UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al., *Plaintiffs*, v. JERRY PETERMAN, et al., *Defendants.*	Civil Action No. _____ **ORAL ARGUMENT REQUESTED**

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

NATURE OF THIS ACTION

Plaintiffs challenge and seek preliminary relief against enforcement of Chapter 18, Art. VI of the City of Graham ("City"), North Carolina's Code of Ordinances ("the Ordinance"). The Ordinance makes it unlawful for any person to gather with anyone else, or even walk on their own, "for the purpose of protesting" or "making known any position or thought" anywhere in the City without first obtaining the Chief of Police's permission at least 24 hours in advance. It grants the Chief discretion to deny a permit application based on vague and, in effect, content- and viewpoint-based standards. It bans the exercise of any speech or assembly rights by minors unless they obtain the discretionary permission of the Chief. And it allows the Chief to limit even permitted gatherings to six people and order their dispersal upon any violation of the permit, no matter how small.

The Ordinance unconstitutionally burdens Plaintiffs and countless others who seek to exercise their First Amendment rights to speak, assemble, and associate in Graham. This includes individuals who, like Plaintiffs, have been moved by the recent killing of George Floyd and the broader reality of police brutality around the country, and who seek to protest the continued presence of Confederate monuments on government property, including at the Alamance County Historic Courthouse in the middle of Graham.

The Ordinance targets expression and is not narrowly tailored to achieve any compelling government interest. In addition, it constitutes an unconstitutional prior restraint. It thus violates the First Amendment both facially and as applied to Plaintiffs. The Ordinance is also impermissibly vague in violation of due process. By forcing Plaintiffs to choose between forgoing their constitutional rights or facing the threat of sanctions or arrest, the Ordinance imposes ongoing, irreparable harm on Plaintiffs. Indeed, the Supreme Court struck down a nearly identical ordinance more than 50 years ago in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); the Eastern District of North Carolina did the same only one year later, *see Underwood v. City Council of Greenville*, 316 F. Supp. 956 (E.D.N.C. 1970); and the Fourth Circuit did so just 15 years ago, *see Cox v. City of Charleston*, 416 F.3d 281 (4th Cir. 2005). This Court should do the same and enjoin enforcement of the Ordinance.

FACTUAL BACKGROUND

I. The Ordinance

The Ordinance provides that "[n]o parade, picket line or group demonstration is permitted on the sidewalks or streets of the city unless a permit therefor has been issued by the city." Ch.18, Art. VI. § 18-175.[1] It defines group demonstration as "any assembly together or concert of action between two or more persons for the purpose of protesting any matter or making known any position or thought of the group or of attracting attention thereto"; defines parade as "any parade, march, ceremony, show, exhibition or procession of any kind in or upon the public streets, sidewalks, parks or other public places"; and defines picket line as "any persons formed together for the purpose of making known any position or promotion of said persons or on behalf of any organization." *Id.* § 18-172.[2]

To run the permit scheme, the Ordinance authorizes the Chief of Police to, in relevant part,

> (1) Require a written application . . . to be filed 24 hours in advance of such parade, picket line or group demonstration . . .
>
> (2) Refuse to issue such permit when the activity or purpose stated in the application would violate any ordinance of the city or statute of the state, or when the activity or purpose would endanger the public health or safety, or hinder or prevent the orderly movement of pedestrian or vehicular traffic on the sidewalks or streets of the city.

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[1] The full text of the ordinance is available through the City of Graham's website at https://library.municode.com/nc/graham/codes/code_of_ordinances?nodeId=PTIICOOR_CH18STSIOTPUPL_ARTVIPADEPE.

[2] The Ordinance specifically exempts "funeral processions," "students going to and from school classes or participating in [supervised] educational activities," and "governmental agenc[ies] acting within the scope of [their] functions." *Id.* § 18-173.

