



December 21, 2015

Mary Gavin, Chief of Police
Falls Church Police Department
300 Park Ave.
G2 Level, East Wing
Falls Church, VA 22046
Via Fax: 703-248-5158 and Email: police@fallschurchva.gov

Re: The First Amendment Protects Singing Christmas Carols on the Public Sidewalk
Outside an Abortion Facility

Dear Chief Gavin:

I write on behalf of Mary Flores, the Rev. Patrick Mahoney, and other pro-life people who peacefully pray and speak in favor of preborn life and against abortion in Falls Church. On Saturday December 21, 2015, one of your officers told them to stop singing Christmas carols on the public sidewalk outside the abortion facility at 900 S. Washington Street, or risk prosecution under an ordinance that imposes fines and jail time. This violated their First Amendment rights. They plan to return again to this public sidewalk to sing Christmas carols this Christmas season, **including at noon on December 23, 2015**, and I respectfully request that your officers refrain from penalizing them or threatening to do so.

By way of background, I am and my colleagues are attorneys for the law firm Alliance Defending Freedom (ADF). ADF is an alliance building legal organization that advocates for the right of people to freely express and live out their faith. ADF frequently assists citizens, students, and others in understanding their rights and responsibilities concerning public free speech about abortion and their faith.

As you know, pro-life people frequently pray and speak in a peaceful manner on the public sidewalk outside the abortion facility on 900 S. Washington Street. On December 21, 2015, several adults and students were there, including Ms. Flores and her daughter, to sing Christmas carols on the sidewalk. They sought to express their religious faith in support of the sanctity of human life, which was blessed by the incarnation of Jesus Christ commemorated at Christmas, and to peacefully offer their love and support so that women who might be seeking abortion would choose life for themselves and their babies.

Apparently the abortion facility called the Falls Church police officers to complain about the Christmas carols. As shown in a video of the incident taken by Ms. Flores, Officer Ortiz and another spoke to the group while they were singing "Silent Night." The officers informed the

group that, in addition to making sure not to block the sidewalk (which group members explained they were not doing because they were on the grass instead), “the singing violates our ordinance.” Officer Ortiz displayed a copy of Falls Church Code of Ordinances, Article III, Sec. 14-51—Prohibited Acts, section (15), entitled “Yelling, shouting, etc.,” which lists “sing” as a potentially prohibited activity. Ms. Flores then asks for clarification from the officers, “It says here on (15) that there’s no singing allowed?” “Yes, ma’am,” replies Officer Ortiz. Ms. Flores’ daughter then asks, “Isn’t this public property?” Officer Ortiz responds, “Unfortunately it’s a noise ordinance violation, on public or private property.” After receiving these officers’ threat of citation under the city ordinance, Ms. Flores and the group ceased their caroling for fear of prosecution.

The officers’ threat of prosecution for singing Christmas carols blatantly violates the free speech clause of the First Amendment. Section. 14-51 of the Code of Ordinances declares:

(15) Yelling, shouting, etc. It shall be unlawful for any person to yell, shout, talk loudly, whistle or sing on any public street or private property in the city at anytime, so as to cause a noise disturbance. This section shall not apply to any person who is participating in a duly permitted or licensed event or who has been duly authorized to engage in such conduct.

Section 14-50 contains the following definitions:

Noise means any sound which annoys or disturbs humans or which causes or tends to cause an adverse psychological or physiological effect on humans.

Noise disturbance denotes any sound which:

- (1) Endangers or injures the safety or health of humans or animals;
- (2) Annoys or disturbs a reasonable person of normal sensitivities...

Section 14-57 declares that “Any person violating any of the provisions of this article shall be punished in accordance with subsection 28-1(1).” Subsection 28-1(1) imposes a penalty of “confinement in jail for not more than 12 months and a fine of not more than \$2,500.00, either or both.”

The constitution prohibits the City of Falls Church from threatening pro-lifers with fines and jail time for singing Christmas carols on the public sidewalk. The City’s noise ordinance and its application against pro-life Christmas caroling are unconstitutional for two fundamental reasons. First, it violated the Free Speech Clause of the First Amendment.

Public sidewalks “occupy a ‘special position in terms of First Amendment protection’ because of their historic role as sites for discussion and debate.” *McCullen v. Coakley*, 134 S. Ct.

2518, 2529 (2014) (quoting *United States v. Grace*, 461 U.S. 171, 180 (1983)). Public sidewalks “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 thoughts between citizens, and discussing public questions.” *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (quoting *Perry Ed. Assn. v. Perry Local Educators’ Assn.*, 460 U.S. 37, 45 (1983)).

“Even today,” public sidewalks “remain one of the few places where a speaker can be confident that he is not simply preaching to the choir.” *McCullen*, 134 S. Ct. at 2529. “There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment’s purpose ‘to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.’” *Id.* (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984)). “[T]he government’s ability to restrict speech in such locations is ‘very limited.’” *Id.* (quoting *Grace*, 461 U.S. at 177). “[S]peech concerning public affairs is more than self expression; it is the essence of self-government.” *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

On a public sidewalk, the government may not “selectively . . . shield the public from some kinds of speech on the ground that they are more offensive than others.” *Erznoznik v. Jacksonville*, 422 U.S. 205, 209 (1975). Religious speech, including Christmas carols, is entitled to the same protection as any other kind of speech. *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). Even “loud” and “boisterous . . . religious harangue[s]” constitute speech worthy of protection. *See Edwards v. South Carolina*, 372 U.S. 229, 233 (1963) (patriotic and religious songs with loud foot stamping and clapping protected). Prosecution of speech “because of disagreement with the message [the speech] conveys” is especially egregious under the First Amendment.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

The Falls Church police officers unconstitutionally discriminated against pro-life speech when they threatened these Christmas carolers with jail time. Christmas carols are obviously not a “noise disturbance” to “a reasonable person of normal sensitivities” as set forth in the ordinance. The Falls Church police officers did not judge the carols to be exceeding the ordinance’s decibel limit (nor could they, since as is apparent in the video, the vehicular traffic alone exceeded the volume of the singing). Nor has the Falls Church Police Department’s bizarre ban on Christmas carols occurred to anyone’s knowledge anywhere else in the City, either on “public or private property” as Officer Ortiz strained to point out.

