AMERICAN CIVIL LIBERTIES UNION
SAN DIEGO & IMPERIAL COUNTIES
FOUNDATION

PO Box 87131
San Diego, CA 92138-7131
T/ 619-232-2121
F/ 619-232-0036
www.aclusandiego.org

VIA ELECTRONIC MAIL

June 8, 2015

Justin Crumley, Esq.
Deputy County Counsel
County Administration Center
1600 Pacific Highway
San Diego, CA 92101

Re: Waterfront Park Ordinance

Dear Mr. Crumley:

Thank you for calling me about the proposed ordinance concerning First Amendment activities at Waterfront Park. I appreciate the County's intent to facilitate free speech at Waterfront Park while respecting other uses. As we discussed, I believe the current draft of the ordinance raises significant free speech concerns, which I hope the County will cure by appropriate clarification or revision. If there is anything about the current draft I have misunderstood, please let me know.

The County appropriately acknowledges that Waterfront Park is a traditional public forum, in which "the government's ability to regulate speech is 'sharply circumscribed.'" *Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1292 (9th Cir. 2015) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). "Public fora have achieved a special status in our law; the government must bear an extraordinarily heavy burden to regulate speech in such locales," especially "core First Amendment speech." *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1022 (9th Cir. 2009).

Public parks "are uniquely suitable for public gatherings and the expression of political or social opinion" and "provide a free forum for those who cannot afford newspaper advertisements, television infomercials, or billboards." *Id.* Restrictions on speech in parks therefore "risk placing speech on topics of public importance within the purview of only the wealthy or those who enjoy the support of local authorities." *Id.*

In a public forum, "the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *United States v. Grace*, 461 U.S. 171, 177 (1983). "The failure to satisfy any single prong of this test invalidates" a restriction on speech. *Grossman v. City of Portland*, 33 F.3d 1200, 1205 (9th Cir. 1994).

For the reasons discussed below, the proposed ordinance raises serious First Amendment issues because (a) the term "interfere" is unduly vague and potentially authorizes content-based restrictions on speech, (b) the free speech zones are not narrowly tailored to the County's interests and do not leave open sufficient alternatives, and (c) the permit provisions may improperly apply to small groups, require advance notice of 20 days, and require indemnification and insurance against risks that permittees cannot control.

A. The Term "Interfere" Is Excessively Vague and May Authorize Content-Based Restrictions on Speech.

Under the proposed ordinance, "Regulated First Amendment Activity" is apparently restricted to a "Free Speech Zone" unless a permit is obtained. § 41.404. The ordinance defines "Regulated First Amendment Activities" as any "First Amendment activities, regardless of the number of attendees, that would interfere with the uses and functions of the Waterfront Park and/or County Administration Center as described in section 41.401 if conducted outside Free Speech Zones or without a First Amendment Activity Permit." § 41.402(d)(2). Those uses and functions include, among other things, "wedding ceremonies … picnicking, lounging and general enjoyment" as well as "access to the County Administration Center building" by "the public and County of San Diego employees" and "[u]nobstructed emergency access." § 41.401.

I appreciate that the County has significant interests in supporting recreational use and preserving ordinary and emergency access. However, standing alone, the term "interfere" cannot justify restricting speech. *See McCoy v. City of Columbia*, 929 F. Supp. 2d 541, 552 (D.S.C. 2013) ("because the terms 'abuse' and 'interfere' are not defined, citizens cannot determine what conduct is prohibited" by ordinance restricting interaction with police). It is "unduly vague" because it provides "no objective standard to guide" County officials "in determining that conduct constitutes unlawful interference" sufficient to restrict speech. *Id.* at 554.