> (3) Specify in the permit whether or not minors below the age of 18 years will be permitted to participate. The chief of police or, in his absence, the next highest ranking police officer of the city on duty shall pass upon whether or not minors below the age of 18 years shall be permitted to participate . . . and shall base his determination upon whether or not the purpose, time or place of the participation will be detrimental to or endanger the health, welfare or safety of said minors.

Id. § 18-178.

In addition, the Ordinance provides that, before issuing a permit, the Chief of Police or other designated officer must, "among other considerations provided," find that the activity will not (1) "require excessive diversion of police from other necessary duties"; (2) "interfere with the right of property owners in the area to enjoy peaceful occupancy and use of their property"; or (3) "unreasonabl[y] interfere[] with normal vehicular or pedestrian traffic in the area, . . . prevent normal police or fire protection to the public, [or] . . . be likely to cause injury to persons or property or provoke disorderly conduct or create a public disturbance." *Id.* § 18-179.

If the Chief grants the permit, he then has complete discretion to limit the protest or other gathering to "not more than six persons . . . [in] the entire width of [the] street or sidewalk within . . . 100 feet." *Id.* § 18-181. During a permitted parade, demonstration, or picket, he also has discretion to "establish lines for separation of the general public from such [protest] activity" and make it "unlawful for any person to . . . cross such lines." *Id.* § 18-174. And he can order individuals to disperse upon a violation of any of the terms of the permit. *Id.* § 18-176. If individuals fail to disperse, they may be arrested under N.C. Gen. Stat. § 14-288.5.

The Ordinance also makes it illegal for any minor to be present at an expressive gathering without explicit permission from the Chief—and it authorizes him to deny such permission upon his own determination that attending would be "detrimental to or endanger [the minor's] health, welfare or safety." Ch. 18, Art. VI §§ 18-177, 178. Each violation of the Ordinance is "punishable as a misdemeanor, subject to a fine not to exceed $500." Ch. 1 § 1-12.

II. Plaintiffs' Protests

Plaintiffs regularly seek to exercise their First Amendment rights to protest, assemble, and associate in Graham to speak out against institutionalized racism and white supremacy, police violence against Black people, and the continued presence of the Confederate monument in front of the Alamance County Historic Courthouse ("Confederate Monument") in the City's town square. Because of the Ordinance, however, Plaintiffs have been chilled from and threatened with arrest for exercising their rights.

Plaintiff Alamance County Branch of the National Association for the Advancement of Colored People ("NAACP") and its members seek to protest racialized police violence and the Confederate Monument. NAACP Decl. ¶ 4. Due to the Ordinance, NAACP has been forced to divert resources to assess, plan for, and educate its members about public assemblies and demonstrations in Graham, including by applying for a permit to protest the Confederate Monument, racialized policing of their community, unjust and unequal treatment by Alamance courts and law enforcement officers of Black individuals, and police brutality. *Id.* ¶ 7. The NAACP is concerned that its request may be denied under

the Ordinance's subjective standards, and also that the delay caused by waiting for the City's response will limit attendance and hinder planning for their protest. *Id*. ¶ 8.

Plaintiff Tamara O. Kersey, a Black woman who is from Graham, has attended vigils and rallies elsewhere in Alamance County to protest racist police brutality in the wake of the killing of George Floyd, but she has not protested in her hometown. Kersey Decl. ¶¶ 2, 3, 7. The Ordinance has placed her in reasonable fear of being sanctioned for doing so without a permit. *Id.* ¶ 4. Rather than forgo exercising her constitutional rights, she has subjected herself to Graham's permit system, but, like the NAACP, she is concerned that her request may be denied under the Ordinance's subjective standards, and also that the delay caused by waiting for the City's response will limit attendance and hinder her planned protest. *Id.* ¶¶ 5, 8–9.

