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March 18, 2025

Members of the Borough of Bergenfield Council
Borough Hall
198 N. Washington Ave.
Bergenfield, NJ 07621

Re: Unconstitutionality of Ordinance 25-2641

To the Members of the Borough of Bergenfield Council:

We understand that the Borough of Bergenfield is today considering an anti-protest ordinance, Ordinance 25-2641, a draft of which was shared with the public on extremely short notice. This ordinance would unconstitutionally interfere with First Amendment-protected activity in Bergenfield. Several provisions of the proposed ordinance are unconstitutional, and we address just a few.

First, section 273-48(h) and (i) are unconstitutionally vague prohibitions on expressive activity including in traditional public fora. Those sections provide that any “march, demonstration, or other expressive activity” that takes place “directly in front of or directly adjacent to, a particular private residence” or within 50 feet of a religious establishment is prohibited if it is “disruptive” or “undertaken to disrupt.”

These provisions ban First Amendment activity, including in traditional public fora like sidewalks, which the Supreme Court has ruled is unconstitutional. *McCullen v. Coakley*, 573 U.S. 464 (2014) (even a content-neutral 35-foot buffer around health facilities failed intermediate scrutiny and was unconstitutional).

The phrase “disruptive” and “undertaken to disrupt” are also unconstitutionally vague. These phrases “fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits,” and they “may authorize and even encourage arbitrary and discriminatory enforcement.” *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). In other words, it is impossible for the average person to know whether the expression they intend to engage in—particularly if it is controversial, political speech—is disruptive or not. Similarly, it allows enforcement authorities to determine, based on their own unbridled discretion, whether or not any expressive activity is too “disruptive” for their liking. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (“the requirement that a legislature establish minimal guidelines to govern law enforcement” is the more important aspect of the vagueness doctrine.)

These provisions are also impermissible content-based restrictions on speech because they would require a law enforcement official to examine the content of the expression to determine whether it is “disruptive” or whether the speaker was undertaking the expressive activity for the purpose of “disrupting.” *McCullen*, 573 U.S. at 479 (law “would be content based if it required ‘enforcement authorities’ to ‘examine the content of the message that is conveyed to determine whether’ a violation has occurred.”).

Second, section 273-39 of the ordinance is an unconstitutional prior restraint on expressive activity because it requires anyone organizing a “special event”—which includes any “parade, walkathon, bikeathon, or jogging group, block party or other organized group having a common purpose or goal” no matter how small—to obtain a permit from the Borough Administrator, and gives the Borough Administrator unbridled discretion to determine whether the event would “unnecessarily interfere” with a public street or “tend to cause a breach of the peace.” *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772 (1988) (“ordinance giving the mayor unfettered discretion to deny a permit application and unbounded authority to condition the permit on any additional terms he deems ‘necessary and reasonable,’” is unconstitutional). It is also void for vagueness because it gives no guidance to the average person on what those phrases mean. *Morales*, 527 U.S. at 56; *Kolender*, 461 U.S. at 358.

Third, section 273-48(b) is an unconstitutional prior restraint on expressive activity in public fora. It prohibits *all* musical instruments as well as sound amplification such as bullhorns without a permit. This is unconstitutional. *Saia v. New York*, 334 U.S. 558, 559 (1948) (holding unconstitutional an ordinance as a prior restraint on sound amplification that was not narrowly tailored and lacked standards of enforcement authority’s exercise of discretion). It is also void for vagueness because it lacks any guidance whatsoever on when such a permit must be granted or can be denied. *City of Lakewood*, 486 U.S. at 772; *Morales*, 527 U.S. at 56; *Kolender*, 461 U.S. at 358.

We understand that this ordinance is intended to target protests that have been organized in Bergenfield to express opposition to the sale of Palestinian land in the West Bank illegally occupied by Israel. This may additionally render the ordinance viewpoint-discriminatory. It is deeply concerning that the Borough would consider passing an ordinance for the purpose of silencing such political speech—speech that receives the highest level of protection under the First Amendment. This ordinance would have a deep chilling effect on constitutionally protected speech.

You should also be aware that the sales events that the ordinance apparently seeks to protect are for sales of Israeli settlements in occupied Palestinian territory that are illegal. The appropriation of occupied Palestinian territory, the forcible transfer of Palestinian civilians within or outside the territory, and the transfer of Israeli civilians into the territory all constitute war crimes under

international and federal law.¹ Aiding and abetting those violations also violate international and federal law, under which individuals can be held civilly and criminally accountable, including in U.S. courts.² The International Court of Justice (ICJ) recently found that Israel’s continued presence in the occupied Palestinian territory is illegal and affirmed the obligation of states “to take steps to prevent trade or investment relations that assist in the maintenance of the illegal situation created by Israel in the Occupied Palestinian Territory.”³ Also note that advertising sales for Jewish-only settlements violate the federal Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, as they indicate discrimination on the basis of national origin and religion.

We urge you to reject this plainly unconstitutional ordinance, which if passed would be subject to insurmountable legal challenges.

Sincerely,



Astha Sharma Pokharel
Staff Attorney
Center for Constitutional Rights

¹ *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) art. 47, 53, 147.

² *See, e.g.*, Alien Tort Statute (28 U.S.C. § 1350); the War Crimes Statute (18 U.S.C. § 2441).

³ Advisory Opinion, Legal Consequences Arising From the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, International Court of Justice (Jul. 19, 2024), <https://www.icjci.org/sites/default/files/case-related/186/186-20240719-adv-01-00-en.pdf>.