

**MUNICIPAL COURT OF  
THE CITY OF STATESBORO,  
STATE OF GEORGIA**

CITY OF STATESBORO, GEORGIA	)	
	)	
v.	)	CRIMINAL
	)	Case No: 05002038
JAMES HOOD	)	
	)	
Defendant.	)	
	)	

**SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS**

**I. CURRENT CONSTITUTIONAL CHALLENGE IS TO UNLAWFUL PRIOR RESTRAINT OF A SINGLE PROTESTOR**

**A. INTRODUCTION AND SUMMARY**

The sole charge against Mr. Hood is picketing without a permit claiming a violation of Statesboro Municipal Code § 70-63. (hereafter "Mun. Code") (See Citation Number 17376, picketing without a permit).

On April 20, 2005, while alone, Mr. Hood was peacefully protesting on a city sidewalk. The Officer asked him to show a permit. Mr. Hood did not have the permit so he was cited.

Although not elaborated in the citation, the section of the Ordinance that requires a permit even if there is only a single person protesting, is Mun. Code § 70-63(b)(1), which follows:

No Picketing shall be conducted on the public ways of this city and no person shall participate in the same unless notice of intent to picket has been given to the chief of police, and unless a receipt of such notice has been

issued. (Emphasis added).

Although First Amendment freedoms are subject to balancing of legitimate state interests related to safety in the face of an imminent threat of substantial harm, as the number of protesters decreases, so does the weight of the threat and the need for the government to impose prior restraints as to time, place and manner in the name of future safety. While it is true that exercise of First Amendment activity is not an absolute, immune from regulation, and its rights are exercised with a balancing test between freedom and safety, when the number of persons peacefully protesting on public ways is small – especially just one – it is still an absolute, that the state’s safety interests may not be imposed until the substantial harm is imminent and not before.

The City can point to no case law that requires a single protester to preregister. It is the City’s burden to demonstrate affirmatively that their restriction of freedom is authorized under the Constitution. Prior registration or “notice of intent to protest” is absolutely forbidden when there is but one protester.

The issue of prior registration, absent the Ordinance laying out the compelling interest of imminent harm, has been decided against the City’s position by the Supreme Court.

If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance

their exercise and for imposing a penalty for violating such a restraining order. So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction. If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment.

*Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 164, 122 S. Ct. 2080, 153 L. Ed. 2d 205 (2002).

Therefore, even if the City takes the factual position that if notice is provided, no permit will ever be denied (contrary to the implicit discretion of the Chief of Police not to issue a permit until “conditions” have been met to his or her satisfaction), the notice of intent provision of the Ordinance is the equivalent of registration, and as to a single protester, is prohibited under *Watchtower Bible v. Village of Stratton*.<sup>1</sup>

---

<sup>1</sup> If in fact the Chief has no discretion or authority not to issue a permit upon mere submission of notice of intent, regardless of the time, place and manner of the proposed demonstration, then the City is taking the position that the Ordinance is nugatory. If the Ordinance is nugatory, then this is a case of selective prosecution.

If given notice of intent to demonstrate the Chief will always issue a permit, the notice and permit requirement are a chilling of speech without purpose. If all permits will be granted, the City is admitting that as a matter of policy and practice, in spite of the implicit and express safety interests addressed in the Ordinances, there is no legitimate safety interest which they can seek to impose before the demonstration occurs.

Future use of the Ordinance as to the notice and permit provisions as to large groups will be selective. Legitimate regulation of safety will then be tied to

---

the existence of an imminent threat on the scene at the time of the demonstration. The officers at the scene must perform the balancing test as to time, place and manner, even when the demonstrators number in the thousands.

It would be in the interests of all to reach an agreement as to time, place and manner before the demonstration. The City needs to set a reasonable floor as to the number of demonstrators who need to notify the City of an intent to demonstrate.

The Application form which is used for Parades, Protesters and Exhibits reflects that if the Chief of Police is not satisfied with the content of the application/notice form, then the permission to protest or picket can be denied, and therefore unless the permission is granted, the protest will be restrained and stopped at the outset of preparing to protest out of fear of arrest or by arrest, when an officials deem the protest has started.

There is a practical effect and political implication of the existing Ordinance which the City leaders surely want to avoid. As written, the Ordinance allows the arrest of any single Statesboro resident or voter who protests a police officer's actions at a traffic scene or arrest, including when an officer is double parked and blocking traffic, or needlessly speeding through a school zone.

