No. COA18-992 EIGHTEENTH DISTRICT

COURT OF APPEALS OF NORTH CAROLINA

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IN THE MATTER OF CUSTODIAL LAW ENFORCEMENT RECORDING SOUGHT BY THE CITY OF GREENSBORO	)	From Guilford County 17 CVS 9673 17 CVS 9674

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BRIEF OF *AMICI CURIAE* THE BELOVED COMMUNITY CENTER OF GREENSBORO, THE LEAGUE OF WOMEN VOTERS OF THE PIEDMONT TRIAD, RECLAIMING DEMOCRACY, ROCH SMITH JR.,THE GUILFORD ANTI-RACISM ALLIANCE, THE HOMELESS UNION OF GREENSBORO, TRIAD CITY BEAT, THE CAROLINA PEACEMAKER, THE PULPIT FORUM OF GREENSBORO AND VICINITY, DEMOCRACY GREENSBORO, THE UNCG CHAPTER OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, ST. BARNABAS EPISCOPAL CHURCH, COMMUNITY PLAY!/ALL STARS ALLIANCE, THE AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION, NC WARN, AND THE CITY OF DURHAM NC IN SUPPORT OF PETITIONER-APPELLANT THE CITY OF GREENSBORO

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When the representatives of the people of North Carolina assembled . . . on November 12, 1776, for the express purpose of framing a Constitution, they . . . were convinced that the government itself must be compelled to respect the inherent rights of the individual if freedom is to be preserved and oppression is to be prevented.

State v. Ballance, 229 N.C. 764, 768, 51 S.E. 2d 721, 733-34 (1949).

INTRODUCTION

This case concerns the unprecedented censorship of elected officials' speech in conflict with well-settled First Amendment law and the people's right to self-governance. The Guilford County Superior Court imposed a sweeping gag order on Greensboro City Councilmembers, forbidding them from discussing the contents of a police body camera video with their constituents. In so doing, the court unconstitutionally suppressed the dialogue necessary for the people of Greensboro to instruct their elected representatives on a matter of critical importance.

The gag order undermines the North Carolina Constitution's guarantee of popular sovereignty. The government derives its power from the people of North Carolina, who "have the inherent, sole, and exclusive right of regulating the internal government and police thereof . . . ." N.C. CONST., Art. I, § 3. In order for this constitutional promise to be realized, elected officials must be able to communicate information of vital public interest to their constituents. The gag order completely frustrates this process and is incompatible with our constitutional system.

Furthermore, the gag order is a prior restraint on speech, and thus is subject to a heavy presumption of unconstitutionality under the First Amendment. Prior restraints directly threaten the strength of our democracy by smothering public debate on important issues, and the gag order here is

especially egregious. It requires elected officials to seek permission to speak freely on an issue of public concern—a misguided inversion of the logic and purpose of the First Amendment. And its implicit target—speech concerning police violence against people of color—is precisely the kind of political and contentious speech that the First Amendment most zealously protects.

BACKGROUND

On September 10, 2017, a Greensboro Police Department (GPD) officer tased Aaron Garrett, a young black man. Jordan Green, *Complaint Against GPD for Profiling Black Men Downtown*, TRIAD CITY BEAT, Sept. 13, 2017, https://triad-city-beat.com/complaint-gpd-profiled-escalated-conflict-black-men-downtown/. This occurred after one of Mr. Garrett's friends allegedly was accosted by a bar security guard and requested assistance from the GPD. *Id*. The interaction between Mr. Garrett and the GPD was captured on a police body camera. R. p. 3.

Greensboro, which has grappled with allegations of discriminatory policing, petitioned the Guilford County Superior Court to release the body camera footage to it on December 6, 2017. R. pp. 3-4. The court granted the request for release on the condition that Councilmembers sign a pledge of confidentiality to refrain from discussing the body camera footage "except with each other in their official capacity as managers, council members, and legal counsel for the City of Greensboro and as necessary to perform their legal

duties." R p. 27. If Councilmembers violated the order they would be subject to contempt of court, which could include a maximum fine of $500 or up to 30 days imprisonment. R p. 27.

