STATE OF NORTH CAROLINA
COUNTY OF BUNCOMBE

IN THE GENERAL COURTS OF JUSTICE
SUPERIOR COURT DIVISION
21 CRS 90691, -95

STATE OF NORTH CAROLINA,

Plaintiff,

vs.

MATILDA RAE BLISS and,
MELISSA ANN COIT

Defendants.

MOTION TO DISMISS

"Journalism is not a crime." – United States President Joe Biden, in remarks at the White House Correspondents Dinner on April 29, 2023, as reported in THE WALL STREET JOURNAL in the article "Biden Calls for Release of Jailed Journalist Evan Gershkovich, Other Detainees," published April 29, 2023.

Defendants, MATILDA RAE BLISS and MELISSA ANN COIT, by and through their attorney of record, Ben Scales, hereby move that these matters be dismissed as violations of the United States and North Carolina Constitutions and in particular, Defendants' rights guaranteed under the First and Fourteenth Amendments to the United States Constitution and Sections 3, 12, 14, 18 and 19 of Article I of the North Carolina Constitution of freedom of the press, freedom of speech, freedom of association and due process of law.

Specifically, the Asheville Police Department (APD) intentionally and purposely used and applied a park curfew ordinance, which on its face is unconstitutional, to deny legitimate members of the press their constitutional rights from covering an incident planned and executed by the APD. The APD used the ordinance to deny the press and

consequentially the public the opportunity to see and scrutinize their actions in arresting houseless citizens camped out in Aston Park.

In support of this motion, Defendants submit the attached Declaration of Gregg P. Leslie, Professor and Executive Director of the First Amendment Clinic at Arizona State University's Sandra Day O'Connor College of Law, and would show the following factual background:

1. This is an appeal from convictions against Defendants for second degree trespassing entered after a bench trial before the District Court on April 19, 2023.

2. The alleged date of offense was December 25, 2021. In the District Court trial, the State produced evidence tending to show that both Defendants refused orders from officers of the Asheville Police Department to leave a city park (Aston Park) after park closing time, 10:00pm. Were this case that simple, this brief would be unnecessary. Yet those are the only facts the State wants this Court to consider.

3. To get a true sense of what happened that night, one must consider what led up to that night, who the various individuals and entities involved were and are, and the actions of those individuals and entities that created the situation whereby it was determined that a planned and coordinated police action would take place on Christmas night 2021 to clear an encampment of people experiencing homelessness and volunteer activists who had assembled there to feed and comfort the houseless and to draw attention to their plight.

4. Homelessness as a national issue is not new. The term "homelessness" was first used in this country in the 1870s, when urbanization, industrialization, and mobility due to the newly constructed national railway system, led to the emergence of tramps "riding the rails" in search of jobs. National Academies of Sciences, Engineering, and Medicine; Health

and Medicine Division; Board on Population Health and Public Health Practice; Policy and Global Affairs; Science and Technology for Sustainability Program; Committee on an Evaluation of Permanent Supportive Housing Programs for Homeless Individuals. Permanent Supportive Housing: Evaluating the Evidence for Improving Health Outcomes Among People Experiencing Chronic Homelessness. Washington (DC): National Academies Press (US); 2018 Jul 11. Appendix B, The History of Homelessness in the United States. Available from: https://www.ncbi.nlm.nih.gov/books/NBK519584/ (last accessed May 27, 2023).

5. The modern era of homelessness began in the 1980s, spurred on by gentrification of the inner city, deinstitutionalization of the mentally ill, high unemployment rate, the emergence of HIV/AIDS, an inadequate supply of affordable housing options, and deep budget cuts to government housing programs and social service agencies. Id.

6. In Asheville, according to reporting on statistics provided by the City, the number of people experiencing homelessness remained about the same for about 25 years, up until the Covid pandemic hit in 2020. Sally Kestin, "From Asheville Watchdog: National consultant offers 'road map' to end homelessness in Asheville … again," MOUNTAIN XPRESS, February 8, 2023, https://mountainx.com/news/from-asheville-watchdog-national-consultant-offers-roadmap-to-end-homelessness-in-asheville-again/ (last accessed May 28, 2023). From 2020 to 2022, that number doubled, with at least 211 chronically homeless people living on the streets, often suffering from mental illness and drug addictions. Id.

7. Even before the Covid pandemic, Asheville police have been quoted as describing homeless encampment as "a growing problem in the city for the last 10-15 years. Taylor Thompson, "Camps not the answer for homelessness, officials say after tons of trash

cleaned from two," ABC 13 NEWS, January 12, 2023, https://wlos.com/news/local/camps-not-the-answer-for-homelessness-officials-say-after-tons-of-trash-cleaned-from-2-asheville-police-department-ncdot-homeward-bound (last accessed May 28, 2023).

8. In 2014, the Asheville Police Department announced a "directive . . . to outline standard operating procedures to be used in the interaction with homeless individuals, homeless camp protocols, and information on outreach assistance to social service resources." Found online at https://beta.ashevillenc.gov/wp-content/uploads/2018/09/Asheville-Police-Department-Policy-Regarding-Homeless-Persons.pdf, last accessed May 28, 2023. According to that directive, before the police would clear a homeless encampment, "responding officers will instruct [camp residents] that they have seven (7) days to vacate the property." Id. This became known as "the 7 day policy," and it was in effect at all times relevant to this case.