Surely the citizens of Statesboro are entitled to the full freedoms and protections of self governance and can protest abuse of governmental power as it is occurring without being subject to arrest for not giving notice of intent and because the Chief of Police has not given them written permission to speak. While this Chief and his officers may not so use the Ordinance, the Ordinance is there as "legal" justification to arrest and silence those citizens in the future who protest or wish to protest the action of an abusive but shrewd officer.

Mr. Hood has not yet challenged other portions of the Ordinance that are also constitutionally infirm, as Mr. Hood has not been put on notice that they are material to this prosecution. Some of the other infirm provisions are briefly addressed in Section III below.

## **II. THE ORDINANCE IS PRIOR RESTRAINT THAT CANNOT SURVIVE EVEN INTERMEDIATE SCRUTINY**

### **A. The Ordinance Requires a Single Protester, to Give Notice of the Details of His Protest to the Chief of Police Before a Protest, When there is a Break in the Protest, and Again After a Break but Before Protesting Again.**

#### **1. The Ordinance Applies to a Single Person**

The Ordinance requires that “. . . no person shall participate . . . [in picketing] . . . unless notice of intent to picket has been given . . . and unless a receipt . . . has been issued.” (Emphasis added). Mun. Code § 70-63(b)(1).

Therefore, all of the restrictions of Mun. Code § 70-63 apply even to just one person who intends to “. . . picket[ ] . . . demonstrat[e] . . . participat[e] in a [silent] vigil and any action primarily promoting or objecting to a policy upon those portions of the public ways not used primarily for vehicular parking and moving traffic and not constituting a parade.”

This would include at least public parks, rights of ways, open spaces of public property abutting buildings, other public land where vehicles only go occasionally, and of course, sidewalks. Mun. Code § 70-63 applies to sidewalks because Mun. Code § 70-61(c)(the parade permit ordinance) excludes the regulation of “[p]icketing on sidewalks” from the Parade Regulation.

Therefore, whenever even a single person wants to or does use any of these public ways, the existing Picketing Ordinance applies.

## **2. The Ordinance is a Prior Restraint on Speech.**

The Ordinance is a prior restraint to speech. A potential protester may not protest until he or she has first met the “conditions” of the Ordinance. Mun. Code § 70-63(b)(1). Stated in the language of the Ordinance, “provided” the potential protester has met the “conditions,” then and only then, can he protest. Mun. Code §

70-63(b). Until the potential protester has first provided notice of intent to protest to the Chief of Police, and if and when the Chief gives the receipt, he or she cannot take actions reflecting “protesting” or even a “vigil” without being subject to arrest under the Ordinance.

The Ordinance also has a unique provision that requires the protester to notify the Chief of the termination of the protest, and then imposes the notice provision any time there is a break in the protest of more than 24 hours.

Notice shall be given by the holder of a receipt of notice to the chief of police or his designated representative immediately upon the cessation of such picketing for period of twenty-four (24) hours or more. Before resumption of picketing interrupted for any such period, a new notice shall be given and a new receipt issued.

Mun. Code § 70-63(b)(3). Therefore, a person cannot stop protesting without immediately notifying the Chief. This onerous and rigid requirement serves no legitimate purpose as it ostensibly seeks to protect against safety problems as to an event that has already past. As to the single protester who wishes to protest from time in a reasonable place and manner, it amounts to pointless prior restraint as to the speech in the first instance as a later undue burden. In addition, as to subsequent speech, it unduly chills the rights of the single protester.

### **3. Registration is Unlawful Prior Restraint on Solo Protester**

Permit requirements, which restrict expression before it occurs, are prior restraints and subject to the most exacting review. *United States v. Frandsen*, 212

F.3d 1231, 1236-37 (11<sup>th</sup> Cir. 2000) (“A prior restraint of expression exists when the government can deny access to a forum before the expression occurs.”); *see also* *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1250 (11<sup>th</sup> Cir. 2004); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). “Prior restraints are presumptively unconstitutional and face strict scrutiny.” *Burk*, 365 F.3d at 1250; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (“exacting scrutiny” applied). As this Circuit recently held in analyzing a similar permit ordinance “few laws survive such [strict] scrutiny.” *Burk v. Augusta-Richmond Cty.*, 365 F.3d at 1251 ; *see also* *Freedman v. Maryland*, 380 U.S. 51, 58-61 (1965) (governments may not require “persons to invoke unduly cumbersome and time-consuming procedures before they may exercise their constitutional right of expression”).

The City has the burden of overcoming this heavy presumption and may only succeed if the regulation is a content-neutral time, place and manner restriction: “A content-neutral time, place, and manner regulation must leave open alternative channels of communication and survive ‘intermediate scrutiny,’ the requirement that it not restrict substantially more speech than necessary to further a legitimate government interest.” *Burk*, 365 F.3d at 1251. The Statesboro picketing ordinance cannot meet such scrutiny and its application to solo protesters substantially restricts more speech than is necessary to further existing legitimate interests.