The Waterfront Park ordinance is subject to heightened scrutiny for vagueness because it regulates speech. "When First Amendment freedoms are at stake, courts apply the vagueness analysis more strictly" and require "a greater degree of specificity and clarity than would be necessary under ordinary due process principles," because uncertain

rules inevitably chill protected speech. *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001). As a result, government may regulate in the First Amendment area "only with narrow specificity." *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1020 (9th Cir. 2010) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). This rule is necessary to avoid "the danger that a police officer might resort to enforcing the [law] only against ... messages the officer or the public dislikes." *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998). Under this heightened standard, the term "interfere" is unconstitutionally vague.

It is also unconstitutional to the extent it would authorize content-based restrictions on speech. Any speech that offends or disturbs anyone engaged in "picnicking, lounging and general enjoyment" arguably "interferes" with those "uses and functions" and thus would justify restricting that speech. That result would violate the First Amendment.

A third party's reaction "is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992). As the Supreme Court has recognized, "a principal 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." *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) (citation and quotation marks omitted). "Given the importance of [public parks], we cannot countenance the view that individuals who choose to enter them, for whatever reason, are to be protected from speech and ideas those individuals find disagreeable, uncomfortable, or annoying." *Berger v. City of Seattle*, 569 F.3d 1029, 1054 (9th Cir. 2009). Accordingly, the term "interfere," standing alone, presents serious First Amendment problems.

In different circumstances, the Ninth Circuit approved a "'likely to interfere' standard" for requiring a permit to the extent it "provides an objective standard that … applies when a reasonable person viewing the situation in advance would anticipate significant interference with the ordinary flow of traffic. Whether an event meets the 'likely to interfere' standard will turn on the reasonable expectations of the organizers of the event, given the size of the group, the precise plans for the event, whether the intention is to block traffic or to avoid doing so, and the predictable conditions at the location and time the organizers have chosen." *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1042 (9th Cir. 2006). As the court noted, that standard "applies only to activities that significantly alter the usual flow of traffic, making it difficult or impossible for citizens to reach their destinations without hindrance," *id.* at 1042 n.16, which is much narrower than the scope of "interfere" standing alone. Accordingly, the Ninth Circuit's decision in *Santa Monica Food Not Bombs* does not support the proposed ordinance's use of "interfere" standing alone.

B. The "Free Speech Zones" Are Not Narrowly Tailored to the County's Interests in Preserving Access and Other Use of Waterfront Park.

I am also concerned that the "free expression zones policy" of the ordinance "is not adequately narrowly tailored" because it "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Kuba v. 1-A Agr. Ass'n*, 387 F.3d 850, 861 (9th Cir. 2004). The "exclusion of communicative activity from a large area" in a public forum often "prevents far more speech than is necessary" and is therefore unconstitutional. *Id.*

To the extent individuals or groups might interfere with access, they may be cited or arrested for unlawful obstruction. If noise is a concern, the County may enforce existing noise rules or require an appropriate permit for amplified sound, as the proposed ordinance in fact does. If large groups or the use of stages and structures present competing demands for space, they may be subject to an appropriate permit requirement.

Accordingly, though the County has legitimate interests in protecting access and recreational use, it "has various other laws at its disposal that would allow it to achieve its stated interests while burdening little or no speech." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 948-49 (9th Cir. 2011) (ban on curbside speech not narrowly tailored where city could enforce existing laws against jaywalking and physically interfering with traffic). As a result, the free speech zones are not narrowly tailored to the County's interests.

In addition, the small area of the "Free Speech Zones" compared to the park as a whole raises serious concerns that the zones are not narrowly tailored and do not leave open ample alternative channels of communication. *See Cuviello v. City & Cnty. of San Francisco*, 940 F. Supp. 2d 1071, 1089 (N.D. Cal. 2013) ("enforcement of … free speech zone was not narrowly tailored, as it restricted Plaintiffs to 0.4% of the total plaza" and "did not leave open ample alternative channels for the communication of information, as Plaintiffs were effectively sequestered from the vast majority of event spectators to whom they wished to communicate"); *cf. Edwards v. City of Coeur d'Alene*, 262 F.3d 856, 866 (9th Cir. 2001) ("If an ordinance effectively prevents a speaker from reaching his intended audience, it fails to leave open ample alternative means of communication.").

