ALAN WILSON
ATTORNEY GENERAL

November 12, 2020

Sheriff S. Duane Lewis
Berkeley County
223 N. Live Oak Drive
Moncks Corner, SC 29461

Dear Sheriff Lewis:

Attorney General Alan Wilson has referred your letter to the Opinions section. The letter asks this Office to review a proposed Berkeley County parade ordinance. The letter states that the proposed ordinance was modeled after existing ordinances in other political subdivisions. It further relates that the proposed ordinance was presented to Berkeley County Council with the intention of protecting "the First Amendment rights as well as the safety of everyone." The letter notes that several Berkeley County Council members expressed concern regarding the constitutionality of this proposed ordinance. Finally, the letter requests that this Office suggest any necessary changes that would make the "proposed parade ordinance pass constitutional muster."

Law/Analysis

This opinion will address provisions of the proposed parade ordinance (the "ordinance") that have been subject to challenge regarding their constitutionality in comparable circumstances. First, the ordinance lists information that an applicant is required to provide for a parade permit. Second, the ordinance provides the standards for issuance of a parade permit. Third, the ordinance requires a parade permit when the total amount of participants "consist[s] of fifty or more persons." Fourth, the ordinance limits the time during which a parade may take place by stating, "No permit shall be granted for a parade to convene before 8:00 a.m. or terminate after 8:00 p.m." Finally, the ordinance states that an application for a parade permit must be filed "not less than three days nor more than thirty days before the date on which it is proposed to conduct the parade."

When parade permitting ordinances are challenged, they are commonly criticized for violating the First Amendment of the United States Constitution "right of free expression," or

more specifically, freedom of speech. Shuttlesworth v. City of Birmingham, Ala., 394 U.S. 147, 151 (1969). Similarly, Article I, § 2 of the South Carolina State Constitution provides nearly identical freedom of speech protections.[1] The South Carolina Supreme Court has recognized "the right to engage in a parade is one phase of the exercise of the fundamental right of free speech." City of Darlington v. Stanley, 239 S.C. 139, 144, 122 S.E.2d 207, 209 (1961). While courts have viewed parades as speech, parades may nevertheless be regulated in light of other governmental interests. In Shuttlesworth v. City of Birmingham, Ala., 394 U.S. 147 (1969), the United States Supreme Court explained how conducting a parade is balanced against regulation of public spaces.

> We have emphasized before this that 'the First and Fourteenth Amendments (do not) afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.' 'Governmental authorities have the duty and responsibility to keep their streets open and available for movement.'
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> ... The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

394 U.S. at 152 (citations omitted). The South Carolina Supreme Court has similarly warned that parade restrictions cannot be used to censor what speech is conveyed:

> [W]e held that the discretion granted to local authorities by such an ordinance was limited to the "safety, comfort and convenience of persons using the streets" and that local authorities could not under color of such an ordinance "act as censors of what is to be said or displayed in any parade."

City of Chester v. Addison, 277 S.C. 179, 181, 284 S.E.2d 579, 580 (1981) (citations omitted).

While noting that parade ordinances are a "prior restraint on speech" and therefore subject to a "heavy presumption" against their validity, the United States Supreme Court has

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[1] S.C. Const. art. I, § 2 ("The General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government or any department thereof for a redress of grievances.").

upheld such ordinances if they meet certain requirements. Forsyth Cty., Ga. v. Nationalist Movement, 505 U.S. 123, 30 (1992).

> [The ordinance] may not delegate overly broad licensing discretion to a government official. Further, any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication.

Id.; see also Green v. City Of Raleigh, 523 F.3d 293 (4th Cir. 2008) (emphasis added); Cox v. City of Charleston, S.C., 250 F. Supp. 2d 582, 587 (D.S.C. 2003), aff'd sub nom. Cox v. City of Charleston, SC, 416 F.3d 281 (4th Cir. 2005).

With these principles in mind, this opinion will next address specific provisions of the ordinance that could be subject to First Amendment challenges.