Plaintiff Gregory Drumwright is a Black man who grew up just outside the city limits of Graham, North Carolina and still has family living there. Drumwright Decl. ¶ 2. He is a social justice activist and organizer, university professor, and Senior Minister at the Citadel Church in Greensboro, North Carolina where he now lives. Although Plaintiff Drumwright subjected himself to Graham's permit system to seek permission for a racial justice demonstration at the Historic Courthouse square on July 11, the City Assistant Manager informed him that Defendant Peterman has disallowed the issuance of any permits for protests. *Id*. ¶ 6. Plaintiff Drumwright plans to go to the Courthouse square without seeking a permit on July 4, 2020 to peacefully protest with other community members. *Id*. ¶ 7.

Plaintiff Colleen Tenae Turner, a 23-year-old Black woman, grew up in Alamance County and went to school in Graham. Turner Decl. ¶ 2. She recalls joyously marching around the court square as a member of her school's marching band; but now that she would like to raise her concerns with racism in Graham, express support for Black lives, and advocate for removal of the Confederate Monument, she finds herself far less free to speak out due to the Ordinance. *Id*. ¶¶ 2–6. In this moment, she would like to gather with others because such assemblies have granted her relief and comfort in the past. *Id*. ¶¶ 3, 17–18. She sought a permit to do precisely that in Graham on June 24, 2020, but Defendants denied her request in part because Defendants believe the protest might (1) interfere with property owners' rights to "enjoy peaceful occupancy and use of their property," (2) divert excessive police from other necessary duties, and (3) "further enhance the fear and concerns that [local business owners] have." *Id*. ¶ 9.

Following Defendants' denial, Plaintiff Turner sought a permit on June 27, 2020 a smaller gathering of eight people, including a minor, for the next day. *Id*. ¶¶ 10–12. Defendants denied that request as well, on the basis of an unfounded State of Emergency order that the City has since rescinded. *Id*. ¶ 15. This Fourth of July weekend, Plaintiff Turner would like to be able to spontaneously assemble with a group of less than 10 people and walk along the public sidewalks of Graham and protest, without seeking a permit. *Id*. ¶ 17. She intends to continue her attempts to organize permitted protests, but is reasonably concerned that the City will continue to stifle her efforts and silence her voice. *Id*. ¶¶ 17–18.

Plaintiff Nerissa Rivera is a 59-year-old Latina woman who had planned to attend the June 27, 2020 protest for which Plaintiff Turner sought a permit. She opposes the continued presence of the Confederate Monument, which she sees as a representation of murder, inequality, and racism. Rivera Decl. ¶¶ 1–5. After learning that the City denied Plaintiff Turner's permit and subsequently suspended the issuance of all permits under the baseless State of Emergency order that has since been rescinded, Plaintiff Rivera decided to go to downtown Graham and protest by herself. *Id*. ¶¶ 6–8. While in Graham, she met a group of other activists for lunch. *Id*. ¶¶ 9–10. As they were walking back to one woman's car in pairs, socially distancing on the sidewalk, they were stopped by officers who told them they could not protest and that, if they started to protest, the officers would order them to leave. *Id*. ¶¶ 11–16. Plaintiff Rivera and her fellow activists left briefly and then walked back along the same path. *Id*. ¶¶ 17–18. That time, the officers ordered them to disperse, although they allowed a group of white people with Confederate flags to congregate across the road. *Id*. ¶¶ 19–21.

This Fourth of July weekend, Plaintiff Rivera would like to be able to spontaneously protest with a small group on the public sidewalks near the monument in Graham, but is unable to do so due to the Ordinance's advance permit requirement. *Id.* Decl. ¶¶ 23–24.

Plaintiff Destiny Clarke is a 27-year-old white woman who lives near Graham and has sought to demonstrate in the City to protest white supremacy, support the Black Lives Matter movement, and oppose the Confederate Monument. Clarke Decl. ¶¶ 9, 15. On June 28, 2020, Ms. Clarke walked alone in downtown Graham, silently carrying a "Black Lives

Matter" sign. *Id*. ¶¶ 3–4. As she neared the courthouse square, a City officer stopped her, told her that protesting is prohibited, and threatened to arrest her if she did not leave the area. *Id.* ¶¶ 4–7. Concerned that she would be arrested for exercising her First Amendment rights, Ms. Clarke offered to throw away her sign, and subsequently did so. *Id*. ¶¶ 8–10. The officer then left. Ms. Clarke wants to continue protesting in Graham, but is reasonably concerned that she may be arrested or fined for doing so. *Id*. ¶¶ 13–15.