C. The Permit Requirements Raise Serious First Amendment Problems to the Extent They Apply to Small Groups, Require Lengthy Advance Notice, and Demand Indemnification and Insurance Against Risks Beyond an Applicant's Control.

The proposed ordinance would require a permit for First Amendment activities that "include tables, chairs, amplified sound equipment, booths, staging or other similar equipment." § 41.404(c). The ordinance does not appear to formally require a permit for other "Regulated First Amendment Activity," but if persons engaging in such activity

wish to be certain of avoiding confinement to a "Free Speech Zone," they must obtain a permit. Given the limited area of the "Free Speech Zones," a permit is effectively required for anyone engaging in "Regulated First Amendment Activity" who seeks to reach most people at the park or nearby.

A requirement to obtain a permit before engaging in speech is a prior restraint. *Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 130 (1992). "Advance notice or registration requirements drastically burden free speech." *Rosen v. Port of Portland*, 641 F.2d 1243, 1249 (9th Cir. 1981). The government therefore bears a heavy burden to justify any requirement to obtain a permit before engaging in speech in a public forum, especially political speech. *NAACP, Western Region v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984).

1. A permit may not be required for the speech of small groups that does not involve tables, chairs, equipment, or stages.

As a threshold matter, it is questionable whether a permit may be required for First Amendment Activity "regardless of the number of attendees" if tables, chairs, sound equipment, or stages are not involved. § 41.402(d)(2). In public parks, permit requirements "regulate competing uses and provide notice to the municipality of the need for additional public safety and other services. Only for quite large groups are these interests implicated, so imposing permitting requirements is permissible only as to those groups." *Santa Monica Food Not Bombs*, 450 F.3d at 1042 (citing cases). As a result, it is unconstitutional to require a permit for a small group to merely assemble and speak in a public park. *Grossman*, 33 F.3d at 1206. To the extent the Waterfront Park ordinance would require a permit in such circumstances, it is unconstitutional.

2. The ordinance cannot require advance notice of 20 days, and it must include an exception for spontaneous events.

To the extent a permit may be required, the requirement to apply 20 days in advance is unconstitutional as applied to political speech and other expressive activity. *NAACP*, 743 F.2d at 1357 ("[T]he City of Richmond's requirement of 20 days advance notice to receive a parade permit violates the First Amendment.").

The fact that "the Director may review" a late application does not save the notice requirement. § 41.406(a)(3). Though the Director must make any decision to "grant or deny the application on a content neutral case-by-case basis," *id.*, nothing in the ordinance apparently controls the Director's threshold discretion to review the application at all. Such unbridled "discretion grants officials the power to discriminate and raises the spectre of selective enforcement on the basis of the content of speech," and even if the ordinance specifies criteria on which any decision to grant or deny must be made, "the grant of 'discretion'" to review a late application "remains unfettered" and thus

unconstitutional.[1] *NAACP*, 743 F.2d at 1357-58; *cf. Kaahumanu v. Hawaii*, 682 F.3d 789, 807 (9th Cir. 2012) (unbridled discretion to revoke permit "is inconsistent with the First Amendment" because it creates unacceptable risk of viewpoint discrimination).

Any claims about the County's limited resources would not justify the 20-day requirement. *Sullivan v. City of Augusta*, 511 F.3d 16, 38-39 (1st Cir. 2007) (rejecting argument that limited staffing justified 30-day requirement, because "First Amendment rights have countervailing strength" that "require the City in time sensitive situations to accommodate proposed parades and marches much more quickly").

The outer limit for advance notice of expressive activity appears to be three days. *Santa Monica Food Not Bombs*, 450 F.3d at 1044. Perhaps the County can require more notice for events not involving expressive activity, as properly defined. *See Long Beach Area Peace Network*, 574 F.3d at 1026-27. But the 20-day requirement violates the First Amendment as to political speech and expressive activity.

