 (4th Cir. 1999). Because Defendants have no legitimate interest in enforcing an unconstitutional policy and because this case implicates fundamental constitutional rights, waiver is appropriate. *See, e.g.*, *Middleton v. Andino*, 488 F. Supp. 3d 261, 304 (D.S.C. 2020) (no bond in voting rights case "given the significance of this matter of local, national, and international public concern").

CONCLUSION

For the reasons discussed above, the Court should grant Plaintiffs' motion for a

preliminary injunction and enjoin Defendants and their officers, agents, servants, employees, and attorneys to (1) cease enforcement of the Park Ban Policy during the pendency of this case until this Court determines whether to permanently enjoin the Policy; and (2) cease enforcement or rescind the park bans imposed against Plaintiffs until this Court makes a final determination that such bans were unlawfully imposed.

Dated: October 12, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 12, 2023, I filed the foregoing with the Clerk of the Court using the CM/ECF system which will effectuate service on all counsel of record.

/s/ Muneeba S. Talukder
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Counsel for Plaintiffs