



April 10, 2014

The Honorable Terry McAuliffe
Governor, Commonwealth of Virginia
1111 East Broad Street
Richmond, VA 23219

Dear Governor McAuliffe:

We were concerned to learn that the Division of General Services (DGS) recently denied a permit to the Family Foundation to hold a National Day of Prayer service at noon on May 1, 2014 on the Capitol Square. The Family Foundation was told that events could not be held at noon, when many people have lunch on the grounds.

This is just the latest in a series of problems that have arisen from the vague and overly restrictive regulation governing speech on the Capitol Square. 1 VAC 30-100-10. The Capitol Square is a traditional public forum, where the right to free speech is at its apex and the government's power to restrict speech is at its lowest. The state may only impose reasonable time, place and manner restrictions that are not based on the content of speech and leave open ample alternative channels of communication. Moreover, any restrictions must be clearly defined and must not give officials undue discretion to determine which speech will be allowed. The existing Capitol Square regulation fails these standards in at least the following respects:

1. Although the Capitol Square is a broad, grassy expanse with plenty of room for free speech, the regulation allows gatherings only at the Bell Tower. This unreasonably limits both the size and number of demonstrations and the ability of demonstrators to communicate to their intended audience.
2. The regulation requires a permit for all "assemblages, meetings, and functions," with no exceptions. While the government generally may require permits for large gatherings—in order, for example, to ensure that two groups do not attempt to occupy the same space at the same time, or to ensure unobstructed pedestrian passage through the square—such administrative issues are not posed by small groups, which should be exempted from the permit requirement.
3. The regulation has no exemption to the six-day requirement for spontaneous events. The right to free speech is meaningless if citizens may not react to events – especially political events – as they arise. Thus, courts have repeatedly held that even though some notice of planned demonstrations may be required, there must be an exception for "spontaneous" demonstrations held in reaction to current events.

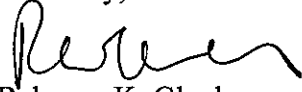
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION OF
VIRGINIA
701 E. FRANKLIN ST.
SUITE 1412
RICHMOND, VA 23219
T/804.644.8080
WWW.ACLUVA.ORG

4. The regulation allows the DGS to deny a permit if it determines that the speech will include advocacy of the violent overthrow of government or other unlawful conduct. The First Amendment protects such advocacy unless it is directed to inciting imminent lawless action and is likely to incite such action. Absent evidence of such immediate incitement, the government must not restrict speech in a public forum based on its content.
5. The regulation allows DGS to deny a permit to an organization that it “has reason to believe that the organization requesting a permit is organized, functioning, or conducting business in violation of Virginia law.” This provision is unacceptably vague, in that it does not explain what evidence would constitute “reason to believe,” and would allow denial of a permit based on bare rumor or insinuation. Moreover, an organization does not forfeit its right to free speech merely because it is under investigation for tax evasion, does not have a proper certificate of occupancy for its building, or even if it has engaged in serious wrongdoing. Permission to speak in a public forum may only be denied for reasons directly related to the government’s ability to administer the property in an efficient and orderly manner.
6. The regulation allows DGS, with the approval of the Governor, to waive regulatory requirements “if, in his discretion, the general enjoyment and use of the Capitol Square is not impaired, if freedom of movement of the public is not disrupted, and if the welfare, health, and safety of tourists, visitors, and persons performing various duties on the premises or traveling thereon are not endangered.” This provision is unacceptably vague. Permission to speak in a public forum must not depend on the “discretion” of any government official, but on clear, neutral guidelines set forth in advance.
7. The provision under which the Family Foundation permit was denied provides: “All authorized functions are expected to be concluded within approximately one hour and during a time of day that will not interfere with major pedestrian and vehicular traffic within Capitol Square, with periods such as the beginning of the workday, the noon hour, and the close of the workday being avoided.” This section is unacceptably vague because it does not define “beginning of the workday” or “close of the workday,” and does not provide criteria for determining whether a demonstration may take place during those time periods. By merely stating that those times should be “avoided,” the regulation allows officials unfettered discretion to determine whether a permit for those hours will be granted. The regulation is overbroad because many demonstrations—due to their size or location—will not interfere with traffic even during peak hours. In particular, it is difficult to see how a demonstration confined to the Bell Tower area would have such an effect. Finally, one hour is too short for many types of demonstrations to be conducted effectively.

In short, the regulation pertaining to demonstrations on the Capitol Square is riddled with constitutional problems. By statute, the Capitol Square is managed by DGS “under the direction and control of the Governor.” Va. Code § 2.2-1144. I urge you to use your statutory authority to take swift action to ensure that the regulation is amended to comply

fully with the First Amendment. The ACLU of Virginia would be pleased to assist in this endeavor.

Sincerely,

A handwritten signature in black ink, appearing to read 'Rebecca K. Glenberg', written in a cursive style.

Rebecca K. Glenberg
Legal Director

cc: Mark Herring, Attorney General

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LIBERTIES UNION
FOUNDATION OF
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