On February 16, 2018, after all criminal matters related to the incident had concluded, the City of Greensboro filed a Motion to Modify Restrictions on its Councilmembers discussing the body camera footage. R pp. 32-36. Greensboro argued the gag order prevented Councilmembers from discussing pressing public issues with the community, in contradiction of their duties as elected representatives. R p. 33 ¶ 12. The only justification presented to the court for keeping the gag order in place was that "[t]he police officers [involved] have a right to have this thing done." T p. 17.

Despite the minimal justification offered, the court left the original gag order in place, preventing the Councilmembers from discussing the body camera video with the very people who empowered them to serve as their representatives. R p. 37-38. The court below entered no findings of fact or conclusions of law to support its order. R p. 37-38.

ARGUMENT

I. A PRIOR RESTRAINT OF SPEECH ON A MATTER OF PUBLIC INTEREST IS ONE OF THE MOST SERIOUS VIOLATIONS OF THE FIRST AMENDMENT.

a. The First Amendment was Ratified to Protect the People from Prior Restraints on Speech and Such Speech

Restrictions Continue to Be One of the Most Objectionable Violations of the Right to Free Speech.

One of the primary purposes of the constitutional guarantee of free speech is to curb prior restraints, "administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (citation omitted). Skepticism of prior restraints stems from an understanding of their inherent dangers. Prior restraints are generally prohibited because of their potential for overbreadth with little accountability. Thomas Emerson, *The Doctrine of Prior Restraint*, 20 Law & Contemp. Prob. 648, 658-60 (1955). Given these serious concerns, our democratic system prefers to punish those who abuse their speech rights after they violate the law, rather "than to throttle them and all others beforehand." *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

Our nation's commitment to freedom of expression began with a desire to ban prior restraints. Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link between the First Amendment and the Separation of Powers*, 34 Ind. L. Rev. 295, 314 (2001). In *Near v. Minnesota*, the Supreme Court struck down a court order that prevented a newspaper from publishing or circulating "malicious, scandalous and defamatory matter." 283 U.S. 697, 703 (1931) (citation omitted). In doing so, the Court traced the origins

of our nation's distrust of prior restraints and the First Amendment's robust protections against them. The Court noted the Framers' intent to secure "the greatest and essential rights of the people . . . against legislative as well as executive ambition." *Id.* at 714 (citation omitted); *see also Corum v. Univ. of N. Carolina*, 330 N.C. 761, 788, 413 S.E.2d 276, 293 (1992) ("The [North Carolina] Constitution is intended to protect our rights as individuals from our actions as the government."). Coupling the Framers' intent with the almost total absence of prior restraints on publications for nearly 150 years, the Court identified a "deep-seated conviction that such restraints would violate a constitutional right." *Id.* at 718; *see also Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (holding the central purpose for the constitutional provisions protecting speech is "to prevent all such *previous restraints* upon publications as had been practiced by other governments") (citation omitted). *Near* reflects a long-standing and deep mistrust of government censorship of private speech. *See Near*, 283 U.S. at 716-19.

Gag orders are quintessential prior restraints and are "subject to strict and rigorous scrutiny under the First Amendment." *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 184 N.C. App. 110, 116, 645 S.E.2d 857, 861 (2007) (citation omitted). In this case, the lower court's order restricting the Greensboro City Councilmembers from discussing contents of a police body camera video "operate[s] to forbid expression before it took place[.]" *Sherrill v.*

Amerada Hess Corp., 130 N.C. App. 711, 720, 504 S.E.2d 802, 808 (1998) (citation omitted). The court permitted Councilmembers to view the video footage but permanently enjoined them from discussing specific content with their constituents—a "true restraint on future speech[.]" *Alexander*, 509 U.S. at 550.

b. Open Communication Between Elected Officials and the People Serves a Vital Role in a Well-Functioning Democracy, and Prior Restraints on Such Discourse Demand an Even Higher Level of Scrutiny.

The government derives its power from the people, and it therefore must use that power to preserve and protect the rights of the people. *See Corum*, 330 N.C. at 787-88, 413 S.E.2d at 292-93. The people of North Carolina can only discharge their constitutional right to hold government actors accountable through open communication with their elected representatives. *See* N.C. CONST. art. I, § 2 ("All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."); *see also* N.C. CONST. art. I, § 3 ("The people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof[.]").

