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Via Email (council@williamsburgva.gov)

Attention: Clyde Haulman, Mayor
Paul Freiling, Vice Mayor
Judith Knudson, Council Member
Scott Foster, Council Member
Douglas Pons, Council Member

Williamsburg City Council
Municipal Building
401 Lafayette Street
Williamsburg, VA 23185-3617

Re: Proposed Ordinance #12-05

Dear Members of the Williamsburg City Council:

The City of Williamsburg, the cradle of the first liberty, has had a long and proud history of protecting and fostering freedom of speech. Public streets (such as Duke of Gloucester Street), sidewalks and other public areas have immemorially been considered open to the public for purposes of assembly, communicating thoughts between citizens, and discussing public questions.[1] Unfortunately, if the Williamsburg City Council adopts Proposed Ordinance #12-05, which would essentially restrict those wishing to exercise their right to free speech to designated zones and criminalize even casual interactions taking place outside these areas, the City's once-stalwart defense of free speech and protest will become little more than a footnote in its storied history.

Specifically, Proposed Ordinance #12-05 would amend § 9-39 of the Williamsburg Code to severely restrict expressive activities on Duke of Gloucester Street within the Colonial Williamsburg Historic Area and the Merchants Square Area. Were this ordinance to be adopted, substantial parts of areas which have historically served as forums for public expression would be made inaccessible. While other communities have succumbed to the authoritarian impulse to adopt free speech zones as a thinly veiled

[1] *Hague v. Committee for Indus. Organization*, 307 U.S. 496, 515-516 (1939).

effort to minimize or altogether mute dissent and the free exchange of ideas in public (or to advance raw commercial interests), it would be a profound misstep by the Williamsburg City Council to adopt an ordinance that flies in the face of the First Amendment's guarantee to freedom of speech.

You are no doubt aware of countless commercial, non-profit, political, historical, religious, musical and other events involving free expression that have occurred, and do occur, on Duke of Gloucester Street on a regular or intermittent basis, some indeed by Colonial Williamsburg personnel. It is also clear from the memorandum attempting to justify the proposed ordinance that it is aimed at street preachers who have already been unlawfully prosecuted by the City. The memorandum also cites as its justification the undesired reactions of listeners. All of this provides direct and non-circumstantial evidence that the contemplated ordinance is aimed at certain viewpoints, in favor of other preferred expressive activity. But content and viewpoint discrimination are patently unconstitutional on public streets and sidewalks. As Justice Sandra Day O'Connor observed, a "[l]istener's reaction to speech is *not* a content-neutral basis for regulation" of speech.[2]

We urge the City Council to continue to set the standard for a vibrant community that not only protects the freedoms prized so highly by our Founders but celebrates them, as well, by rejecting this misguided ordinance. Moreover, we urge the Council to use its ordinances and law enforcement power to restrain unlawful conduct that may arise from the bona fide exercise of free speech, and not to squelch it.

A Traditional Public Forum

Proposed Ordinance #12-05 bars persons from engaging in expressive activities within the Historic Area and the abutting Merchants Square Area except in two "presentation areas," thereby closing off other sidewalks and public areas to such activities. Closing these public areas to expressive activity is contrary to the First Amendment's strong protections for speech and expressive activity in traditional public forums. Sidewalks and public rights of way are among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property.[3] Restrictions which seek to prohibit expressive activity within a traditional public forum are presumptively impermissible and must be narrowly drawn to accomplish a compelling governmental interest.[4]

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[2] *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) *see also*, *United States v. Marcavage*, 609 F.3d 264 (3rd Cir. 2010) ("[W]here the government regulates speech based on its perception that the speech will spark fear among or disturb its audience, such regulation is by definition based on the speech's content."); *accord*, *Swagler v. Sheridan*, 2011 WL 2746649 (D. Md. July 12, 2011).
[3] *United States v. Grace*, 461 U.S. 171, 179 (1983).
[4] *Id.* at 178-79.

Burdening Free Expression

A restriction such as Proposed Ordinance #12-05, which simply closes off substantial areas of a traditional public forum and restricts expressive activities to particular "free speech zones," would burden speech and expressive activity far more than necessary to protect the safety and convenience of travelers along the rights-of-way and the welfare of those shopping or dining in the area. By prohibiting *all* First Amendment-protected expressive activity outside the two "free speech zones," the Proposed Ordinance is highly overbroad and would criminalize a broad range of innocuous activity. Under this ordinance, for example, a group of four friends would be barred from conversing about primary election results outside of a designated area. Likewise, missionaries speaking about their faith with interested passersby outside of the "presentation areas" would risk criminal charges, as would a solitary individual wearing a sticker proclaiming "I voted." Clearly, none of these activities pose a danger to the public welfare. However, they would all be considered violations under this ordinance, which fails to meet the First Amendment test requiring narrow tailoring. In order to be narrowly tailored, a restriction must be no broader than necessary to achieve its goal; it must target and eliminate no more than the exact source of the "evil" it seeks to remedy. "A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil."[5]