In its Ordinance, the City sets out its purpose as “the need to preserve the safety and welfare of the general public.” Hood does not contest that such an

interest is legitimate. But, many provisions in the Ordinance “restrict substantially more speech than necessary to further” that interest. *Burk*, 365 F.3d at 1251. The only provision that this Court must review, however, is the requirement that a single-protester must apply for a permit for a one person picket because that is the only charge for which Mr. Hood has been cited.

Requiring a permit for one person to picket, however, targets far more speech than is necessary to protect the safety of the public. ***Lovell v. City of Griffin*, 303 U.S. 444 (1937) (holding unconstitutional permit requirement for single-person to leaflet); *Schneider v. State*, 308 U.S. 147, 163-65 (1939) (same); *Watchtower Bible & Tract Soc’y v. Village of Stratton*, 536 U.S. 150, 165-68 (2002) (reaffirming *Lovell* and *Schneider*); *Burk*, 365 F.3d at 1255, 1259 (striking down a permit requirement for groups of five (5) or more); *Douglass v. Brownell*, 88 F.3d 1511, 1524 (8<sup>th</sup> Cir. 1996) (striking down a permit requirement for ten (10) or more people); *Grossman v. City of Portland*, 33 F.3d 1200, 1206 (9<sup>th</sup> Cir. 1994) (holding unconstitutional a permit scheme for six (6) to eight (8) people); *Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1392 (D.C. Cir. 1990) (concluding that a permit requirement for two (2) or more people violated the constitution); *Cox v. Charleston*, 250 F. Supp. 2d 582, 590 (D.S.C. 2003) (holding unconstitutional a permit requirement for “small gatherings and sole protestors.”)**. In *Cox*, 250 F. Supp. 2d at 590, for example, the Court wrote:

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.

The Ordinance is overly broad and seeks to regulate activity which does not require notice to a Chief of Police and a permit. One person, standing and thinking about the meaning of life, politics pro and con, or the grocery list, could easily be mistaken as one who should first have given the chief notice of his intent to have a “vigil.” Mun. Code § 70-63(a) and (b)(1).

The Picketing Ordinance obviously applies to one person, like Mr. Hood, who has the familiar protester trappings of signs and banners standing on a sidewalk or other public way. It applies if the protester is in the middle of a park, a half mile away from any sidewalks or roads. It applies in circumstances in which there is not even a remote chance of harm, and only a lightning strike possibility that something might happen. Yet if the Officer asks for a permit, because the Officer alleges the person is engaging in any of the regulated acts, from picketing to a silent vigil, then the person can be arrested on failure to provide a permit.

In a case involving classically protected activity by an individual, which was brought challenging the Rome Ordinance, there was one “protester” in the middle of a park collecting signatures for a petition on the Fourth of July. How more

American can you get. Under the Ordinance, Statesboro Police would have a duty to arrest someone in the middle of the City park holding a sign saying “God Bless America - and Her Policies” on the day when we celebrate our freedoms, because the Statesboro citizen did not have permission to so speak from the Chief of Police.

Accordingly, the City may not require Mr. Hood to obtain a permit to picket and the charge against Mr. Hood must be dismissed.

### **III. OTHER INFIRMITIES OF THE ORDINANCE NOT YET AT ISSUE**

#### **A. PICKETERS MUST MARCH SINGLE FILE AND FIFTEEN (15) FEET APART ON OUTERMOST PART OF THE SIDEWALK**

Although not at issue as to Hood’s citation, Section 70-63(3) states that “[p]ickets must, if marching, march in single file, not abreast, and may not march closer than fifteen (15) feet, except in passing one another. Pickets not marching shall remain at least fifteen (15) feet apart.” Again, Hood concedes that the City has an interest in public safety and even concedes that the City has an interest in allowing citizens free passage on the sidewalk. The City could achieve these goals, however, without requiring that picketers march single file and either march or stand fifteen feet apart. *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544, 560-62 (5<sup>th</sup> Cir. 1988) (striking down a 50 foot distance requirement because “[l]ittle imagination is required to envisage circumstances where groups of demonstrators, substantially larger than two persons, standing at closer quarters than fifty feet would not threaten the safe flow of traffic nor unreasonably interfere with free ingress or

egress from nearby buildings."); *Davis v. Francois*, 395 F.2d 730, 732 (5th Cir. 1968) (striking down a limit of 2 picketers five (5) feet apart).

