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"God now commandeth all men every where to repent." – Acts 17:30

March 27, 2012

Mayor Clyde Haulman
City of Williamsburg
Municipal Building
401 Lafayette Street
Williamsburg, VA 23185

Mayor Haulman,

It has come to my attention that the City of Williamsburg is considering enacting amendments to its municipal noise ordinance that include the establishment of "free speech zones" at the outskirts of Merchants Square and the Colonial Williamsburg Historic Area, along with a complete ban on amplified free speech activity in these locations. It is my hope that this letter will reveal the vice of these proposed amendments and that it will provide a clear outline as to why they are blatantly unconstitutional according to the United States Supreme Court and various circuit courts. Furthermore, as I will explain, the impetus behind the creation of the amendments is undeniably the dislike of the content and viewpoints of those engaged in religious free speech, which the business owners in Merchants Square have made clear in public statements. It has long been established in our nation that these types of regulations must be rejected.

WILLIAMSBURG WAS FOUNDED UPON THE CONCEPT OF FREEDOM

Firstly, it is disgraceful that this proposal is even being considered. Williamsburg has been known throughout history to be one of the birthplaces of American freedom, and the city's preservation of liberty served as an example to the rest of the country. Additionally, beginning in the 1920's, a minister of the Gospel named Dr. William Archer Rutherford Goodwin devoted his life to ensuring that the historicity of the city would be preserved, and is responsible for what remains of the city's colonial roots. Therefore, it is profoundly ironic that the Williamsburg City Council now seeks to restrict freedom of speech, especially the speech of ministers of the Gospel.

FREE SPEECH MUST BE PROTECTED IN TRADITIONAL PUBLIC FORUMS

For many years, the United States Supreme Court has upheld the right to free speech, especially in commercial zones. In areas that are considered to be traditional public forums, such as streets, sidewalks and parks, speech is entitled to utmost protection. The court established in the landmark case of *Hague v. CIO* (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 the purposes of assembly, communicating thoughts between citizens and discussing public questions."*

The court has pointed to this cornerstone in numerous rulings. In *Jamison v. Texas* (1943) the Supreme Court declared: "[O]ne who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion.' In *Shuttlesworth v. City of Birmingham* (1969), the court repeated, "Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens." The court again ruled in *United States v. Grace* (1983), "[I]t has long been established that 'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered without more, to be 'public forums'."

Since Merchants Square and the Colonial Williamsburg Historic Area have long been open as public forums, citizens have the right to engage in constitutionally-protected activity in these areas. As long as the speaker behaves in a lawful manner, his speech must not be suppressed. If there truly was a problem with any speaker behaving unlawfully, the already existing laws should be enforced.

CONTENT-BASED RESTRICTIONS HAVE LONG BEEN HELD TO BE UNCONSTITUTIONAL

The businesses in Merchants Square have clearly revealed in public statements that they want the speakers removed due to the content of their speech. In an article published in the Virginia Gazette on March 13, 2012, one of the complaining businesses stated, "People want to enjoy their dinner and talk with their friends. They aren't here to hear someone's opinions about religion." Another business owner claimed that the speakers are "self-righteous" and didn't like some of the statements that they have purportedly made about women's issues and homosexuality. It could not be clearer that these businesses have a goal of getting rid of religious speakers simply because they have viewpoints that the business owners find "offensive."

Regulations that are based upon content of speech have repeatedly been declared by the Supreme Court to be unconstitutional. For example, the court affirmed in *Texas v. Johnson* (1989):

> *"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."*

The various circuit courts have also echoed this declaration. In *Odaval v. City of Madison* (7th Circuit, 2005), drivers complained about a group that was displaying signs about abortion on an overpass, which they found offensive. While the police tried to remove the group, the court ruled in favor of Odaval, stating:

> *"Listeners' reaction to speech is not a content-neutral basis for regulation. ... Speech cannot ... be punished or banned simply because it might offend those who hear it."*

Indeed, the very nature of free speech is to allow for discussion and, at times, spirited debate. The Supreme Court outlined in 1949 in *Terminiello v. Chicago*:

> *"[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view." (Emphasis added)*

Yet, under the proposed changes to 12-05, the City Council seeks to restrict speech and to force all speakers to assemble in an area away from the vast majority of the public simply because some businesses have moaned about what they are saying. In essence, the City Council is creating an unconstitutional heckler's veto, which is defined as the restricting of a speaker based upon the reaction of the hearers. The Supreme Court and various circuit courts have strongly denounced this type of regulation.