The fact that "presentation areas" would remain available for expressive activities under the proposed ordinance does not eliminate the constitutional problem created by closing off other, more extensive areas that are traditional public forums. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[6] Confining First Amendment protected expressive activity to one or two free speech zones—either of which can be closed at any time—does not afford adequate alternative means for expression, as is constitutionally required. Indeed, courts reject as unconstitutional restrictions that "totally foreclose a speaker's ability to reach one audience even if [they] allow[] the speaker to reach other groups."[7] The proposed location of the zones appears to prevent speakers in them from reaching audiences in much, if not virtually all, of the Colonial Williamsburg Historic Area CW (while permitting Colonial interpreters and others to engage in the same type of speech, only 200 years removed in content).

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[5] *Frisby v. Schultz*, 487 U.S. 474, 485 (1988); cf. *Board of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987).

[6] *Reno v. ACLU*, 521 U.S. 844, 880 (1997).

[7] *Blair v. City of Evansville, Ind.*, 361 F.Supp.2d 846, 859 (S.D. Ind. 2005) (internal quotation marks removed) (quoting *Gresham v. Peterson*, 225 F.3d 899, 907 (7th Cir. 2000)); *see also United States v. Baugh*, 187 F.3d 1037, 1044 (9th Cir. 1999).

Permit Requirement Is Unconstitutional

Nor is the constitutionality of the proposed ordinance saved by the fact that persons might be allowed to engage in expressive activity outside the presentation areas if they obtain a short-term permit. Requiring such a permit is a presumptively unconstitutional prior restraint on speech and is allowed only when necessary to regulate competing uses of a public forum.[8] The First Amendment forbids the government from limiting access to a traditional public forum by imposing a license or permit requirement upon speakers.

Moreover, the proposed 15-day cap on expressive activity even within the presentation areas violates the First Amendment. Indeed, federal courts have held similar restrictions to be unconstitutional. Thus, in *Bowman v. University of Arkansas*,[9] the United States Court of Appeals for the Eighth Circuit concluded that a five day per semester cap on a single speaker's expression was not narrowly tailored to achieving the government's significant interest in education and fostering a diversity of viewpoints.[10] Similarly, there is no demonstrable connection between the 15-day limit set forth in the proposed ordinance and the interests purported to be served by it.

While the City may have concerns about speakers blocking pedestrian and vehicular traffic or creating noise in excess of objective levels established in other parts of the City Code, those problems should be addressed by targeted regulations. The undeniable need for regulations prohibiting persons from impeding traffic, blocking sidewalks, or creating excessive noise and for enforcement of those regulations, does not demonstrate that there is a significant state interest in banning expressive activity entirely except in a few small zones.[11] Adopting the simple expedient of closing off traditional public forums not only violates the First Amendment, but does a disservice to the community by choking off expression on matters of public interest.

The United States has historically stood for unfettered free speech, which is vital to a functioning democracy. Unfortunately, the tendency on the part of government and law enforcement officials (often at the behest of commercial interests) to purge dissent for matters of convenience, control and dubious security concerns has largely undermined the First Amendment's safeguards for political free speech.

The City of Williamsburg remains one of our lone links to a time when communities had town squares—public areas where people gathered to exchange information, ideas, and do business. These served a vital function in America's history,

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[8] *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992).
[9] *Bowman v. White*, 444 F.3d 967, 981–82 (8th Cir. 2006).
[10] *See id.*; *see also SEIU, Local 5 v. City of Houston*, 595 F.3d 588, 601 (5th Cir. 2010) (concluding that a restriction on sound amplification permits to two per month was not narrowly tailored and therefore unconstitutional).
[11] *Kuba v. 1-A Agr. Ass'n*, 387 F.3d 850, 861 (9th Cir. 2004); *see also Weinberg v. City of Chicago*, 310 F.3d 1029, 1039 (7th Cir. 2002).

allowing opinions and ideas—whether good or bad—to be aired and debated. Yet as areas once open to the public have been overtaken by state and corporate interests, traditional public forums for free speech have all but disappeared. Town squares have been replaced by private shopping malls and parking lots, neither of which are freely accessible to individuals hoping to voice their views. Consequently, citizens hoping to exercise their First Amendment right to freedom of expression are shut out, sometimes forcibly, from public areas, while attempts to peaceably assemble are overburdened by government regulations and permit requirements.

It is my hope that the City Council will recognize the duty they owe, not only to the members of the community who wish to freely exercise their constitutional rights within the city limits but also to our forebears who sacrificed life and limb to secure the freedoms we have today. For these reasons, I urge the City Council to reject Proposed Ordinance #12-05.

Sincerely yours,

John W. Whitehead
President