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"The right to assemble peaceably is among the most precious of the liberties safeguarded by the Bill of Rights, and is intimately connected both in origin and in purpose with the other First Amendment rights. . . Whenever the state restricts the right of assembly, there is no presumption of constitutionality; the state must have a compelling interest in the subject matter to justify abridgment, and the scope of the abridgment itself must not be greater than reasonably necessary to serve the state interest."[1]— *Murphy v. Zoning Com'n of Town of New Milford*

May 7, 2014

Via Email, Facsimile, and U.S. Mail

Fairfax County Board of Supervisors
12000 Government Center Parkway
Fairfax, VA 22035

Re: ***Proposed zoning changes restricting group assembly***

Dear Board of Supervisors:

As an organization dedicated to the defense of Americans' constitutional rights, The Rutherford Institute[2] is routinely called upon to intervene when those rights are threatened or violated. In this regard, we are gravely concerned about a proposed regulation by the Fairfax Board of Supervisors that, if adopted, would significantly circumscribe the essential right to group assembly of all citizens of Fairfax County in order to allegedly pacify a few residents[3] complaining about noise and parking.

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[1] Murphy v. Zoning Com'n of Town of New Milford, 289 F.Supp.2d 87, 102-03 (D.Conn.,2003) (vacated on other grounds) (citing United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967) and Blasecki v. City of Durham, 456 F.2d 87, 91 (4th Cir.1972)).

[2] The Rutherford Institute is a non-profit civil liberties organization that provides free legal representation to individuals whose civil rights are threatened and/or infringed.

[3] County officials have acknowledged that any existing noise or parking-related concerns are vanishingly minor, with Supervisor Pat Herrity acknowledging that such complaints "haven't even reached 1 percent of the thousands of complaints our Department of Code Compliance investigates a year."

Not only would such a regulation signify a gross overreach by the Board of Supervisors in violation of the First Amendment to the U.S. Constitution, but it would also significantly and unnecessarily restrict the ability of community leaders and religious groups to engage in meaningful expression and public assembly, in addition to suppressing a core liberty dating back to the days of America's founding—the right to freely assemble—a right which has been at the heart of every historically significant movement in our nation's history.

The First Amendment does not permit governments to "make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people"

Offering no more justification for its actions than the complaints of a few residents annoyed about general noise and parking problems,[4] the Board proposes to broadly restrict the individual rights of residents within its community to gather together in their own homes for any lawful purpose.

Specifically, under article 10-102, a proposal to alter the existing accessory use provisions of the zoning ordinances governing "group assemblies," Fairfax citizens would be restricted to assembling in any group exceeding 49 persons in one residential structure "in one day" to only 3 or fewer times within any 40 day period. Although the existing zoning regulations already currently restrict commercial "group assembly" accessory uses in private dwellings, this proposed amendment would be specifically targeted at wholly private and non-commercial group assemblies.

However, the First Amendment does not permit governments to "make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people."[5] This is especially true when the rights that will be impacted touch on other fundamental rights, as is the case here.

In the realm of free assembly rights, the government's role in inhibiting this right should always be limited to intervening when *only* the most essential interests are at stake

According to the proposed regulation's advocates, "occasional" large gatherings would remain permissible under the amended regulations, and the new regulations would only *incidentally* impact the rights of residents.[6]

Such a statement fundamentally misunderstands the purpose of a local government's role in enacting zoning regulations. In the realm of free assembly rights, the government's role in inhibiting this right should always be limited to intervening

[4] "Fairfax aims to downsize home assemblies," http://watchdog.org/142488/faiirfax-home-assemblies/
[5] Coates v. City of Cincinnati, 402 U.S. 611, 615 (1971).
[6] http://www.fairfaxcounty.gov/dpz/zoning/groupassembly/

when only the most essential interests are at stake. Responding to complaints about large gatherings creating parking space and noise issues, and "detract[ing] from the residential nature of neighborhoods" simply does not rise to the level of essential interests requiring government intervention.

The historical significance for the constitutional right to group assembly dates back to the very founding of the republic

The right to peaceably assemble is one of the most core fundamental rights protected by the Constitution. Indeed, the historical significance of the right to assemble dates back to the very founding of the republic. As early as 1763, American colonists were regularly using taverns as meeting houses for discussing political and philosophical ideas of the time, and eventually as planning grounds for staging opposition against the increasingly oppressive British rule.[7]

The presumptive status of the right to assemble as a fundamental right was so ingrained in the understanding of the colonists that by the founding, one House of Representatives member at the 1789 Constitutional ratifying convention noted that "[i]f people freely converse together, they must assemble for that purpose; it is a self-evident unalienable right which the people possess; it is certainly a thing that never would be called in question[.]"[8]

This right has been central to every notable movement since, from the women's suffragette movement to the abolitionist movement, from the civil rights movement to the more recent Occupy movement, and everything in between—controversial or not, including gatherings by the Ku Klux Klan[9] and the NAACP[10] alike.