I. Information Required on an Application

It is this Office's opinion that a court would hold the parade ordinance provision addressing the required information on parade permits does not violate constitutional protections for freedom of speech. The majority of the information that must be supplied on an application for a parade permit relates to the parade route, naming a point person responsible for the conduct of the parade, and proposed logistics of the parade itself: date of the parade, route to be traveled, approximate number of persons and vehicles, the hours of the parade, assembly areas, the intervals of space between parade units, etc. In contrast, numbered item thirteen is an open-ended requirement to provide "[a]ny additional information which the Sheriff shall find reasonably necessary to a fair determination as to whether a permit should issue." (emphasis added). Unlike the other requirements, the requirement for any additional information could be construed to invite broad licensing discretion. In Cox, the District Court explained that a "court may invalidate a permit scheme if, despite being content neutral, the scheme vests unbridled discretion in the decision-maker. ... Accordingly, the ordinance must 'contain adequate standards to guide the official's decision and render it subject to effective judicial review.'" Cox, 250 F. Supp. 2d at 588. The threat posed by "overly broad licensing discretion" is that it "creates the opportunity for undetectable censorship and signals a lack of narrow tailoring. Therefore, time, place, and manner regulations must contain 'narrowly drawn, reasonable and definite standards,' 'to guide the official's decision and render it subject to effective judicial review.'" Burk v. Augusta-Richmond Cty., 365 F.3d 1247, 1256 (11th Cir. 2004). This potential conflict could be addressed in a multiple ways. First, the language could be left intact and county council could make a legislative determination that the language "[a]ny additional information ... necessary to a fair determination" refers only to information relevant to the findings listed in the "Standards for Issuance" provision that the Sheriff is required to make before issuing a parade

permit. The Supreme Court in Forsyth stated that courts will consider a "county's authoritative constructions of [an] ordinance, including its own implementation and interpretation of it" when deciding an ordinance's constitutionality. Forsyth, 505 U.S. at 131. If council renders a limiting construction of numbered item thirteen, a court likely would hold it provides sufficient guidance to the sheriff regarding what additional information that can be required from an applicant. Alternatively, numbered item thirteen could be rewritten to better define what additional information the sheriff may require.

II. Standards for Issuing a Parade Permit

It is this Office's opinion that a court may well hold that the majority of the parade ordinance provision listing the standards the sheriff must find before issuing a permit is constitutional. However, subpart e may be challenged as a content-based prior restraint because it directs the sheriff to find whether the "conduct of the parade is reasonably likely ... to provoke disorderly conduct or to create a disturbance." As is discussed above, a parade ordinance is a prior restraint on expression. Such a restraint may be approved "if it qualifies as a regulation of the time, place, and manner of expression rather than a regulation of content." Burk v. Augusta-Richmond Cty., 365 F.3d 1247, 1251 (11th Cir. 2004) (emphasis added); see also Cox, 250 F. Supp. 2d at 588 (same). The Forsyth Court warned that basing a permit on a "[l]isteners' reaction to speech" is not a content-neutral regulation and that speech cannot be punished or banned "simply because it might offend a hostile mob." Forsyth, 505 U.S. at 135. To the extent that subpart e can be read to base the issuance of a parade permit on the sheriff's evaluation of the public's reaction, even its potential hostility, a court would likely find that such the ordinance is not content-neutral and apply strict scrutiny analysis. Burk, 365 F.3d at 1251 ("[C]ontent-based speech regulations face "strict scrutiny," the requirement that the government use the least restrictive means of advancing a compelling government interest."). A court would likely find the remainder of subpart e, which states "the conduct of the parade is not reasonably likely to cause injury to persons or property," is content neutral, analyze it under the "intermediate scrutiny"[2] standard, and hold it is constitutional. Therefore, if subpart e is edited by removing the reference to listeners' reaction to the parade, a court is more likely to hold that it does not violate the First Amendment of the Federal Constitution or Article I, § 2 of the South Carolina State Constitution.

[2] Under the "intermediate scrutiny" standard, the parade ordinance may "not restrict substantially more speech than necessary to further a legitimate government interest." Burk, 365 F.3d at 1251.

III. Small Group Exception

It is this Office's opinion that a court would hold the parade ordinance provision requiring a parade permit only for parades that "consist of fifty (50) or more persons" does not violate constitutional protections for freedom of speech. In Cox v. City of Charleston, S.C., supra, the U.S. District Court for the District of South Carolina held that parade ordinances that do not contain exceptions for small groups of persons were unconstitutional. The Court explained:

> [T]his court agrees that the Parade Ordinances violate the First Amendment because they do not contain any exemption for small gatherings or sole protesters. Although the cities have a legitimate safety interest in controlling organized protests, parades, or other significant gatherings on the streets and sidewalks, requiring gatherings of a few people or a single protester to obtain a permit days in advance before protesting in a public forum sweeps too broadly and is not narrowly tailored to achieve the cities' safety interest.