QUESTIONS PRESENTED

1. Do Plaintiffs demonstrate a likelihood of success on their claims that:
    a. the Ordinance violates the First Amendment?;
    b. the Ordinance violates the Due Process Clause?
2. Do Plaintiffs satisfy the other requirements for preliminary injunctive relief?

ARGUMENT

To obtain a temporary restraining order and preliminary injunction, Plaintiffs must demonstrate that they are likely to succeed on the merits of at least one of their claims; they are likely to suffer irreparable harm if a temporary restraining order or preliminary injunction is not granted; the equities favor preliminary injunctive relief; and such relief serves the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also U.S. Dep't of Labor v. Wolf Run Mining Co*., 452 F.3d 275, 281 n.1 (4th Cir. 2006) (substantive standard for temporary restraining order is same as for preliminary injunction). Plaintiffs satisfy each of these requirements.

I. Plaintiffs are likely to succeed on the merits.

Plaintiffs have a likelihood of success because the Ordinance imposes a content-based restriction on their protected speech, assembly, and association in a manner that is not tailored to any valid state interest. In addition, it constitutes an unconstitutional prior restraint because it vests Defendants with sweeping discretion to suppress speech and is not a reasonable time, place, and manner restriction. The Ordinance is also void for vagueness.

A. The Ordinance violates the First Amendment.

i. The Ordinance is a content-based law that fails strict scrutiny.

"[I]t is a prized American privilege to speak one's mind." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). The First Amendment was designed "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). And it reflects our "profound national commitment to the principle that debate on public issues"—including police brutality, racism in government institutions, and the presence of Confederate monuments on government land— "should be uninhibited, robust, and wide-open[.]" *New York Times*, 376 U.S. at 270. Such speech "is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). Political protest "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey v. Brown*, 447 U.S. 455, 467 (1980).

Rather than recognize the value of free speech in a democracy, the Ordinance attempts to suppress it—and it does so in a content-based manner. The First Amendment

prohibits the government from "defin[ing] regulated speech by its function or purpose." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Yet that is precisely what the Ordinance does by specifically regulating those who assemble "for the purpose of protesting or making known any position or thought of the group or of attracting attention thereto." Ch. 18, Art. VI § 18-172. And it expressly exempts funeral processions, students going to educational activities, and government agencies. *Id.* § 18-173. "On its face, the [Ordinance is] content-based because it applie[s] or [does] not apply as a result of content, that is, 'the topic discussed or the idea or message expressed.'" *Cent. Radio Co. Inc. v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016) (quoting *Reed*, 576 U.S. at 163).

Plaintiffs' experience bears this out: Defendants told Ms. Rivera that she could not walk in pairs with others in protest but could walk with them to get to her car. *See* Rivera Decl. ¶¶ 11–16. And Defendants threatened to arrest Ms. Clarke while she was walking down the street carrying a "Black Lives Matter" sign, but left after she threw her sign away. *See* Clarke Decl. ¶¶ 4–10.

"[T]he Constitution demands that content-based restrictions on speech be presumed invalid and that the Government bear the burden of showing their constitutionality," *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 660 (2004) (citations omitted), by establishing that "the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 576 U.S. at 171. Defendants cannot satisfy this standard. It is clear from the face of the Ordinance that the only interest served by the law is silencing

protest, *see*, *e.g.*, Ch. 18, Art. VI § 18-172 (defining "group demonstration" specifically to include those "protesting any matter"). That is plainly impermissible.

