Testimony of the New York Civil Liberties Union
before
BOARD OF TRUSTEES OF THE
VILLAGE OF TARRYTOWN
regarding
Proposed Amendments to the Tarrytown Municipal Code Regarding Parades and other Public Assemblies

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The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state and over 190,000 members and supporters. The NYCLU defends and promotes the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, through an integrated program of litigation, legislative advocacy, public education and community organizing. The First Amendment and due process rights of every New Yorker are fundamental to our democracy, and protected by the both the Constitution of the United States and that of New York. The NYCLU has long been a leader in the fight to ensure that every person may enjoy these fundamental rights.

We are grateful for the opportunity to offer testimony on the Board's proposed changes to the Tarrytown code regarding parades and other public assemblies.

The changes invite unconstitutional enforcement in a variety of ways, the most significant of which we address below in the order in which they appear in the code. We also address several flaws in the existing Tarrytown parade code. That said, our testimony is not a complete list of the constitutional defects in the parade code, and of course should not be taken as legal advice.

Parade Definition

Existing code §218-1(a) defines "parade" as "any procession or race" consisting of a "recognizable group of 20 or more pedestrians, vehicles, bicycles or other devices moved by human power, [etc.]" "upon any street, roadway or public area." While the Town does not propose to amend this definition, it is too problematic and too intertwined with the rest of the ordinance for us not to address its constitutional flaws.

Chiefly, "parade" is defined so broadly that *any* "recognizable" group of 20 or more people traversing *any* public park or road in Tarrytown would qualify as a parade. A caravan of trucks and military vehicles carrying "Back the Blue"[1] banners through town would qualify, but so would a group of 20 pedestrians peacefully marching on the sidewalk in support of breast cancer awareness, a group of 20 passing cyclists training for a race, a Purim parade in a local park, or a large group of Halloween trick-or-treaters.

Foreclosing non-permitted access to *all* public parks, sidewalks, streets and other public areas for *all* groups of 20 or more people, regardless of relative size, speed, or mode of transportation – even when those groups will not block pedestrian or vehicular traffic, or threaten public safety – is simply too sweeping a measure to survive judicial review.[2]

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Demonstration/Special Event Definition

Section 218-1(b) defines "demonstration" as a "group activity or congregation including, but not limited to, a meeting, assembly, protest, rally or vigil, moving or otherwise, which involves the expression of views or grievances, involving more than 12 people." While the Town does not propose to amend this definition, it too is notably flawed. Indeed, this broad, vague provision is – colloquially put – a lawsuit waiting to happen.[3]

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[1] Steve Gosset, "Tarrytown Back the Blue Convoy Rally Goes Off Peacefully." *Hudson Independent*, September 12, 2020. Available at: https://thehudsonindependent.com/tarrytown-back-the-blue-convoy-rally-goes-off-peacefully/

[2] In a traditional public forum, such as a park or public thoroughfare, even content-neutral restrictions – that is, regulations that restrict just the time, place, or manner of protected speech, regardless of the message – still "must not delegate overly broad licensing discretion to a government official," must be "narrowly tailored to serve a significant governmental interest," and must "leave open ample alternative channels for communication of the information." *Thomas v. Chicago Park District*, 534 U.S. 316, 322–23 (2002). An ordinance that leaves access to *all* public spaces at the discretion of a local permitting authority unquestionably fails that test.

[3] Because protest restrictions usually enjoy popular support but are *very* difficult to craft, they're often "low hanging fruit" for litigation. The town of Glens Falls, which recently adopted a set of protest restrictions in response to increased activity there, has been sued by a group of pro-Trump activists who frequently assemble in a local park. *See*, Jay Petrequin, "Glens Falls makes changes to protest law that triggered lawsuit from pro-Trump group," *News10ABC*, October 15, 2020.

Under this language, a socially-distanced book club meeting of more than 12 people in a local park is a demonstration. So too, with enough people, are a high school biology field trip, a monument dedication, a press conference on the courthouse steps, or an impromptu speech by a local politician. Indeed, *any* group of 12 or more people in which someone offers an opinion on *anything* would, technically, find itself in need of a permit. Moreover, because the ordinance applies only to groups expressing "views" or "grievances," (a group assembled to cheerfully dispense facts would appear exempt) it imposes a content-based[4] prior restraint on speech in a traditional public forum, which, like all content-based restrictions on protected speech, is presumptively unconstitutional.

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Notice Periods and Spontaneous Demonstrations

Sections 218-2 and 218-3 require organizers to notify the Town in advance of parades, demonstrations and special events, with no exception for spontaneous demonstrations that develop in response to topical events, such as election results or court decisions. Notice requirements restrict free expression,[5] and so must be drawn narrowly. In general, while a municipality may require some "short period of advance notice,"[6] the period can be no longer than necessary to meet the City's "urgent and essential" traffic management, crowd control, and public safety needs.[7]

Available at: https://www.news10.com/news/glens-falls-makes-changes-to-protest-law-that-triggered-lawsuit-from-pro-trump-group/

[4] For the Town to enforce a content-based permitting regulation in a traditional public forum, that regulation would have to survive strict scrutiny; that is, the Town would have to show the regulation was "necessary to serve a compelling state interest," was "narrowly drawn" to do so, and that no less-restrictive measure would work. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). This is an almost insurmountable obstacle.

[5] *See American–Arab Anti–Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 605 (6th Cir.2005) ("Any notice period is a substantial inhibition on speech.")

[6] *Sullivan v. City of Augusta*, 511 F.3d 16, 38–39 (1st Cir. 2007) (30 day notice requirement with no exception for spontaneous demonstrations was not narrowly tailored, and violated the First Amendment.)