Instead, the officers imposed their Christmas-caroling ban solely as a response to the hostility of abortion facility staff to the pro-life Christian viewpoint. Consequently, the officers adopted a content based ban on pro-life singing of Christmas carols, “because of disagreement with the message.” The fact that abortion workers are “annoyed” or “disturbed” by the singing of “Silent Night” outside the location where they assist the destruction of infant humans is not a legitimate basis under the First Amendment to suppress the singing. “[I]t is firmly settled that

under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers, or simply because bystanders object to peaceful and orderly demonstrations.” *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970).

Second, threatening pro-life Christmas carolers with jail time for singing on the public sidewalk outside an abortion facility runs afoul of the First and Fourteenth Amendments’ requirement that restrictions on speech be neither overbroad nor vague. Noise ordinances may not burden more speech than is necessary to advance the government’s interests in public peace. *Ward*, 491 U.S. at 796. But there is no valid state interest in prohibiting sound that does not actually cause, or imminently threaten to cause, disruption in the area in which it occurs. *See Grayned v. City of Rockford*, 408 U.S. 104, 115–21 (1972); *Cox v. Louisiana*, 379 U.S. 559, 562–64 (1965)). The City could not ban Christmas carols on the public sidewalk unless it shows that the songs are “basically incompatible with the normal activity of a particular place at a particular time.” *Grayned*, 408 U.S. at 116.

As pointed out above, public sidewalks are prototypical places for public speech. Moreover, like the Holy Infant in “Silent Night,” Christmas carol singing is an inherently mild form of speech in a location that the First Amendment reserves for robust public discourse. No amplification was used, and in any event the vehicular traffic at this location on Washington Avenue is far louder than any Christmas caroling. It is simply impossible for the City to show that singing Christmas carols is “incompatible” with the purpose of a public sidewalk.

The ordinance is also unconstitutionally vague. “Vague laws may trap the innocent by not providing fair warning.” *Grayned*, 408 U.S. at 108–09. For a statute to pass muster with respect to vagueness, it must define the offense involved with sufficient specificity so that a person of ordinary intelligence is not required to guess at what conduct is prohibited. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). This standard is applied even more strictly to statutes that inhibit free speech. *Hynes v. Mayor and Council of Borough of Oradell*, 425 U.S. 610, 620 (1976). “[L]aws must provide explicit standards for those who apply them” in order to avoid “arbitrary and discriminatory enforcement.” *Grayned*, 408 U.S. at 108–09. A law is unconstitutionally vague if it “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Id.* A law is unconstitutional on its face if it “delegates overly broad discretion to the decisionmaker” regardless of “whether the administrator has exercised his discretion in a content-based manner,” if there is nothing “in the ordinance preventing him from doing so.” *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992).

The ordinance allows officers to threaten jail time for singing merely because an officer deems it to “cause a noise disturbance,” meaning, it “[a]nnoys or disturbs a reasonable person of normal sensitivities,” which here the officer applied to Christmas carols. As the U.S. Supreme Court has emphasized, the government cannot make criminal the exercise of First Amendment

rights “simply because the exercise may be ‘annoying’ to some people.” *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971). “[S]uch a prohibition . . . contains an obvious invitation to discriminatory enforcement against those whose association together is ‘annoying’ because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens.” *Id.*

The City Code’s “annoyance” clause was abused in exactly the way the Supreme Court warns against when abortion facility workers, whose full time trade is the destruction of unborn children, deemed “Silent Night” to be annoying, and then Falls Church police officers acceded to their view by inventing a ban on Christmas caroling on the public sidewalk. The law’s unconstitutional and arbitrary discretion is exacerbated when it declares that an officer gets to decide for himself that a singer “has been duly authorized to engage in such conduct”—by him, apparently, or by some other unspecified process—so that the singer will not go to jail. The ordinance contains absolutely zero criteria to restrict officers from deciding what “annoys,” what “disturbs,” and what the officer may choose instead to “duly authorize[.]” The ordinance is therefore unconstitutionally vague and cannot be used to threaten fines or jail time for pro-life Christmas caroling on the public sidewalk.

Alliance Defending Freedom therefore respectfully requests that you and the City of Falls Church instruct your officers to cease threatening pro-life Christmas carolers with fines and jail time for singing on the public sidewalk outside the Washington Avenue abortion facility, or anywhere else for that matter. It is important that this ban on caroling be lifted in time for my clients and others to return to the Washington Avenue location to sing **at noon on December 23, 2015**, as they currently plan to do.

Public sidewalks cannot be purged of citizens singing carols to celebrate the Christmas season and the gift of life that God gave the world. If the City continues to threaten citizens with citation, fines and jail time for singing Christmas carols on the public sidewalk, ADF will advise its clients of their right to seek injunctive relief in federal court, and to obtain reimbursement from the City for their attorneys fees and costs.

Respectfully submitted,

s/ Kevin H. Theriot
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