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April 24, 2020

Via Email (Haley.Roberts@montgomerycountymd.gov)

Haley Roberts, Associate County Attorney
Montgomery County
Office of the County Attorney
101 Monroe St., 3rd Floor
Executive Office Building
Rockville, MD 20850

Re: COVID-19 and the right to publicly protest government misconduct

Dear Attorney Roberts:

Please be reminded: we are not in a state of martial law, either at the federal or state level.

While federal and state governments have adopted specific measures in an effort to decelerate the spread of the COVID-19 virus, the current public health situation has not resulted in the suspension of fundamental constitutional rights such as freedom of speech and the right of assembly. Nevertheless, it has come to The Rutherford Institute's¹ attention that government officials have threatened to prosecute individuals who exercise their First Amendment right to protest an early-morning SWAT team raid that resulted in a young man without any significant criminal past being gunned down in his bedroom. Under Maryland's existing "stay at home" order, violations can result in imprisonment of up to one year and a \$5000 fine.²

In no way should this health crisis be used as a justification for carrying out surveillance on and retaliating against persons who exercise their First Amendment rights to criticize the government in a manner consistent with "social distancing" guidelines.³

¹ The Rutherford Institute is a national, non-profit civil liberties organization that educates the public on policy issues of constitutional concern and provides legal representation at no charge to individuals whose civil rights are threatened or infringed.

² Order of the Governor of the State of Maryland Number 20-03-30-01, <https://governor.maryland.gov/wp-content/uploads/2020/03/Gatherings-FOURTH-AMENDED-3.30.20.pdf>.

³ Jim Bovard, "Duncan Lemp's Parents Threatened With Jail For Protesting His Killing," *The American Conservative* (Apr. 23, 2020), <https://www.theamericanconservative.com/articles/duncan-lemps-parents-threatened-with-jail-for-protesting-his-killing/>.

Duncan Lemp Shooting and Planned Protest

Specifically, our concerns relate to threats that the government plans to prosecute individuals who gather publicly to protest a SWAT team raid that resulted in the death of 21-year-old Duncan Lemp.⁴

At 4:30 a.m. on March 12, 2020, Montgomery County Police carried out a SWAT team raid at Lemp's residence in order to execute a search warrant. Lemp was killed when police reportedly initiated gunfire and flash bangs through his bedroom window in the front of the house. It is unclear whether Lemp was asleep at the time of the shooting.⁵

Since the March 12 SWAT raid, family and friends have raised serious questions about the actions of the police that led to Lemp's shooting and death. They have also been critical of the failure of Montgomery County officials to be transparent in disclosing evidence pertinent to the shooting and the County's unwillingness to explain why a young man without any significant criminal past was the target of an early-morning raid and gunned down in his bedroom.

Despite inconsistencies between police statements and eye witness accounts regarding the circumstances of the shooting, government officials have not been forthcoming with details about the shooting: officials have refused to meet with family members, the contents of the warrant supporting the raid have not been revealed, and bodycam footage of the raid has not been disclosed.⁶

In order to voice their objections to police violence and demand answers about the shooting, Lemp's family and friends planned to conduct an outdoor public demonstration.

After monitoring the social media of those seeking answers to the questions surrounding Lemp's shooting and learning of the family's plans for the demonstration, County officials reportedly warned Lemp's family Gov. Hogan's stay-at-home order "does not appear to include planned protest" and that the order mandates that law enforcement officers must enforce that order,⁷ which can result in imprisonment of up to one year and a \$5000 fine.⁸

⁴ Jim Bovard, "Duncan Lemp's Parents Threatened With Jail For Protesting His Killing," *The American Conservative* (Apr. 23, 2020), <https://www.theamericanconservative.com/articles/duncan-lemps-parents-threatened-with-jail-for-protesting-his-killing/>.

⁵ Michael Kunzelman, "Lawyer: Man killed by police was asleep when police fired," *ABCNews* (March 13, 2020), <https://abcnews.go.com/US/wireStory/lawyer-man-asleep-police-fired-house-killing-69587748>.

⁶ Jim Bovard, "Duncan Lemp's Parents Threatened With Jail For Protesting His Killing," *The American Conservative* (Apr. 23, 2020), <https://www.theamericanconservative.com/articles/duncan-lemps-parents-threatened-with-jail-for-protesting-his-killing/>.

⁷ *Id.*

⁸ Order of the Governor of the State of Maryland Number 20-03-30-01, <https://governor.maryland.gov/wp-content/uploads/2020/03/Gatherings-FOURTH-AMENDED-3.30.20.pdf>.

The Limit on Gatherings Does Not Ban First Amendment Activity

A demonstration such as that planned by Lemp’s family to protest police violence clearly falls within the expressive activity protected by the First Amendment, which guarantees “the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

As the U.S. Supreme Court has ruled, “The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs[.]”⁹ Public parks and streets “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. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”¹⁰

Gov. Hogan’s “stay at home” order and restriction on gatherings should not be construed to criminalize the fundamental rights of assembly and speech unless it clearly appears that the order does so. But that order allows people to engage in “outdoor exercise activities, such as walking, hiking, running, or biking,” so long as persons abide by the Centers for Disease Control’s guidelines on “social distancing.”

An outdoor demonstration involves activity that is not in any relevant way distinguishable from the kind of recreational activity specifically allowed by Gov. Hogan’s order.