The bedrock of the First Amendment is to protect free discussion of government affairs and allow citizens to participate in and contribute to our system of self-government. *Globe Newspaper Co. v. Superior Court*, 457 U.S.

596, 604 (1982). A policy of openness is critical to the "functioning of the . . . government as a whole." *Id.* at 606; *see also Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (noting speech pertaining to public affairs is "the essence of self-government"); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open[.]").

Consistent with this theory of governance, courts have recognized two complementary principles in speech jurisprudence. First, the right to free speech ensures the "unfettered interchange of ideas" between private citizens and elected officials. *Roth v. United States*, 354 U.S. 476, 484 (1957). Second, speech regarding matters of public concern "occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection." *Connick v. Meyers*, 461 U.S. 138, 145 (1983) (citation omitted); *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (holding speech pertaining to public affairs lies "at the heart of the First Amendment's protection"); *Sullivan*, 376 U.S. at 297 (Black, J., concurring) (noting that speech on matters of public concern is "the kind of speech the First Amendment was primarily designed to keep within the area of free discussion").

Reaffirming these principles, the Fourth Circuit Court of Appeals recently vacated a trial court's gag order in a high-profile trial pertaining to industrial hog operations in North Carolina. *Murphy-Brown LLC v. American Farm Bureau Federation*, 907 F.3d 788 (4th Cir. 2018). The trial court's

concerns about publicity could not justify the damage wrought by the gag order and its "mut[ing] political engagement on a contested issue of great public and private consequence." *Id.* at 795. "[E]ven in short doses, these harms are hostile to the First Amendment." *Id.*

Here, the court shut down important civic discourse at every stage of the case. It first imposed a gag order preventing Councilmembers from discussing the contents of the body camera footage with their constituents. R p. 25-27. If Councilmembers exercised their right to speech then they faced a possible fine and imprisonment. R p. 27. To speak about the body camera footage to the public, Councilmembers had to establish to the court that "these restrictions pose a substantial impediment" to "discharging their duties[.]" R p. 27. When Councilmembers sought modification of the gag order, specifically noting that "their inability to discuss [these] pressing issues of social concern with the police and the community" was "in direct contradiction" to their duties, R p. 33 ¶ 12 (internal quotation marks omitted), the court summarily denied relief without making any findings of fact or conclusions of law. R p. 37-38; *but cf. Murphy-Brown*, 907 F.3d at 800 ("The skimpy findings supporting the gag order here frustrate the sort of fulsome, substantive appellate review that shields First Amendment freedoms from unjustifiable restraints.").

The gag order betrays the fundamental principles of representative democracy. The order chokes communication between the Councilmembers

and their constituents, making it impossible for the elected officials to keep community members informed on matters of vital public concern. This, in turn, undermines the sovereign power vested in the people by the North Carolina Constitution to meaningful self-government and to hold their elected representatives accountable. The gag order cripples the trust and transparency in local government necessary for the community to make educated decisions on matters of grave public importance, such as racial bias in policing and police officers' use of excessive force.

c. Unfettered Communication Between Elected Officials and the People They Represent is Imperative in Moments of Political Discord.

Courts have long recognized that speech during politically-fraught periods can take on an elevated importance. Political turmoil does not immunize prior restraints from constitutional scrutiny, and a prior restraint cannot be justified by mere conjecture of inconvenient consequences that may result from the speech. *See New York Times v. United States*, 403 U.S. 713, 725-26 (1971) (Brennan, J., concurring). Rather, the First Amendment's protection of the dialogue between elected officials and the public is especially critical during turbulent social and political moments. *See id.* at 719-20 (Black, J. concurring).