Group assembly restrictions disproportionately affect religious worship rights and lend themselves to discriminatory enforcement against religious minorities in violation of RLUIPA

Although the Board of Supervisors officials vaguely promise that *occasional* "private parties, house concerts, religious meetings and social clubs" are expected and permissible events, so long as they abide by the frequency restrictions put in place by the new amendments, this dismissive language fails to acknowledge the varied and diverse nature of sincere religious practices of the residents of Fairfax County, many of whom may hold

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[7] " *'Tavern Talk' and the Origins of the Assembly Clause: Tracing the First Amendment's Assembly Clause Back to Its Roots in Colonial Taverns,*" HASTINGS CONSTITUTIONAL LAW QUARTERLY, Vol. 39:3 (2012).
[8] *Id.* at 611.
[9] National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977).
[10] National Association for the Advancement of Colored People v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

religious beliefs that necessitate more frequent meetings than would be allowable under the proposed regulations.

If left unchecked, there is little doubt that the proposed amendment would be disproportionately applied to silence religious groups, minority or otherwise. Religious individuals or groups who have a local community-based approach to worship, moderate-sized weekly bible study groups, and even religious sects that explicitly require regularly meeting at a religious leader's house to fulfill religious obligations would all be impacted under the revised regulations.

Rutherford Institute attorneys have repeatedly challenged other restrictive zoning regulations on the grounds that they disproportionately burden free religious exercise. In one such instance, Institute attorneys sued a local zoning board that denied an Orthodox Jewish Rabbi's conditional use application requesting that his house be used for Jewish services[11] despite a similarly restrictive regulation limiting group assembly, arguing that the denial unduly burdened the practice of their sincere religious beliefs.[12] Under the Fairfax Board's proposed regulations, minority religious adherents would similarly be forced to make the unconscionable choice between adhering to the dictates of their faith by engaging in group worship and fellowship, or violating the County's restrictive zoning regulations and opening themselves up to fines or imprisonment.

As an additional consideration, the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc et seq., limits the power of local zoning boards from impeding the ability of churches or other religious organizations in carrying out their mission of serving the religious needs of their members. Section 2 of the Act bars zoning restrictions that impose a "substantial burden" on the religious exercise of a person or institution, unless the government can show both that 1) it has a "compelling interest" in imposing the restriction, and 2) that the restriction is the least restrictive way for the government to further that interest. There is little doubt that negligible amount of noise from religious meetings and other group assemblies that contribute to less than "one percent" of zoning board complaints would not support such an expansive restriction on the sincere religious rights of so many county citizens.

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[11] 554 Queen Anne Road, Inc. v. Teaneck Board of Adjustment, https://www.rutherford.org/publications_resources/on_the_front_lines/Rutherford_Institute_Joins_Suit_Against_Zoning_Board_Over_Right_of_Jewish_C.

[12] Rutherford Institute attorneys argued that under the dictates and customs of some Orthodox Jewish law and practices, members must "pray together in a quorum, celebrate life-cycle events such as circumcisions and bar and bat mitzvahs, attend Bible and Talmud study groups, and gather for a festive meal following weekly service at the synagogue," under the leadership of and at the home of, a community Rabbi leader. Further, on the weekly Sabbath and other Jewish holidays, Orthodox adherents are not able to drive under the dictates of their faith and instead must walk to local houses of worship, necessarily resulting in a large number of worshipers congregating in a small number of nearby houses of worship.

This proposed amendment will inevitably criminalize otherwise lawful activities and give rise to onerous methods, such as surveillance, of enforcing the regulation

Case history shows that if enacted, these applications of Board zoning regulations will inevitably give rise to onerous methods, such as surveillance, of enforcing the regulation and open the door to criminalization of otherwise lawful activities.

In one such case, Rutherford Institute attorneys came to the defense of a Rabbi who was retaliated against by local government officials after challenging a New Jersey Township's use of its zoning powers against the Rabbi. In the case, Rabbi Avraham Bernstein was issued a summons charging him with illegally operating a "house of worship" for his weekly activities of hosting Sabbath prayer services at his house in accordance with an Orthodox Jewish law requiring the presence of ten men, or *minyan* to read from the Torah together and recite prayers. After filing suit in federal court challenging the Board's zoning powers, the Rabbi was subject to intimidation tactics in which township officials set up a video camcorder facing the front lawn of his house to conduct surveillance against him and monitor who entered and left the home.