Even if the City's interest in the Ordinance were compelling, the ban on any protest, assembly, and parade by any individual or group anywhere in the City without a permit would violate the Constitution because it is not tailored to that interest. As the Supreme Court has recognized, a total ban on expression on public sidewalks does not substantially serve any government purpose. *See United States v. Grace*, 461 U.S. 171, 182 (1983).

The Fourth Circuit's opinion in *Cox v. City of Charleston* is particularly instructive on this point. There, the court struck down a city ordinance remarkably like the one at issue here on First Amendment grounds. That ordinance made it illegal to "organize, hold or participate in any parade, meeting, exhibition, assembly, or procession . . . on the streets or sidewalks of the city" without a permit. *Cox*, 416 F.3d at 283. While recognizing that "it may be true that the permit requirement succeeds in mitigating the potential of any of the activities listed in the Ordinance to threaten the safety, order, and accessibility of city streets and sidewalks," the Fourth Circuit held that "it does so at too high a cost, namely, by significantly restricting a substantial quantity of speech that does not impede the City's permissible goals." *Id.* at 285 (alterations, marks, and citation omitted).

The Fourth Circuit set forth a series of hypotheticals to highlight the troubling reach of that ordinance, each of which is equally applicable here: "Consider three friends who are walking along the sidewalk in downtown . . . They come upon a newspaper stand displaying a headline that outrages them. So moved by the headline, they walk to the end

of the street and hold up handmade signs protesting the headline." Under the Ordinance, their expression is illegal even if it "does nothing to disturb the peace, block the sidewalk, or interfere with traffic." *Id.* at 286. "Similarly, the Ordinance criminalizes a small meeting of individuals who gather on the sidewalk [downtown] . . . to hand out religious tracts without first obtaining a permit, even if their expression does nothing to disturb or disrupt the flow of sidewalk traffic." *Id.* "Indeed, any group of individuals who gather together on the sidewalks for a 'meeting' or 'assembly'—no matter how innocuous—is in violation of the Ordinance unless the group first obtains a permit from the city administrator." *Id.*

Recognizing this lack of tailoring, the Fourth Circuit held "that the Ordinance 'burden[s] substantially more speech than is necessary to further the government's legitimate interests,' and therefore facially violates the First Amendment." *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). The same reasoning applies to the Ordinance at issue here.

In addition, the Fourth Circuit held that "the unflinching application of the Ordinance to groups as small as two or three renders it constitutionally infirm" and that "[s]pontaneous expression, which is often the most effective kind of expression, is prohibited by the Ordinance," *id.* at 285–86 (alterations omitted). The Ordinance also shares those constitutional infirmities, which further highlight the insufficient tailoring.

ii. The Ordinance is an unconstitutional prior restraint.

While the Supreme Court has approved reasonable permit requirements for large demonstrations, *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941), "any system of prior

restraints" bears "a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The Fourth Circuit has stated unequivocally that "[a]n ordinance that requires individuals or groups to obtain a permit before engaging in protected speech is a prior restraint on speech" and "the City bears the burden of proving its constitutionality." *Cox*, 416 F.3d at 284 (citations omitted).

Decades of Supreme Court precedent make clear that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth*, 394 U.S. at 150–51. "It is settled . . . that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional . . . prior restraint." *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958). *See also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992).

Applying this standard in *Shuttlesworth*, the Supreme Court invalidated an Alabama law that, much like the Ordinance, required a permit for "any parade or procession or other public demonstration," 394 U.S. at 149, and enabled the licensing authority to deny a permit if, in "its judgment[,] the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused," *id.* at 149–50. The Court held that this was unconstitutional because it gave the administrator "virtually unbridled and absolute power." *Id.* at 150.

The Graham Ordinance is no different. It requires a permit for any "parade, picket line or group demonstration" gathering "for the purpose of protesting any matter." Ch. 18, Art. VI §§ 18-172, 175. The Police Chief has discretion to deny a permit if he believes the parade, picket line, or demonstration endangers "the public health or safety," hinders "orderly movement of pedestrian or vehicular traffic," *id.* § 18-178(2), or is likely to "create a public disturbance," *id.* § 18-179(3). Moreover, the Police Chief may limit gatherings to six people in areas with "normally heavy pedestrian or vehicular traffic," or set another higher number if "in his judgment, conditions permit" him to do so.