In *New York Times v. United States*, the U.S. Supreme Court struck down an order enjoining the New York Times and Washington Post from

publishing a classified government history of the Vietnam War. *Id.* at 714. Despite the delicate nature of the documents in question, the Court held that the executive branch did not overcome the heavy presumption against the constitutionality of prior restraints. *Id*. Forcefully condemning prior restraints, Justice Hugo Black in his concurrence noted:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

Id. at 719-20 (Black, J., concurring) (quoting *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937)). Thus, every moment the dissemination of "current news of vital importance to the people" is restrained constitutes a "flagrant, indefensible and continuing violation of the First Amendment." *Id.* at 715 (Black, J., concurring).

The Fourth Circuit has reinforced these longstanding First Amendment principles in racialized police misconduct cases. In *Nero v. Mosby*, 890 F.3d 106, 113 (4th Cir. 2018), Baltimore police officers sued the State's Attorney who prosecuted them for the death of Freddie Gray, a black man who "suffered fatal injuries while handcuffed and shackled" in police custody. In the

aftermath of Mr. Gray's death, the citizens of Baltimore rallied to express their outrage about the disproportionate levels of police brutality against people of color. Sheryl G. Stolberg & Stephen Babcock, *Scenes of Chaos in Baltimore as Thousands Protest Freddie Gray's Death*, N.Y. TIMES, Apr. 25, 2015, https://www.nytimes.com/2015/04/26/us/baltimore-crowd-swells-in-protest-of-freddie-grays-death.html. After an investigation concluded Mr. Gray's death was a homicide, the State's Attorney announced that the city would press criminal charges against the officers involved. *Nero*, 890 F.3d at 114. Five of the officers sued the State's Attorney for defamation based on her comments. *Id.*

Rejecting this challenge, the Fourth Circuit emphasized the importance of the unrestricted exchange of information between the people and those entrusted with carrying out the public duties of our government. In his concurrence, Judge Wilkinson recognized, "the First Amendment was founded on the belief 'that the greatest menace to freedom is an inert people; [and] that public discussion is a political duty[.]'" *Id.* (Wilkinson, J., concurring) (citing *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J. concurring)). The public has a right to be fully informed of issues concerning current events, and it would be inimical to our "most cherished constitutional ideals[]" to punish an elected official who is discharging her democratic duties. *Id.*; *see also Bank*

v. Floyd, 385 U.S. 116, 136 (1966) (noting elected officials have "an obligation to take positions on controversial political questions").

This case implicates issues of race and justice that are of significant public concern: disproportionate police violence against people of color. *See, e.g.,* Niraj Choksi, *How #BlackLivesMatter Came to Define a Movement,* N.Y. TIMES, Aug. 22, 2016, https://www.nytimes.com/2016/08/23/us/how-blacklivesmatter-came-to-define-a-movement.html. Just two years ago, North Carolina grappled with the killing of Keith Lamont Scott by the Charlotte-Mecklenburg Police Department ("CMPD"). In the aftermath of that shooting, the CMPD recognized the need for public transparency and released the officer's body camera footage. Colin Dwyer, *Amid Mounting Pressure, Charlotte Police Release Video Of Shooting*, NPR, Sept. 24, 2016, https://www.npr.org/sections/thetwo-way/2016/09/24/495318164/amid-mounting-pressure-charlotte-police-to-release-video-of-shooting. Greensboro has also faced serious questions about disproportionate policing of people of color in their community. *See, e.g.,* Sharon LaFraniere & Andrew W. Lehren, N.Y. TIMES, Oct. 24, 2015, *The Disproportionate Risk of Driving While Black*, https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html. Acting against the backdrop of tensions between the Greensboro Police Department and communities of color, the City Council sought to approach this incident with openness. However, the lower court's gag order

silenced the Councilmembers' efforts to promote transparency and dialogue on the officers' use of force against one of their community members.

From the height of the Vietnam War, to periods of recent civil unrest in Baltimore, and now to the streets of Greensboro, "the censors never sleep." *Nero*, 890 F.3d at 133 (Wilkinson, J., concurring). Fortunately, neither does the First Amendment, nor its skepticism of prior restraints, especially in moments of discord. This case calls for greater government transparency precisely because it is a fraught moment between law enforcement and communities of color in Greensboro, and across our state and nation. The Court should overturn the lower court's gag order that stifles public discourse and frustrates the people's fundamental right to self-governance.

