March 7, 2023

CONFIDENTIAL RULE 408 COMMUNICATION

VIA EMAIL AND US CERTIFIED MAIL
Jimmy Stalling, Mayor
Hackney High, Jr., Councilman, First Ward Seat
Samuel Dixon, Councilman, Second Ward Seat
Aaron Coston, Councilman, Third Ward Seat
Elton Bond, Councilman, Fourth Ward Seat
Craig Miller, Councilman, At Large Seat
Roger Coleman, Councilman, At Large Seat
Cc: Corey Gooden, Town Manager

Dear Edenton Town Council:

I hope this letter finds you all well. I am writing on behalf of Emancipate NC, a Durham-based civil rights organization, and at the request of several concerned citizens in the Edenton Monument Group. The purpose of this letter is to address constitutional concerns with Chapter 91, Tit. IX, Sections 91.01 through 91.41 of the Edenton, N.C., Code of Ordinances (hereafter the "Ordinance"), which purports to require individuals to obtain permits for parades, group demonstrations, and picket lines. It is our belief that the Ordinance is an unconstitutional content-based prior restraint that violates the First Amendment.

Under the Ordinance, a Group Demonstration is defined as follows:

> Any assembly together or concert of action between or among two or more persons which takes place on streets, sidewalks, alley ways, public parking facilities, private parking lots open to the public and other public grounds for the purpose of protesting any matter or of making known any position or promotion of the persons, or of or on behalf of any organization or class of persons, or for the purpose of attracting attention to the assembly. §91.01.

A Picket Line is similarly defined as "Any two or more persons formed together for the purpose of making known any position or promotion of the persons or of or on behalf of any organization or class of persons." §91.01. The Ordinance purports to require permits for "any person to organize, conduct or participate in any" parade, picket line, or group demonstration "in or upon any street, sidewalk, alley or other public place within the town unless a permit therefor has been issued by the town in accordance with the provisions of this subchapter." §91.16; §91.36. The ordinance vests the authority to issue a permit solely with the Town Manager or their designee.

§91.17(A). It also prohibits the issuance of a permit for a group demonstration that does not purport to "promote a particular or singular objective," and it only allows for the issuance of one permit every 24-hour period. §91.17(A); §91.17(B). The Ordinance ostensibly prohibits anyone below the age of 16 from participating in the group demonstration unless the Town Manager receives written permission from their parents. §91.17(B)(4). It empowers the Town Manager to limit the number of participants in areas of heavy pedestrian traffic, §91.18(A), and permits the denial of a permit on the basis of vague and arbitrary reasoning, such as "whether the activity will be likely to . . . provoke disorderly conduct or create a public nuisance." §91.18(B)(3)(d). Notably, the Ordinance exempts funeral processions and educational activities from the permitting requirements. §91.15.

While the U.S. 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 been unequivocal 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). The U.S. Supreme Court has likewise repeatedly held that ordinances prohibiting any **"parade, procession, or demonstration on the city's streets or public ways"** and "mak[ing] 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 officia**l—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Shuttlesworth v. City of Birmingham, Ala.,* 394 U.S. 147, 150-51 (1969) (citing *Lovell v. City of Griffin*, 303 U.S. 444; *Hague v. C.I.O.*, 307 U.S. 496; *Schneider v. State*, 308 U.S. 147, 163-165; *Cantwell v. Connecticut*, 310 U.S. 296, 60; *Largent v. Texas*, 318 U.S. 418) (emphasis added).

The right of an individual to engage in First Amendment protected activity is particularly well-established in the context of streets, sidewalks, and other public forums. *Shuttlesworth*, 394 U.S. at 152 ("'Whenever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the . . . rights, and liberties of citizens.'" "Moreover, when that speech takes place in a quintessential public forum, the ability of the state to limit expressive activity are sharply circumscribed." *Occupy Columbia v. Haley*, 738 F.3d 107, 125 (4th Cir. 2013) (internal quotations and citations omitted). Courts have long recognized public sidewalks as public forums for assembly and speech. *See, e.g.*, *United States v. Grace*, 461 U.S. 171, 179, (1983) ("Sidewalks . . . 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 . . . to be public forum property.").

Political speech, such as speech "for the purpose of protesting any matter or making known any position" criticizing the government, enjoys the highest level of protection under the First

Amendment. *See, e.g.*, *Tobey v. Jones,* 706 F.3d 379, 391 (4th Cir. 2013) ("A bedrock First Amendment principle is that citizens have a right to voice dissent from government policies."); *accord*, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 758–59 (1985); *Occupy Columbia,* 738 F.3d at 122. The First Amendment likewise prohibits the government from "defin[ing] regulated speech by its function or purpose," and considers such regulations to be content-based restrictions. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

Yet that is precisely what your Ordinance does by specifically regulating people who assemble "for the purpose of protesting any matter or of making known any position," §91.01, and prohibiting the issuance of a permit for a group demonstration that does not purport to "promote a particular or singular objective." §91.17(A). It expressly exempts funeral processions, students going to educational activities, and government agencies. §91.15; §91.35. Thus, "[o]n 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). "[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. The U.S. Supreme Court has held that a total ban on expression on public sidewalks does not substantially serve any government purpose. *United States v. Grace*, 461 U.S. 171, 182 (1983).

The Fourth Circuit's opinion in *Cox v. City of Charleston* is particularly instructive. There, the court struck down, on First Amendment grounds, a city ordinance remarkably similar to the Ordinance here. 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 Court went on to hold 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).

Chapter 18, Art. VI, Sections 18-172 and 18-174–181 of the City of Graham, N.C's Code of Ordinances ("Graham Ordinance"), which is virtually identical to the Edenton Ordinance, was repealed in July 2020 by the Graham City Council after the U.S. District Court for the Middle District of North Carolina issued a Temporary Restraining Order ("TRO") barring the City from enforcing the ordinance. The Graham Ordinance was challenged on the basis that it was an unconstitutional, content-based prior restraint and that it was void for vagueness. In issuing the

TRO, the District Court found that the plaintiffs demonstrated a likelihood of success on the merits of their First Amendment claims.

Your Ordinance's content-based restrictions render it unconstitutional. However, even if the Ordinance were found to be content-neutral, it would still be unconstitutional because it is not narrowly tailored to serve a significant government interest, it is overbroad, and it does not leave open ample alternative channels for demonstrating. The Ordinance has so far operated to prohibit and/or dissuade the members of the Edenton Monument Group from exercising their First Amendment rights by preventing them from protesting in the public square where the Confederate Monument is located. This prohibition, in addition to arbitrary requirements related to insurance, the number of participants, and the group's signage, violates the First Amendment rights guaranteed to the members of the organization. In light of the above, we hope the Edenton City Council will elect to voluntarily cease enforcement of the unconstitutional permitting system and repeal the Ordinance without the need for any legal action.

Please do not hesitate to reach out if you have any questions or concerns. You can reach me via my cell at 910-228-3741 or via email at jaelyn@emancipatenc.org.

Respectfully,

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On behalf of the Edenton Monument Group and Emancipate NC