Indeed, the standards governing consideration of permits in the Ordinance are even more constitutionally suspect than those at issue in *Shuttlesworth*. The Ordinance invites discriminatory enforcement against disfavored views by authorizing the Police Chief to deny a permit where, in his judgment, a proposed assembly will "require excessive diversion of police from other necessary duties," without any objective standards. This provision allows the government to suppress views that officials fear will draw large crowds either of supporters or counter-demonstrators.

In *Forsyth*, the Supreme Court squarely rejected such a basis for regulation, holding that the government cannot burden assemblies because "a controversial political message" will be "delivered before a hostile audience." 505 U.S. at 136. Instead, the Supreme Court struck down a permit fee requirement that covered "the cost of maintaining public order" because it gave the administrator too much discretion. *Id.* at 134. As the Supreme Court explained, such a standard is based on "the public's reaction to the speech" and is therefore

an impermissible justification for denying the right to protest. *Id*. Here, such a standard is used not to impose a fee, but to ban expression entirely.

In Graham, the Ordinance is not only susceptible to discriminatory application, but it has in fact repeatedly been used to threaten Plaintiffs and prohibit them from protesting because of their support for racial justice and equality. *See, e.g.*, Clarke Decl. ¶¶ 9–13; Rivera Decl. ¶¶ 19–22; Turner Decl. ¶¶ 17–18.

In addition, the Ordinance is an unconstitutional prior restraint because it fails to provide notice or standards regarding how long the permit review process will take, or to require the government to provide a justification when a permit is denied. *See Freedman v. Maryland*, 380 U.S. 51, 58–60 (1965). These infirmities have hindered Plaintiffs in planning protests even when they have chosen to submit applications to the unconstitutional scheme. *See* NAACP Decl ¶ 8; Kersey Decl. ¶ 9.

iii. The Ordinance is not a reasonable time, place, and manner restriction.

Even if the Ordinance were viewed as content-neutral, it would nevertheless violate the First Amendment. The Ordinance regulates speech in traditional public forums—streets, sidewalks, and parks, which 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 thought between citizens, and discussing public questions." *Hague v. Comm. for Indust. Org.*, 307 U.S. 496, 515 (1939). In such spaces, the government may only impose "reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they

are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward*, 491 U.S. at 791 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

To satisfy this standard, "the government is obliged to demonstrate that it actually tried or considered less-speech-restrictive alternatives and that such alternatives were inadequate to serve the government's interest." *Billups v. City of Charleston*, 961 F.3d 673, 688 (4th Cir. 2020). "Absent such a showing, [courts] cannot simply accept the City's assurances that those other ordinances would be too difficult to enforce or would not sufficiently safeguard its interest." *Id.* at 689. Defendants cannot make such a showing here.

As noted above, the Ordinance is not narrowly tailored to serve a significant government interest. *See* Part I.A.i *supra*. The Ordinance presumptively bans all protest and assembly absent government permission everywhere in the City, without any attempt to tailor the restriction to, for example, the level of traffic in a particular place. "Rather than enforcing a prior restraint on protected expression, cities can enforce ordinances prohibiting and punishing conduct that disturbs the peace, blocks the sidewalks, or impedes the flow of traffic." *Cox*, 416 F.3d at 286. "Cities can also pass ordinances that 'regulate only the volume, location, or duration of [protected] expression,' rather than subjecting all speech to a permit requirement." *Id.* (quoting *Community for Creative Nonviolence v. Turner*, 893 F.2d 1387, 1393 (D.C. Cir. 1990)). "At bottom, the legislative body can enact a permit requirement that burdens expression only to the extent necessary to effectuate the

city's significant interests, and no more so." *Id.* at 287. That is far from what the City has done here.