It is easy to conceive of ways that picketers, especially picketers in small groups of two or more, could picket while standing or marching closer together and not in a single-file line, without blocking free passage of the sidewalks or ingress or egress to or from buildings. At the other end of the spectrum, such a requirement would be impractical for large pickets: Under the ordinance, a picket with only 50 participants would have to be arranged so that the picketers would walk single file in a loop, one side of which would extend approximately 390 feet in length - making the length of the picket longer than a football field.

The requirement that the picketers are limited to the outermost half of the sidewalk, Statesboro Municipal Code § 70-63(5), also restricts substantially more speech than necessary to meet the City's interest safety or in protecting free passage on the sidewalks. A lone protester would not be blocking free passage on the sidewalk if he or she walked on the innermost half of the sidewalk. Nor, in many instances, would small groups block egress or ingress when standing or marching on the innermost half of the sidewalk. Indeed, if the picketer were allowed to move from the outermost part of the sidewalk into the innermost portion of the sidewalk it may be more convenient for people who were attempting to exit and enter cars parked along the sidewalk. Restricting picketers to the outermost portion of the sidewalk is arbitrary and restricts substantially more speech than is necessary. This

is true, especially when coupled with the other restrictions in the ordinance.

**B. NO PICKETING, UNDER ANY CIRCUMSTANCE, MAY TAKE PLACE IN AREAS “PRIMARYLY USED FOR VEHICULAR PARKING OR MOVING TRAFFIC**

Although not at issue as to Hood’s citation, Section 70-63 (c)(1) also prohibits picketers from engaging in free speech activity in any public way “used primarily for vehicular parking or moving traffic.” Again, this provision restricts substantially more speech than is necessary to protect public safety. In *United Food & Commercial Workers Local Union v. City of Valdosta*, 861 F. Supp. 1570, 1582 (M.D. Ga. 1994), the court struck down a similar ordinance that stated “[p]icketing in streets, alleys, roads, highways, driveways, or other places predominately dedicated to the use of vehicular traffic is prohibited.” The court explained:

Although the court recognizes that defendants have a significant interest in protecting ‘the right of persons and property to move upon public streets, roads, sidewalks, alleys, and all other places subject to a public easement of travel,’ the countervailing First Amendment interests demand that the restrictions be narrowly tailored. A broad prohibition on *all* picketing in *all* streets, alleys, roads, highways, and driveways predominately dedicated to the use of vehicular traffic does not serve defendants’ interests in the narrow fashion demanded by the First Amendment.

*Id.* Likewise, the Statesboro Municipal Code must also be struck down.

**C. INDEMNIFICATION CLAUSE IS UNCONSTITUTIONAL**

Although Statesboro Municipal Ordinance § 70-63 does not require that a picketer sign an indemnification agreement as a condition of receiving a permit, the

application provided by the City to persons seeking a permit to picket includes an indemnification. It reads: “I hereby agree to release, indemnify and hold harmless the City of Statesboro for and from any liability for personal injury or property sustained by any person in connection with any activities for which this permit is issued.”

Although governments have legitimate interests in protecting themselves from liability for injuries as a result of protesters own actions, a requirement that permit applicants sign a release promising to indemnify the City against “any liability for personal injury or property damage sustained by any person” is not sufficiently narrowly tailored to that goal to pass constitutional muster.

The federal courts have struck down mandatory liability insurance and broad indemnification requirements because (1) they are not narrowly tailored to achieve the government’s interest in protecting itself from liability, and (2) they present a substantial risk that groups with more controversial messages will be deterred from speaking because of the prohibitive financial burden of these requirements, thus having the effect of discriminating on the basis of content. *Eastern Connecticut Citizens Action Group [ECCAG] v. Powers*, 723 F.2d 1050 (2d Cir. 1983) (disapproving requirement of liability insurance in the amount of \$750,000 and a save-harmless agreement in order to use an abandoned rail line as a march route); *Courtemanche v. G.S.A.*, 172 F. Supp. 2d 251, 272-73 (D. Mass. 2001) (striking

requirement that the permittee provide hold harmless agreement wherein she agreed to “indemnify and save harmless the United States, its agents and employees against any and all loss, damage, claim or liability whatsoever” arising out of the permit activities because “demonstrators may be required to pay for expenses or damage caused directly by them,” but damage by counter protesters, spectators, and other people over whom the permittee has no control is the responsibility of the government, not the demonstrators); *Mardi Gras of San Luis Obispo v. City of San Luis Obispo*, 189 F. Supp. 2d 1018, 1030-31 (C.D. Cal. 2002) (holding liability insurance requirement unconstitutionally content-based); *Wilson ex rel United States Nationalist Party v. Castle*, No. 93-3002, 1993 U.S. Dist. LEXIS 9726, at \*10 (E.D. Pa. July 15, 1993) (holding insurance provision not narrowly tailored to government’s interests in avoiding liability for injuries); *MacDonald v. Chicago Park District*, No. 97C2963, 1999 U.S. Dist. LEXIS 7416,\*19 (N.D. Ill. Mar. 8, 1999) (“[B]y requiring the permit applicant to personally bear the cost of his/her public rally, the conveyance of unpopular messages could be chilled. This provision could dissuade speakers from using public parks for political speeches because of a fear of huge financial consequences.”). Accordingly, the indemnification requirement in the application for a picketing permit cannot stand.