II. COURTS HAVE ONLY ALLOWED PRIOR RESTRAINTS IN A FEW, NARROWLY-DRAWN CIRCUMSTANCES, NONE OF WHICH APPLY HERE.

Recognizing that open communication is indispensable to a well-functioning democracy, courts have upheld prior restraints only in limited, narrowly-tailored circumstances related to fair trials, national security, and obscene materials. Even in exceptional circumstances, any speech restriction must "be couched in the narrowest terms that will accomplish the pin-pointed objective[.]" *Carroll v. President & Com'rs of Princess Anne*, 393 U.S. 175, 183 (1968). The restriction on free speech in this case falls far outside any of the circumstances where prior restraints have been permitted.

Prior restraints may be valid when they are the only way to protect a person's right to a fair trial. However, in *Nebraska Press Ass'n. v. Stuart*, the Court made clear that the right to a fair trial is not elevated over the right to free speech, and the government had to meet stringent requirements to show that a prior restraint was necessary to protect a fair trial. *See* 427 U.S. 539, 570 (1976). First, there must be a showing of pervasive publicity before the trial. *Id.* at 562-63; Second, a showing that nothing short of a gag order would ensure the defendant's right to a fair trial is necessary. *Id* at 563-65; *see also Murphy-Brown*, 907 F.3d at 800 ("Gag orders should be a last resort, not a first impulse."). And, third, the court must find the prior restraint a workable and effective means of preserving a fair trial. *Id.* at 565-66.

This court has applied the *Nebraska Press* standard to invalidate gag orders issued pursuant to fair trial concerns. In *Sherrill*, the court evaluated a gag order that prevented parties in a trial from speaking to the public or press about the proceedings. 130 N.C. App. at 720, 504 S.E.2d at 808. Reversing the lower court's order as an unconstitutional prior restraint, the Court made clear that the record must include written findings under each of the three prongs laid out in *Nebraska Press* and consider less restrictive alternatives. *Id.* at 720.

Second, courts have upheld prior restraints in the context of national security only in extraordinary circumstances. In *Snepp v. United States*, the Court held that the Central Intelligence Agency (CIA) could require pre-

publication review of a former agent's book on the Vietnam War. *See* 444 U.S. 507, 510-14 (1980). In upholding this review, the Court noted the CIA's unique role in receiving highly-sensitive information from both domestic and foreign governments as well as the fact that compromising this information would undermine its mission. *Id.* at 511-12.

Finally, the government may also use a prior restraint to stop the publication of obscene material in public places, but only after an adversarial proceeding to determine whether the content is unprotected under the First Amendment. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 55 (1973).

The current controversy is readily distinguishable from the rare cases in which prior restraints have met constitutional muster. This case does not concern national security or obscene material. And the exception to preserve the fairness of an ongoing trial does not apply here. There are no pending trials related to the incident in question. Even assuming *arguendo* that there was a trial pending, there is no evidence in the record that City Council's commentary on this issue would so unduly influence the proceedings such that nothing but a gag order would ensure a fair process.

The court below imposed a prior restraint without any basis in fact or law. In the face of near unanimous judicial condemnation of such restrictions, the gag order cannot stand.

CONCLUSION

The lower court's gag order conflicts with longstanding constitutional protections of free speech and the sovereignty of the people. A ban on prior restraints was one of the primary reasons for the ratification of the First Amendment. And the First Amendment provides heightened protection for discourse on matters of public importance between the people and their elected representatives. *See Roth*, 354 U.S. at 484.

The fundamental right of the people to engage their elected officials and hold those officials accountable is imperative in moments of social and political controversy. Racialized police practices, potential government misconduct, and external oversight of police departments are among the most contentious issues confronting not just the City of Greensboro and North Carolina but also our nation as a whole. Our state and federal constitution safeguard the free, open, and informed discussion of these critical matters of public concern.

Because no constitutionally-sufficient justification was presented to support the prior restraint at issue here, this court should reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Amicus Curiae certifies that the foregoing brief, which is prepared using a 13-point proportionally spaced font with serifs, is less than 3,750 words (excluding covers, tables of authorities, indices, counsel's signature block, and certificates of service and compliance) as reported by the word-processing software.

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