In another case, Institute attorneys defended Michael Salman, an Arizona pastor who was ordered by city officials to stop hosting Bible studies in his home for 20 or so family members and friends after a few neighbors complained. After additional complaints and warnings informing Mr. Salman that he must cease his religious activities, nearly a dozen police officers accompanied by city inspectors raided Salman's property, searching for zoning violations. Having determined that Salman's weekly Bible studies constituted a church, city officials charged Salman with being in violation of various code regulations that apply to commercial and public buildings, and he was eventually found guilty of 67 code violations and sentenced to 60 days in jail. Such a gross misuse of city power is the eventual consequence of overly burdensome and restrictive zoning laws.

The proposed amendment is unconstitutionally vague in its prohibitions and serves no greater function but to further entrench local government into citizens' daily lives

The proposed amendment is unconstitutionally vague in its failure to adequately define essential terms. The proposed regulation purports to prohibit any "group assembly exceeding 49 people in one day" if it occurs "more frequently than 3 times in any 40 day period," without further explanation. The Supreme Court has held that a policy is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment if it fails to adequately define essential terms, forcing persons of ordinary intelligence to necessarily guess at the policy's meaning. Indeed, to withstand challenge,

the terms of a regulation "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties."[13]

Without defining essential terms like "in one day," "forty-nine people," and "three times," the regulation opens itself up to discretionary and potential discriminatory interpretation by zoning Board regulators. For example, "49 people in one day" could be interpreted to mean that multiple violations could occur in any 24 hour period, such that three separate assemblies of 50 people in the morning, afternoon, and evening could result in the maximum number of allowable instances for a 40 day period. Alternatively, the regulation does not explain how the 49 person limit is calculated, so that a single event or "assembly" of people taking place over a 10 hour period may have groups of 5 people come and go each hour, reaching an aggregate number of 50 total people in the 10 hour period, in facial violation of the language of the regulation.

As such, even non-religious meetings, including community service and outreach groups, home-based charitable organizations like soup kitchens or day shelters, book clubs, and even homeowners association meetings could be restricted under the proposed regulations. At a time in our history when a growing number of citizens are eschewing reliance on the federal government in favor of a more localized and community-based approach to problem solving, this amendment will do nothing but undermine this goal, and unnecessarily further entrench local government into citizens' daily lives.

Existing regulations adequately address the issues targeted by the sweeping amendment

In addition to the amendment being entirely unnecessary, the conduct targeted by the proposed amendment can already be readily dealt with by existing zoning regulations. Under Fairfax County Code of Ordinances § 108-1, the county is already able to regulate excessive noise that "jeopardizes [the] health or welfare or degrades the quality of life" of citizens in the county. In doing so, the Zoning Administrator may issue criminal warrants for violations of the code provisions, resulting in up to 30 days imprisonment or up to $1,000 in fines for violation. Further, the regulations already allow the county to significantly restrict the type of noise that is the true target of these amendments. Under § 108-4-4, the Code of Ordinances sets the maximum permissible sound pressure level at 55 decibels for residential zoned districts, and § 408-4-3 further allows the county to designate geographic "quiet zone" areas, within which the county may discretionarily limit noise to an even greater degree.

Finally, with respect to the related concerns about parking issues or increased traffic resulting from group assemblies, § 82-5-37(2) of the Code of Ordinances already allows the Board of Supervisors to designate "any local residential street[]" as a restricted

[13] Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

parking area if parking on that street "is so restricting the primary purpose of the road as to interfere with that purpose." When so designated, the Fairfax County Police Department is then able to issue fines or have violating vehicles towed after continuing violations. Such an arrangement allows the county to regulate problems with excessive numbers of vehicles from large group assemblies on a case-by-case basis, as opposed to broadly and unconstitutionally restricting residents' rights to assemble entirely.

For the reasons discussed herein, I respectfully urge the Board of Supervisors *not* to adopt the amendment, which unconstitutionally restricts free assembly and free speech, and which may well open the County up to costly litigation.

Should you have any further questions on this issue, I would be happy to make The Rutherford Institute available as a resource to ensure that any actions taken by the Board are constitutionally sound.

Sincerely yours,

John W. Whitehead
President

cc: Pat Herrity, Springfield District Supervisor