AMERICAN CIVIL LIBERTIES UNION
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December 6, 2017

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Dear Mr. Foley,

I am writing on behalf of the American Civil Liberties Union of San Diego and Imperial Counties ("ACLU") to express concerns about the City of El Cajon's Urgency Ordinance No. 5066 ("Ordinance"), which was enacted on October 24, 2017.

The Ordinance notes that "the San Diego County public health officer declared a local public health emergency due to ongoing outbreak of the Hepatitis A virus" and states that its purpose includes "prohibiting any persons or organizations from sponsoring, promoting or engaging in food sharing events on City owned property until the public health emergency is lifted by the County of San Diego."[1] The term "[f]ood sharing event" means "a non-social gathering … where food is distributed or offered for charitable purposes." It excludes "social gatherings such as family reunions, birthday parties, baptisms, youth sport team celebrations, school field trips, wedding anniversaries and similar events."

I appreciate the importance of protecting public health, but the government may not pursue worthy ends through unconstitutional means. On its face, the Ordinance presents significant First Amendment concerns, because it singles out expressive conduct based on its content. "Non-verbal conduct implicates the First Amendment when it is intended to convey a 'particularized message' and the likelihood is great that the message would be so understood." *Nunez v. Davis*, 169 F.3d 1222, 1226 (9th Cir. 1999) (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)). If "charitable appeals for funds … are within the protection of the First Amendment," *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980), the same is true for charitable giving, whether of money or food, which is necessarily intended to convey a particular message and reasonably understood as such. *See Save Westwood Vill. v. Luskin*, 233 Cal. App. 4th 135, 145 (2014) (like "a political campaign contribution … [t]he charitable donation made by the Foundation to UCLA is similarly an

[1] Although the Ordinance contains no language expressly making it unlawful to engage in "food sharing events," I presume it does in fact does prohibit such events.

expression of support for the university, and as such, constitutes conduct in furtherance of the constitutional right of free speech.").

By prohibiting food sharing only when done for "charitable purposes," the City is regulating food sharing because of its expressive content, punishing only those who share food to express their religious or political beliefs in ministry or charity but not those who share food for other purposes. Although "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word," it may not "proscribe particular conduct *because* it has expressive elements." *Johnson*, 491 U.S. at 406 (emphasis in original). On its face, the Ordinance "is related to the suppression of free expression" in the form of charitable giving and therefore subject to "the most exacting scrutiny." *Id.* at 403, 412. Strict scrutiny applies regardless of the City's motives. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227-28 (2015). Under strict scrutiny, the Ordinance is unconstitutional unless it "furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* at 2231; *see also Boos v. Barry*, 485 U.S. 312, 321 (1988) (content-based restriction on speech in public forum is unconstitutional unless "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end").

The preservation of public health is a compelling interest, but the ban on food sharing for charitable purposes is likely not narrowly tailored to achieve that interest, for at least three reasons. First, to the extent the City is concerned with preventing transmission of disease, such transmission can also occur through non-charitable food sharing. Second, the ban is limited to municipal land, and there is no reason to believe the risk of disease transmission from food sharing is any lower on private land. Third, the City has less restrictive alternatives that would prevent disease transmission from food sharing or address "litter, trash and other debris left over from these food sharing events," such as an appropriate permitting and inspection program, proper sanitation and food handling requirements, and enforcement of existing laws against littering. Indeed, the Ordinance itself acknowledges the importance of "regulations that control the manner in which food is prepared, stored, transported, or served."

The Ordinance thus likely fails strict scrutiny because it is underinclusive with respect to its stated justifications and the City has less restrictive alternatives that would effectively protect public health. *See Reed*, 135 S. Ct. at 2232 ("The Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs.... In light of this underinclusiveness, the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest."); *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011) (where state restricted violent video games but not other speech depicting violence, the "regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint."); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."); *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (content-based regulation invalid "if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve"); *cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993) (ordinances violated Free Exercise Clause as "underinclusive" with respect to "protecting the public health and preventing

cruelty to animals," because "[t]hey fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does").

Alternatively, assuming the City's interests are "unrelated to the suppression of free expression" and the Ordinance is subject to "the standard applied to time, place, or manner restrictions," *Johnson*, 491 U.S. at 407, the Ordinance likely remains unconstitutional even if treated as "content neutral," because it is not "narrowly tailored to serve a significant government interest," since the City has obvious alternatives for "achieving its stated goals" through adoption or enforcement of "various other laws at its disposal" that would protect public health without prohibiting charitable food sharing on municipal land. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 945, 949 (9th Cir. 2011) (en banc). "Even under the intermediate scrutiny 'time, place, and manner' analysis, we cannot ignore the existence of these readily available alternatives," and "[t]he Ordinance is not narrowly tailored" because "there are a number of feasible, readily identifiable, and less-restrictive means of addressing the City's concerns." *Id.* at 950.

I look forward to the City's response and hope this matter can be resolved without litigation. If you have any questions or concerns, please do not hesitate to call me at 619.398.4496.

Sincerely,

David Loy
Legal Director

cc: Barbara Luck
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