#### **D. ORDINANCE IS UNCONSTITUTIONALLY VAGUE**

“It is established that a law that fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain

as to the conduct it prohibits.” *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966); *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

Statesboro Municipal Ordinance § 70-63 (b) (1) states that “No picketing shall be conducted on the public ways of this city and no person shall participate in the same unless notice of intent to picket has been given to the chief of police, *and unless a receipt of such notice has been given.*” Yet, Section 70-63 (c) (7) states that it “shall be unlawful for anyone to picket without filing a notice as required herein *or without being issued a receipt of such notice.*” Whether notice *and* a permit, or notice *or* a permit is required before a picket may take place is unclear from the ordinance. Section 70-63, therefore, fails to “provide the kind of notice that will enable ordinary people to understand what conduct it prohibits.” *Morales*, 527 U.S. at 56. Accordingly, the Ordinance is, again, unconstitutional.

The Ordinance attempts to regulate “any action primarily promoting or objecting” (emphasis added). Mun. Code § 70-63 (a). “Primarily” seems to give notice that one might not need to file notice until a certain level of promotion is reached. This term adds unnecessary vagary and exposes persons to wrongful arrest, and therefore chills speech.

The Ordinance requires that when a protester is taking a break in the protest, he “shall” give notice of “cessation” to the Chief, “immediately upon cessation of such picketing for a period of twenty-four (24) hours or more.” Mun. Code § 70-63(b)(3). Does this mean that the protester must immediately leave the scene of a

protest and go to the Chief when knows he won't be protesting for twenty-four hours, or does it mean that "immediately" after a period of twenty-four hours of no protesting there is "cessation" and the protester must give notice "immediately" after the passage of the twenty-four hours? Also, what if the protester does not intend to have a twenty-four-hour break, but in fact has a twenty-four-hour break? According to the Ordinance he is subject to a citation although nothing untoward has happened, because after the speech or protected activity, he did not notify the Chief. While the requirement that after a protest, notice must be given of twenty-four-hour breaks in the protest is an unlawful prior restraint and chilling of subsequent speech without legitimate reason for regulation, the terms of when such a requirement would need to be implemented are void for vagueness.

### **III. CONCLUSION**

Statesboro's ordinance has Constitutional problems. Hood has identified some of the principal ones.

However, this Court need only find that requiring a permit for a one-person protest is unconstitutional. The remaining constitutional problems must also be addressed, whether by order of this Court, or through the legislative process.

The charge against Hood should be dismissed as further prosecution is unlawful.

DATED: This 13th day of May 2005.

Respectfully submitted,

---

John P. Batson  
(Georgia State Bar No. 042150)  
303 Tenth Street  
P.O. Box 3248  
Augusta, GA 30914-3248  
Ph: 706-737-4040  
Fax: 706-736-3391

Gerald R. Weber  
(Georgia Bar No. 744878)  
Margaret F. Garrett  
(Georgia Bar No. 255865)  
American Civil Liberties Union of Georgia  
Ph: 404-523-6201  
Fax: 404-577-0181

**MUNICIPAL COURT OF  
THE CITY OF STATESBORO,  
STATE OF GEORGIA**

CITY OF STATESBORO, GEORGIA	)	
	)	
v.	)	CRIMINAL
	)	Case No: 05002038
	)	
JAMES HOOD	)	
	)	
Defendant.	)	
	)	

**CERTIFICATE OF SERVICE**

I hereby certify that I have, on this date, served a copy of the foregoing Supplemental Brief in Support of Motion to Dismiss by placing a copy of the same in the U.S. mail first class, properly addressed to:

W. Keith Barber  
W. Keith Barber, P.C.  
18 South Main Street  
Statesboro, GA 30458

This 13th day of May 2005.

\_\_\_\_\_  
John P. Batson  
(Georgia State Bar No. 042150)  
303 Tenth Street  
P.O. Box 3248  
Augusta, GA 30914-3248  
Ph: 706-737-4040  
Fax: 706-736-3391