So long as protesters abide by the social distancing guidelines, they should be considered to fall within the outdoor activities exception. To preemptively accuse demonstrators of violating the order without knowing if they will maintain social distancing is an abuse of authority imposing an unwarranted chill on the exercise of First Amendment rights.

Even to the extent the “stay at home” order can be deemed to cover the kind of demonstration planned by Lemp’s family and friends, the order improperly discriminates against outdoor assemblies like the planned demonstration. Recent decisions involving the application of orders in other states responding to the Covid-19 outbreak have stressed that when the state imposes restrictions on gatherings that implicate the exercise of First Amendment rights, those restrictions must be not be arbitrary or inconsistent. Thus:

- a Kansas federal court struck down a public health gatherings restriction as applied to church gatherings of more than 10 persons where the order allowed gatherings of more than that number in airports, hotels, food pantries, detoxification centers, and retail establishments;¹¹ and

⁹ *Hague v. C.I.O.*, 307 U.S. 496 (1939).

¹⁰ *Id.*

¹¹ *First Baptist Church, et al. v. Gov. Laura Kelly*, No.6:20-cv-1102 (D. Kan. Apr. 18, 2020), slip op. at 14.

- a Kentucky federal court ruled that a restriction preventing a church from holding drive-in religious services was likely unconstitutional where other activities, including drive-in liquor sales, were not prohibited despite posing similar health concerns.¹²

These cases illustrate the principle that when the government seeks to restrict conduct protected by the First Amendment, there must not only be a compelling interest for the restriction, but the restrictions must be “narrowly tailored,” and not unnecessarily circumscribe protected expression.¹³

As in the recent Kansas and Kentucky cases, Gov. Hogan’s gathering order, if applicable to outdoor demonstration, is not narrowly tailored because it allows gatherings that pose at least as great a public health risk as an outdoor demonstration. As pointed out above, outdoor walking and hiking are allowed even though that activity poses the same risk as an outdoor demonstration if social distancing is not practiced. Additionally, the operative orders allow persons to gather in retail establishments, including convenience stores and liquor stores.¹⁴ And non-essential businesses may continue to operate minimal operations, but with no set limit on the number of persons who may gather at the business.

If these gatherings are allowed for activities that are not essential and not fundamental rights, then it is certainly not necessary that outdoor demonstrations involving constitutionally-protected expression be categorically banned. A broad prohibition on outdoor assemblies of more than ten persons is not narrowly tailored to achieve the stated public health goals where other comparable gatherings are not similarly prohibited.¹⁵

Therefore, to apply Gov. Hogan’s orders to a public assemble of the kind Lemp’s friends and family intend violates the First Amendment.

Retaliation

Threatening to prosecute those who demand government transparency and accountability in an attempt to squelch speech is a clear violation of the First Amendment. The Constitution prohibits government officials from subjecting an individual to retaliatory actions for engaging in protected speech.¹⁶ Government actions in response to protected activity that would have the effect of chilling the speech of a person of ordinary firmness are prohibited by the First Amendment.¹⁷

¹² *On Fire Christian Center v. Greg Fischer*, No. 3:20-cv-264 (W.D. Ky. Apr. 11, 2020), slip op. at 12-13.

¹³ *Republican Party of Minnesota v. White*, 536 U.S. 765, 775 (2002).

¹⁴ Order of the Governor of the State of Maryland Number 20-04-15-01, <https://governor.maryland.gov/wp-content/uploads/2020/04/Masks-and-Physical-Distancing-4.15.20.pdf>.

¹⁵ *First Baptist Church, et al. v. Gov. Laura Kelly*, No.6:20-cv-1102 (D. Kan. Apr. 18, 2020), slip op. at 15-16.

¹⁶ *Hartman v. Moore*, 547 U. S. 250, 256 (2006).

¹⁷ *The Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410, 415-16 (4th Cir. 2006).

As such, your letter to Lemp's family warning them that their planned demonstration would violate Maryland's gatherings restrictions and subject demonstrators to up to a year in jail appears to be a clear act of retaliation against them because of their intention to exercise their right to constitutionally-protected speech.

Indeed, there is little doubt that your letter of warning would have a chilling effect on the rights to assemble and speak. Moreover, the fact that government officials revealed that they were monitoring the social media of Lemp's family is further evidence that officials were seeking an opportunity to retaliate against them for their criticism of the County.

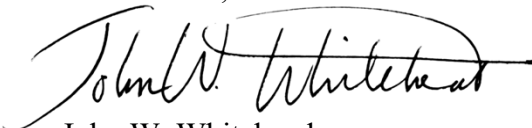
Surveillance and retaliation—the tactics of police states—have no place in a society that protects the right to speak out against the government in the pursuit of justice.

As an organization dedicated to defending civil liberties, we are compelled to remind you that while a public health emergency exists, Maryland is not under martial law and the fundamental rights guaranteed by the Constitution have not been suspended.

You would do well to remember that citizens remain free to exercise those rights, including the rights of assembly and speech, including in times of upheaval.

Additionally, we would caution you against weaponizing this health crisis in order to silence those who seek to challenge government misconduct. As such, we will be monitoring the situation carefully to ensure that the planned protest over Duncan Lemp's shooting is not banned and participants are not prosecuted for engaging in First Amendment activities in compliance with "social distancing" guidelines that pose no greater risk to public health than other activities allowed under Gov. Hogan's orders limiting gatherings.

For freedom,

A handwritten signature in black ink that reads "John W. Whitehead". The signature is written in a cursive style with a long horizontal flourish extending to the right.

John W. Whitehead
President