



June 26, 2020

**VIA REGULAR AND ELECTRONIC MAIL**

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**RE: The Right to Protest**

Dear Sheriff Johnson:

The ACLU of North Carolina, the Lawyers' Committee for Civil Rights Under Law, and Emancipate NC write to raise our concerns about the Alamance County Sheriff's Office recent communication, shared on Facebook, stating that the Sheriff will not grant any permits to protest "for the foreseeable future" and that the Sheriff intends to arrest individuals protesting without a permit in the city of Graham. Your threat to arrest people for protesting without a permit, as well as the indefinite blanket refusal to issue permits, violates the most fundamental constitutional rights to assembly, speech, and to be

free from unlawful seizures and use of excessive force without due process of law. We demand that you immediately issue a retraction and clarify that residents are able to exercise their constitutional rights to be free from arrest and harassment.

The rights to protest and assembly are protected by the First Amendment to the U.S. Constitution and Art. I, Sec. 12 of the North Carolina Constitution. Peaceful protest has a robust tradition in our country, and is one of the main ways to engage in political discourse, especially at a time when the entire country faces a public reckoning about police violence against Black communities. Protected speech during times of unrest and public crisis can be loud, raucous, and uncomfortable and yet remain within the bounds of the First Amendment.

Expression in the form of protests and demonstrations is most protected in traditional “public forums”—streets, sidewalks, parks, and other public locations such as courthouses. *See, e.g., Hague v. C.I.O.*, 307 U.S. 496, 515 (1939) (“Wherever the title of streets and parks may rest, they 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. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”). Marchers on sidewalks are almost always constitutionally protected, even without a permit. *See, e.g., Forsyth County, Ga. v. Nat’list Movement*, 505 U.S. 123, 130 (1992).

Any restriction of speech and assembly in outdoor public spaces must be strictly limited and enforced in such a way as to ensure that it does not burden more speech than necessary to achieve the government’s purpose. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“Our cases make clear . . . that even in a public forum the government may 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.’”) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1983)). In addition to being narrowly tailored, time, place and manner restrictions on speech should not give rise to discriminatory enforcement. *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (“A government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view . . . To curtail that risk, a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority.”)

Restrictions that are not tethered to a significant government interest are not constitutional. *See United States v. Grace*, 461 U.S. 171, 182 (1983). The blanket ban on all forms of assembly in Graham is not narrowly tailored and clearly violates the First Amendment. It further appears motivated by a desire to suppress protestors’ speech because of its content, which is a First Amendment violation all on its own.

Only in very limited circumstances can government officials demand that protestors obtain a permit in order to use public property for speech and assembly. Protesters around the country and world are responding to current public events as they unfold. The government must accordingly accommodate spontaneous events that do not lend themselves to advance permitting requirements such as Graham’s local ordinance Art. VI, Sec. 18-178 (1). Even if such a permitting scheme is justified, the city’s refusal to issue

permits “for the foreseeable future” is a grossly overreaching attempt to broadly and indefinitely suppress all speech and assembly in Graham. Providing no means whatsoever by which protestors can assemble and demonstrate, and threatening to arrest protestors who do so without a permit, clearly violates the First Amendment.

Each and every law enforcement agent has an affirmative duty to ensure that the rights of protesters are protected, even when the police themselves are the subject of the demonstration, as they were in yesterday’s protest of police violence against Black individuals. Threatening to arrest individuals engaged in peaceful protests violates the federal and North Carolina Constitutions. Nor is the use of force against protesters, absent a real and immediate threat of physical harm to others, permissible. Police cannot arrest, or threaten to arrest protestors en masse without individualized probable cause. *See, e.g., Barham v. Ramsey*, 434 F.3d 565, 576 (D.C. Cir. 2006) (holding that assistant police chief was not entitled to qualified immunity for ordering unlawful mass arrest of protestors because “a reasonable police officer [is] on notice that the Constitution does not tolerate the unwarranted, indiscriminate arrest of hundreds of individuals as a response to the demonstration that he faced.”).

The targeting and criminal prosecution of protesters, in addition to being unlawful, means that jail officials must devote their time and energy to housing and guarding people who pose no threat to public safety amidst a global pandemic, requires prosecutors and court officials to spend time and resources sorting out whether and how to prosecute individuals who are exercising constitutionally-protected rights, and affords protesters an additional platform to obtain court orders and/or attorneys’ fees.

We ask you to immediately retract your communication on protests and instruct all law enforcement officers on the contours of protected speech under the law. We further call on you to publicly reaffirm the right of protestors to gather and demonstrate peacefully in Graham without a permit. Should you wish to discuss this matter further, please contact us at the email addresses listed below.

Sincerely,

/s/ Irena Como

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