[7] *Id. See also, e.g., Church of the American Knights of the Ku Klux Klan v. City of Gary*, 334 F.3d 676, 682 (7th Cir.2003) (noting that "the length of the required period of advance notice is critical to its reasonableness; and given ... that political demonstrations are often engendered by topical events, **a very long period of**

Tarrytown's proposed amendments extending the notice period for parades from 15 to 30 days, the period for special events from 21 to 30 days, and that for demonstrations from 10 to 15 days, would likely violate the First Amendment.[8]

The "Extraordinary Public Interest" Exception

Section 218-2(B)(4) allows the Village Administrator, with the mayor's written approval, to waive the ordinance's requirements and permit a parade at any time, anywhere in town, for "occasions of extraordinary public interest." However, "occasion of extraordinary public interest" isn't defined, leaving that determination to the broad discretion of the Village Administrator and Mayor, and leaving the public vulnerable to arbitrary, or even discriminatory, enforcement.

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Grandfather Clause

Section 218-2(C)(3), which exempts from parade permitting requirements groups who've "marched annually upon the streets for more than ten years prior to" the ordinance, would likely favor religious, military, police, and other more well-established groups to

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advance notice with no exception for spontaneous demonstrations unreasonably limits free speech" (emphasis added).

[8] Courts generally have upheld notice periods of less than a week. *See*, *e.g.*, *A Quaker Action Group v. Morton*, 516 F.2d 717, 735 (D.C.Cir.1975) (two-day advance notice requirement is reasonable for use of National Park areas in District of Columbia for public gatherings); *Powe v. Miles*, 407 F.2d 73, 84 (2d Cir.1968) (two-day advance notice requirement for parade is reasonable); *Progressive Labor Party v. Lloyd*, 487 F.Supp. 1054, 1059 (D.Mass.1980) (three-day advance filing requirement for parade permit approved in context of broader challenge); *Jackson v. Dobbs*, 329 F.Supp. 287, 292 (N.D.Ga.1970) (marchers must obtain permit by 4 p.m. on day before the march), *aff'd*, 442 F.2d 928 (5th Cir.1971).

On the other hand, longer periods have routinely been struck down. *See*, *e.g.*, *American–Arab Anti–Discrimination Comm.*, *supra* at 605–07 (thirty-day notice period too long, and not saved by an unwritten policy of waiving the provision); *NAACP, Western Region v. City of Richmond*, 743 F.2d 1346, 1357 (9th Cir.1984) ("[A]ll available precedent suggests that a 20–day advance notice requirement is overbroad.").

Five days was too long for an ordinance that defined "parade" too broadly . *See Douglas v. Brownell*, 88 F.3d 1511, 1523–24 (8th Cir.1996) (city's need to protect pedestrian and vehicular traffic and minimize inconvenience to the public does not justify five-day advance filing requirement for *any parade, defined as ten or more persons*).

the detriment of newer organizations. This could easily be seen as tacit viewpoint discrimination or content-based favoritism.

Limits on Large Events in Pierson Park, Patriots Park and Losee Park

Section 218-3(G) applies to demonstrations and special events in Pierson, Patriots and Losee Parks, and limits "large" gatherings – currently defined as any demonstration or special event with more than 150 people (pending amendment to 250) – in those parks to no more than two per year. First, when applied in conjunction with §218-3(G), which would be amended to prohibit *all* permit-required demonstrations and special events in Wilson Park, Tarrytown Lakes Park, the Losee Park ballfields and Wilson Park soccer field, these amendments would completely deny access to *all* of Tarrytown's public parks to anyone looking to hold a large event once annual event quotas were reached.[9] As just one example, under the proposed amendments, Pierson Park's outdoor concert series (assuming more than two of those many concerts qualify as "large" events) would likely exclude all other "large" events from Pierson Park every year.[10]

Second, the amendments could incentivize some organizers (or for that matter, the Town) to shut less popular or more controversial groups out of Pierson, Patriots and Losee Parks by holding (or in the case of the Town, permitting) two large events in each park as early in the year as possible. Indeed, it is not hard to imagine established, politically popular groups who can easily draw large crowds "weaponizing" this provision against less well-established groups that want to attempt a large event in a park – and the Town happily acquiescing.

Violations and Penalties (§218-5)

While the Town does not propose to change this section, we note that regulating speakers' efforts to "advertise any special event or

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[9] This would almost certainly fail both the "narrow tailoring" and "ample alternative channel" elements of intermediate scrutiny, *see Thomas*, *supra*, 534 U.S. at 322–23, in that the amended policy would be, respectively, both (1) broader than necessary to serve the Town's interest in keeping its parks accessible to all, while protecting natural areas from damage; and (2) so restrictive as to leave organizers nowhere to organize large events.

[10] Indeed, if the amended ordinance were applied evenly, Pierson Park could not host more than two "large" concerts a year.

demonstration requiring a permit under this Chapter via posting, print media, radio, television, or the internet prior to obtaining a permit," imposes a content-based prior restraint on speech, which, like the aforementioned restriction on groups expressing "views or grievances," is presumptively unconstitutional under the First Amendment.[11]

Conclusions

As we noted, this is not an exhaustive list of the ordinance's constitutional infirmities, nor is it even a detailed analysis. We respectfully request Tarrytown not adopt the proposed amendments, and indeed conduct a searching review of its existing permitting policies as soon as practicable.

Thank you for the opportunity to have presented this testimony.

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[11] *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 164 (2015) (laws that apply to particular speech "because of the topic discussed or the idea or message expressed" are facially content-based and "presumptively unconstitutional.")