Id. at 590. In Cox, the plaintiffs argued that parade ordinances in Beaufort, Mount Pleasant, and Port Royal were amended to include an exemption for fifty-persons or less as a result of settlement agreements. Id. The Court did not establish a fifty-person minim threshold before a parade permit could be required, but instead held the ordinances at issue were unconstitutional on their face "to the extent that they require small gatherings, including sole protestors, to obtain a permit before protesting in a public forum." Id. at 591. On appeal, the Fourth Circuit affirmed the district court and similarly declined "to announce a numerical floor below which a permit requirement cannot apply." Cox v. City of Charleston, SC, 416 F.3d 281, 286 (4th Cir. 2005). While the courts have not established a numerical floor below which a parade permit cannot be required, the Supreme Court of the United States has upheld a park ordinance that only applied to "events involving more than fifty individuals" against a First Amendment challenge, although the exception for small groups was not at issue in that case. Thomas v. Chicago Park Dist., 534 U.S. 316, 318 (2002). Therefore, it is this Office's opinion that a court would likely hold the ordinance provision requiring a parade permit for parades of fifty or more persons does not violate constitutional safeguards for free speech.

IV. Time Restrictions

It is this Office's opinion that a court would hold the parade ordinance provision that restricts the times during which parades may be held to between 8:00 a.m. and 8:00 p.m. does not violate constitutional protections for freedom of speech. In Cox v. City of Charleston, S.C., supra, the

District Court explained that identical time restrictions have been upheld in the Fourth Circuit against First Amendment challenges.

> The Fourth Circuit has upheld the Charleston Ordinance's provision prohibiting parades that convene before 8:00 A.M. or terminate after 8:00 P.M. as a reasonable time restriction. Abernathy v. Conroy, 429 F.2d 1170, 1174 (4th Cir.1970). The court reasoned:
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> > "The evening is traditionally a time of repose, when people retire to their homes for relaxation. There is a significant state interest in preserving reasonable serenity during this period for the mutual benefit of all citizens.... Restricting parades to daylight hours in order to accomplish this legitimate end is not an unreasonable limitation upon the right of free expression..... Another substantial reason for prohibiting night parades is that crime prevention and maintenance of the public safety are more difficult after dark.... On balance, a prohibition against parades at night reasonably accommodates both free expression and crime prevention by discouraging violence during parades and increasing the authorities' ability to apprehend persons who do violate the law."

Id. at 591-92. Accordingly, it is this Office's opinion that a court would similarly hold the identical time restrictions in the ordinance do not violate constitutional safeguards for free speech.

V. Advance Notice

Finally, it is this Office's opinion that a court would hold the ordinance provisions requiring applications to be filed "not less than three (3) days nor more than thirty (30) days" along with allowing the Sheriff "where good cause is shown therefor... to consider any application hereunder which is less than three days before the date [of] such parade" do not violate constitutional protections for freedom of speech. In Sullivan v. City of Augusta, 511 F.3d 16 (1st Cir. 2007), the First Circuit Court of Appeals held that a parade ordinance that required thirty days of advance notice, even with a "good cause" exception, was unconstitutional. The Court explained:

> While even in such time-sensitive situations, a municipality may require some short period of advance notice so as to allow it time to take measures to provide for necessary traffic control and other aspects of public safety, the period can be

> no longer than necessary to meet the City's urgent and essential needs of this type. Advance notice requirements that have been upheld by courts have most generally been of less than a week. Lengthy advance filing requirements for parade permits, such as the present thirty days, have been struck down as violative of the First Amendment.

Id. at 38–39 (citations omitted). Therefore, when considered on its own merits, the ordinance's advance notice provision which requires only three days may well be held constitutional. Moreover, the additional provision allowing the Sheriff to consider applications on less than 3 days notice for "good cause" is even more likely be held constitutional. The Sullivan Court noted a "'good cause' exception … attached to a reasonably short application period" may "save" an otherwise unconstitutional advanced notice requirement. Id. at 40. When these two provisions are construed together, it is this Office's opinion that that a court would likely hold the advance notice requirement does not violate constitutional safeguards for free speech.

Conclusion

As is discussed more fully above, it is this Office's opinion that a court would hold the majority of the proposed parade ordinance complies with First Amendment of the United States Constitution right of free expression as well as Article I, § 2 of the South Carolina State Constitution. However, two provisions concerning the information required on a parade permit application and the standards for issuance may be challenged for allowing overly-broad licensing discretion and for not being content-neutral, respectively. Because the request letter asked that this Office suggest necessary changes, the body of this opinion contains edits to these provisions which a court may be more likely to uphold against a First Amendment challenge. However, please note that this Office cannot anticipate all challenges or guarantee that an ordinance will not be the subject of future litigation.

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General