Furthermore, the United States Supreme Court advised in the precedential case of *Saia v. New York* (1948) that "[a]nnoyance at ideas can be cloaked in annoyance at sound." The businesses in Merchants Square may complain about sound levels; however, as already cited, they have informed the media that the heart of the matter is that they disagree with the speech.

COMPETING MESSAGES WILL BE FORCED TO MERGE AND BE INDISCERNABLE

The proposed free speech zones create other problems as well. Numerous speakers, which may have varying topics and viewpoints, will be forced to stand together in the zone, and their speech will combine into one jumbled and indiscernible mess. Speakers need the freedom to spread out away from each other throughout Merchants Square and the Colonial Williamsburg Historic Area as they wish, as long as they are not blocking pedestrian traffic or engaging in any prohibited behavior.

Additionally, mandating that speakers discontinue their free speech activities at 9 p.m. is not reasonable as members of the public are still out and about at this time. Placing a 15-day limit on speech is also utterly absurd as it serves no legitimate or compelling government interest, which is required by the law. Certainly the framers of the Constitution never intended for freedom of speech to be so constricted.

FIFTY-FOOT REGULATIONS HAVE BEEN FOUND TO BE OVERLY RESTRICTIVE

In the D.C. Circuit case of *United States v. Doe*, the federal court struck down the conviction of a woman who was arrested for playing a drum in LaFayette Park that could be heard at over 60 decibels from 50 feet away. The court concluded that the regulation was not narrowly-tailored as many everyday sounds would violate the statute. The ruling explained:

> *"[E]vidence put in the record by defense counsel suggested that loud conversation — the speaking voice of a single person during questioning in the courtroom — exceeds 60 decibels. There was also evidence that electric generators in the Park operating at the time of the protest, when tested two days after Nomad's arrest, made noise that registered higher than 60 decibels at 50 feet. Further, Nomad presented evidence that the manufacturer's own instruction manual for the measuring meters used by the Park Police describes a 60-decibel sound as equivalent to 'background music.' While by no means conclusive, these particles of evidence certainly raise doubts as to whether the 60-decibel regulation prohibits only speech activity that is excessive or disturbing. In any event, it is the government's case to prove and it has failed to do so. There is nothing upon which we can base a holding that this regulation is "narrowly tailored" to promote the government's interest in maintaining an appropriate level of sound volume in a traditional public forum…"*

While the courts found that a regulation that banned sound measuring at 60 decibels from 50 feet away was unconstitutional, the proposed amendment to the Williamsburg noise ordinance bans ANY sound from being heard at 50 feet away. Therefore, it is obvious that the amendment is even more unconstitutional. It is not narrowly-tailored as its restrictions are drastic and overly broad. In fact, it will utterly shut down the free speech of citizens as speech cannot be communicated effectively in a noisy and bustling business district with one's bare voice without violating the ordinance. The sound of cell phones ringing, motorcycles rumbling and children playing can all be heard at 50 feet away, let alone public speech.

The Supreme Court declared in *Ward v. Rock Against Racism* (1989) that "[a] regulation may not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" Therefore, this draconian measure before City Council must be defeated. The writers of the original ordinance understood the importance of protecting religious speech, and specifically added an exemption to ensure that these very same types of restrictions would not be placed upon speakers.

AMPLIFIED FREE SPEECH IS A RIGHT PROTECTED BY THE FIRST AMENDMENT

Additionally, the amendment's complete ban on the usage of amplification for free speech purposes in Merchants Square and the Colonial Williamsburg Historic Area causes serious constitutional concern. The Supreme Court affirmed in *Saia v. New York* (1948) that free speech rights in public forum areas encompass and include amplified free speech activity. The court set a binding precedent when it upheld the use of sound equipment as an effectual means of addressing the public as it declared, "Loud-speakers are today indispensable instruments of effective public speech. … It is the way people are reached."