Even when advance notice is otherwise appropriate, the ordinance must contain an exemption for spontaneous events arising in response to breaking news or other unforeseen contingencies. "Spontaneous expression ... is often the most effective kind of expression." *Grossman*, 33 F.3d at 1206. To "comport with the First Amendment, a permitting ordinance must provide some alternative for expression concerning fast-breaking events." *Santa Monica*, 450 F.3d at 1047; *see also Long Beach Area Peace Network*, 574 F.3d at 1036-38; *Rosen*, 641 F.2d at 1247-50.

3. The ordinance should clarify that any requirement for indemnification and insurance cannot be based on risks beyond an applicant's control.

The proposed ordinance would require a permit applicant "to indemnify, save harmless and defend the County of San Diego as determined by the County" and provide "[p]roof of insurance policy or certificate of insurance as required by the County of San Diego." § 41.406(b)(7)-(8). I appreciate the County's intent to manage risks appropriately, but without clarification or revision to avoid the problems discussed below, these provisions violate the First Amendment as applied to political speech or other expressive activity.

The Ninth Circuit struck down an indemnification provision that required event organizers to hold a city harmless for "any liability caused by the conduct of the event," because such language impermissibly encompassed "liability caused by the acts or

[1] A similar problem arises with respect to "Floating Free Speech Zones," which "may be designated by the Director … or designee on a case-by-case basis." § 41.402(f)(2). Although "[d]esignation of a Floating Free Speech Zone," if any, "shall be content-neutral and take into account only those significant government interests described" in the ordinance, § 41.405(a), nothing apparently controls the Director's threshold discretion whether to establish a Floating Free Speech Zone at all.

omissions of any person or entity involved in the event, including acts and omissions not only of the permittees but also of the City and third parties." *Long Beach Area Peace Network*, 574 F.3d at 1039.

Based on that decision, the indemnification language in the Waterfront Park ordinance raises several concerns. First, because it contains "no exclusion for losses to the [County] occasioned by the reaction to the permittees' expressive activity," it may "allow the [County] impermissibly to shift some of the costs related to listeners' reactions to speech from the [County] to the permittees." *Id.* at 1040. Second, it could require the permittee to indemnify the County for its own conduct, and "permittees cannot be required to waive their right to hold the [County] liable for its otherwise actionable conduct as a condition of exercising their right to free speech." *Id.* Third, it allows the County to require "permittees to assume legal and financial responsibility" for actions "that are outside the control of the permittee." *Id.* The First Amendment prohibits the County from requiring permittees "to compensate third parties for harm caused by hecklers, counter-protesters, or other persons not part of permittees' organization." *Id.* at 1041 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916-19 (1982)).

Similarly, the insurance requirement creates First Amendment problems because it contains no language specifying that the risks to be insured or the amount of insurance shall not be based on the potential reaction of third parties to the content of protected speech. *See, e.g.*, *Collin v. Smith*, 578 F.2d 1197, 1207-09 (7th Cir. 1978); *Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F. Supp. 2d 1018, 1029-30 (C.D. Cal. 2002); *Courtemanche v. General Services Admin.*, 172 F. Supp. 2d 251, 268-69 (D. Mass. 2001); *Invisible Empire v. Mayor*, 700 F. Supp. 281, 285 (D. Md. 1988). *Cf. Long Beach Area Peace Network*, 574 F.3d at 1030-31 (upholding insurance requirement that exempted special events involving expressive activity, if organizers indemnified city for their own acts or worked with city to redesign event in response to specific health or safety concerns).

Thank you again for reaching out to me about the Waterfront Park ordinance. I appreciate the opportunity to review and comment on it. Please let me know if you have any questions or concerns.

Sincerely,

David Loy
Legal Director