Equally, because the Ordinance prohibits any expressive assembly or parade anywhere in the City without 24 hours advance notice to and permission from Defendants, and because it grants Defendants discretion "to establish lines for separation of the general public from [protest] activity," essentially removing traditional public forum status from public land at Defendants' whim, it fails to leave open ample alternative channels for communication. In addition, because the Ordinance allows the Chief to limit gatherings to six people for every hundred feet—that is, the length of a nine-story building—it can serve as a functional bar to any mass protest or assembly, period.

B. The Ordinance is void for vagueness.

"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). Due process requires clarity for two reasons. First, a vague law "fails to give ordinary people fair notice of the conduct it punishes," *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015), and second, it invites "arbitrary and discriminatory application" by failing to provide "explicit standards for those [government actors] who apply [it]." *Grayned*, 408 U.S. at 108–09. This principle applies to administrative, civil, and criminal prohibitions. *See, e.g., FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012) (civil fines); *Gentile v. State Bar*, 501 U.S. 1030, 1048–51 (1991) (state bar rule); *United*

States v. Hoechst Celanese Corp., 128 F.3d 216, 224 (4th Cir. 1997) (environmental regulations).

Where First Amendment rights are at stake, it is especially important that laws are clear. *See Fox Television Stations*, 567 U.S. at 253–54; *Smith v. Goguen*, 415 U.S. 566, 573 (1974); *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1228–29 (2018) (Gorsuch, J., concurring). Vague laws threaten to chill speech because they "inevitably lead citizens to steer far wider of the unlawful zone." *Grayned*, 408 U.S. at 109 (marks and citation omitted). Moreover, clarity is required "based in part on the need to eliminate the impermissible risk of discriminatory enforcement, for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law." *Gentile*, 501 U.S. at 1051 (citations omitted). That danger is particularly stark where, as here, Plaintiffs aim to join a worldwide movement specifically addressing their grievances about those who enforce the law.

The Supreme Court has repeatedly held that laws that, like the Ordinance, turn on terms such as "disturbing the peace," are void for vagueness. *See, e.g.*, Ch. 18, Art. VI § 18-179 (conditioning police issuance of permit on determination of whether the protest is likely to "provoke disorderly conduct or create a public disturbance"). In *Cox v. Louisiana*, the Supreme Court declared unconstitutional a statute that prohibited "congregating with others with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned." 379 U.S. 536, 551 (1965) (marks and citation omitted); *accord Gooding v. Wilson*, 405 U.S. 518, 527 (1972)

(holding a "breach of the peace" statute void for vagueness); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (same).

In *Cox v. Louisiana*, the Supreme Court held that breach of the peace statutes are impermissibly vague because they condition legality on the reaction of the speakers' critics, making it impossible for speakers to predict whether they will be punished for their constitutionally protected speech. *See* 379 U.S. at 552; *see also Terminiello v. City of Chicago*, 337 U.S. 1, 4–5 (1949). The same is true here. Neither the police chief nor Plaintiffs can know whether their acts will provoke disorderly conduct or create a public disturbance. That is up to their listeners, including critics. This Court should not sanction such a heckler's veto.

Indeed, fifty years ago, the District Court for the Eastern District of North Carolina struck down another North Carolina city ordinance that was nearly identical to the Ordinance at issue here as void for vagueness. *Underwood v. City Council of Greenville*, 316 F. Supp. 956 (E.D.N.C. 1970). In that case, the ordinance read:

> [T]he chief of police . . . may refuse to issue a permit to march, parade, assemble, picket or demonstrate in any way when and if he determines that said activity would either constitute a clear and present danger to the public health or safety or would 'hinder or prevent the orderly movement of pedestrian or vehicular traffic on the streets, alleys, or sidewalks.' Further the chief or his designee may specify whether or not minors will be allowed to participate . . .
>
> [A]mong other considerations, [the chief may] consider and find as a requisite to issuance the following:
>
> (1) the activity will not require excessive diversion of police from other necessary duties;

> (2) the activity will not interfere with the right of property owners in the area to enjoy peaceful and lawful occupancy and use of their property;
>
> (3) the activity can be conducted without unreasonable interference with normal pedestrian or vehicular traffic in the area, and will not prevent normal police and fire protection to the public, and will not be likely to cause injury to persons or property or to provoke disorderly conduct or to create a public disturbance.