A number of the federal circuit court decisions that have followed *Saia* have also ruled that amplified free speech must be guaranteed constitutional protection. In *Jim Crockett Promotions v. City of Charlotte* (1983), the 4th Circuit stated, "[T]he 'right to amplify speech' is within the protection of the First Amendment." *Reeves v. McConn* (5th Circuit, 1980) also asserted, "*[T]*he use of sound equipment within reasonable limits is an aspect of free speech protected by the First Amendment. The right to communicate inherently comprehends the right to communicate effectively."

Likewise, in 1991, the 7th Circuit remarked in *Stokes v. City of Madison*, "… Madison contends that only speech, not amplified speech, enjoys First Amendment protection. This is incorrect. The First Amendment protects effective speech, not merely uttered words …"

In noisy city environments, it is an absolute necessity to use amplification in order to communicate effectively. "[A] public address system is reasonably required to be heard above the normal noises of the city." (*U.S. Labor Party v. Rochford*, ND District Court, Illinois, 1975) "They cannot effectively communicate … without using sound amplification devices. 'It is the way people are reached.'" (*Maldonado v. County of Monterey*, ND District Court, California, 1971, citing *Saia*) *Reeves v. McConn* also stated clearly: "Precisely because the downtown district is already a busy and noisy place, reasonably amplified free speech is guaranteed a broad right to equal protection in these aspects of modern urban life. … [T]here is probably no more appropriate place for reasonably amplified free speech than the streets and sidewalks of a downtown business district." Furthermore, those who are more soft-spoken, who might require the aid of amplification, should not be subjected to a complete ban on effective speech.

Therefore, because the First Amendment protects amplified free speech as a necessary vehicle of communication, the courts have declared, "The mere existence of an alternative means of expression — in this case, unamplified speech — cannot by itself justify a restraint on some particular means that the speaker finds more effective." (*McConn*)

Instead, municipalities must be careful to tailor their regulations pertaining to amplified free speech activity "only with precision." *Saia* instructed, "Noise can be regulated by regulating decibels." "The narrowly tailored standard does not tolerate a time, place or manner regulation that may burden substantially more speech than necessary to achieve its goal." (*Deegan v. City of Ithaca*, 2nd Circuit, 2006) It "must avoid unnecessary intrusion of … freedom of expression." (Ibid.)

Requiring a permit to engage in amplified free speech elsewhere in the city is likewise unconstitutional. Besides violating the right to the spontaneity and anonymity of speech, the Supreme Court declared sixty-six years ago in *Thomas v. Collins*,

> *"If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than exercise of free speech and free assembly, it is immune to such a restriction."*

THE PROPOSED MEASURE MUST BE DEFEATED

As can be seen, the proposed ordinance presents numerous constitutional conflicts. Should the amendments to 12-05 become law, we are prepared to pursue a federal lawsuit to challenge the measure and will continue to do so as far as necessary to ensure its defeat. Moreover, we will bring national attention to those who vote in favor of restricting free speech in one of the birthplaces of American liberty. Recently, we challenged an unconstitutional ordinance in Winchester, Virginia, and the federal court

forced the city to make changes to its statute to ensure that it upheld and protected the right to amplified free speech activity. If we have to pursue a lawsuit to overturn this draconian measure in Williamsburg, it will unnecessarily cost the city and its taxpayers tens of thousands of dollars. Subsequently, it is in the best interest of all parties involved to resolve this issue in the most amiable and prompt way possible.

We request a response from your office within ten days regarding your position(s) on this matter so that we can better address any concerns or misconceptions you may have. If you would like to speak to me directly, please feel free to contact me at 800-373-7368, Ext. 5.

Thank you in advance for your attention, and I look forward to your favorable response.

Sincerely,

Michael Marcavage

Michael Marcavage
Director, Repent America

cc: Vice Mayor Paul Freiling
Council Member Scott Foster
Council Member Judith Knudson
Council Member Douglas Pons
Christina Shelton, Esquire