Id. at 960. The court held that it was "[c]lear[]" that this law—which is nearly identical to the Ordinance—was unconstitutionally vague because it failed to give notice as to what is considered a permissible assembly, and it failed to cabin the police chief's discretion. *Id.*

Like the ordinance declared void for vagueness in *Underwood*, the Graham Ordinance enables the chief of police to "[r]efuse to issue [a] permit . . . when the activity or purpose would endanger the public health or safety," Ch.18, Art. VI § 18-178(2), and permits are allowed only when the protest "will not interfere with the right of property owners in the area to enjoy peaceful occupancy" and "will not be likely to cause injury to persons or property or provoke disorderly conduct or create a public disturbance." *Id.* § 18-179(2)–(3).[3] As in *Cox* and *Underwood*, it is entirely unclear how speakers or the Police Chief will know whether a demonstration is likely to fail or satisfy these standards.

Finally, to the extent that it does anything, the provision stating that "nothing in this section shall be construed to prevent the peaceful assembly of any group for orderly

[3] In fact, the ordinance is even vaguer than the law in *Cox v. Louisiana*, which at least had a scienter requirement. *See* 379 U.S. at 551.

expression or communication between those assembled" only exacerbates the Ordinance's vagueness. As the Fourth Circuit has recognized, laws that equivocate about the legality of constitutionally protected acts are impermissibly vague. In *Lytle v. Doyle*, the Fourth Circuit held that a statute prohibiting "loitering" on a bridge was unconstitutionally vague because it was unclear whether protesting there qualified as loitering. 326 F.3d 463, 469 (4th Cir. 2003) (citing *Chicago v. Morales*, 527 U.S. 41, 57 (1999)).

Graham's Ordinance shares this defect. It purports to reserve space for constitutionally protected free expression, while simultaneously prohibiting "any [unpermitted] assembly together or concert of action between two or more persons for the purpose of protesting any matter or making known any position or thought of the group[.]" Ch. 18, Art. VI §§ 18–172, 18–175. Protesters could rightfully be unsure of whether they may gather in public without a permit to express their viewpoints. If the permissibility of such an action depends on whether the expression is "between" those assembled or is "ma[de] known" to those nearby, do they need to whisper? This reasonable question illustrates the great potential for confusion inherent in this Ordinance; it is unclear to protesters and open to discriminatory enforcement by the police.

II. Plaintiffs are irreparably harmed.

Preliminary relief is necessary to prevent irreparable harm to Plaintiffs. Absent such relief, Plaintiffs will not be able to exercise their First Amendment freedoms, including by protesting over the coming weekend in small groups, in response to breaking news, and/or without obstructing any traffic. "[L]oss of First Amendment freedoms, for

even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

III. The balance of equities and public interest favor preliminary relief.

The balance of equities also weighs in favor of Plaintiffs. The Ordinance obstructs Plaintiffs' exercise of their constitutional rights, causing them great harm. Meanwhile, no harm will come to Defendants if Plaintiffs are allowed to engage in protected speech. *See Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (injunction of a likely unconstitutional law does not harm the government). The balance therefore weighs in favor of an injunction. And upholding constitutional rights "surely serves" the public interest. *Id.*

CONCLUSION

For the reasons stated, Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Relying on the word count function of Microsoft Word, I hereby certify that this brief complies with the word limitations set forth in LR 7.3.

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CERTIFICATE OF SERVICE

I certify that on July 3, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and e-mailed true copies of this motion and attachments to the following:

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