9. In the winter of 2020-21, the Asheville Police Department cleared several encampments of people experiencing homelessness, sometimes without providing the seven-day notice required by its own policies. On February 1, 2021, on a day when the temperature never got higher than 37 degrees Fahrenheit,[1] police participated in the removal of an encampment under the I-240 bridge on North Lexington Street. John Boyle, "Removal of homeless camp under I-240 bridge sparks outrage," ASHEVILLE CITIZEN-TIMES, February 3, 2021, https://www.citizen-times.com/story/news/local/2021/02/03/asheville-nc-i-240-homeless-camp-removed-sparks-outrage/4370179001/ (last accessed May 28, 2023). That article cites a press release from BeLoved, a non-profit organization that works with the

[1] Historical weather data obtained at https://world-weather.info/forecast/usa/asheville/february-2021/ (last accessed May 28, 2023).

unhoused population, as stating that that night the "winds were blowing up to 50 miles an hour and the wind chill set to get down to 7 degrees." Id.

10. The Asheville Blade, which is a self-described "Leftist" news organization that employs both Defendants in this case, also covered the February 1 camp sweep and published an article in which Defendant Coit was listed as a contributor. Orion Solstice, "Out in the cold," THE ASHEVILLE BLADE, February 2, 2021, https://ashevilleblade.com/?p=3982 (last accessed May 28, 2023). That article was particularly critical of the Asheville Police Department for doing the bidding of Asheville's elite by conducting the camp sweeps, and referring to the police's actions during the George Floyd protests in the Summer 2020 "to tear gas crowds and destroy medic stations." Id. The Asheville Police Department had been roundly criticized in the national media for those actions and formally apologized for destroying the medic station. See, e.g., Minyvonne Burke, "N.C. police chief apologizes after video shows officers destroying medic tent set up for protesters," NBC NEWS, June 5, 2020, https://www.nbcnews.com/news/us-news/n-c-police-chief-apologizes-after-video-shows-officers-destroying-n1225716 (last accessed May 28, 2023).

11. Community backlash against the removal of the encampment was swift. In response, the Asheville Police Department tried to distance itself from the event, saying through a spokesperson that officers were on the scene "as advocates, not enforcement." Id. BeLoved called for "an immediate moratorium on camp sweeps and destroying people's only shelter during this health crisis and in the winter." Id.

12. In April 2021, a number of people experiencing homelessness who had been previously been evicted from public lands formed an encampment in Aston Park, inviting

community members to join them in support of the unhoused people's right to housing. In the mid-morning hours of April 16, a phalanx of at least 18 officers from the Asheville Police Department marched into Aston Park to clear that encampment. Reporters from the Asheville Blade, including Defendant Coit, were on hand to document the police action. David Forbes, "Eviction season," THE ASHEVILLE BLADE, April 19, 2021, https://ashevilleblade.com/?p=4023 (last accessed May 28, 2023). Some of the unhoused people who were camping in Aston Park had been moved by the City and/or NCDOT "eight or even 10 times." Id. Those who were evicted told of having their personal items, such as cookbooks and family photos, raked "into piles destined for the trash." Id. They told reporters that Asheville police had directed them to Aston Park. Id.

13. The Asheville Police Department's clearing of the homeless encampment from Aston Park in April 2021 attracted heavy media scrutiny. In addition to coverage by outlets such as the Asheville Blade and the Asheville Free Press, the Asheville Citizen-Times published an op-ed entitled "City evictions will not solve homelessness." Libertie Valance and Beck Nippes, ASHEVILLE CITIZEN-TIMES, April 18, 2021, https://www.citizen-times.com/story/opinion/2021/04/18/opinion-city-evictions-asheville-not-solve-homelessness-homeless-camps/7209261002/ (last accessed May 28, 2023). The authors of that piece described the police's actions as "jackboot tactics" and "attacks on [the unhoused people's] security and humanity." Id.

14. In text messages released in response to a public records request, City Manager Debra Campbell, who had ordered the April 2021 camp sweep, wrote: "Perfect! Yippee!" when informed by Police Chief David Zack that the sweep had resulted in three

arrests. David Forbes, "Behind the raid," THE ASHEVILLE BLADE, February 7, 2022, https://ashevilleblade.com/?p=4180 (last accessed May 28, 2023).

15. Among those arrested as part of the April 2021 camp sweep was Greenleaf Clarke, who had been serving as a mutual aid medic at Aston Park during the events there, preparing salt water soaks to aid those with foot injuries. Clarke was charged with assaulting a police officer, resisting arrest, and larceny of an officer's body camera. Defendant Bliss covered Clarke's trial for the Asheville Blade. Matilda Bliss, "The trial of Greenleaf Clarke," THE ASHEVILLE BLADE, August 10, 2022, https://ashevilleblade.com/?p=4382 (last accessed May 27, 2023). The trial lasted two days, after which District Court Judge Julie Kepple found that the officers' testimony was not credible and dismissed all charges for lack of evidence. Id.

16. In May 2021, the City's Human Relations Commission passed recommendations that the City code be amended to prohibit further encampment removals on City property, at least in event of inclement weather, to adhere to then-current Center for Disease Control protocols. Sarah Honosky, " Asheville commission calls for a moratorium on homeless camp clearing amid COVID, cold," Asheville Citizen-Times, December 27, 2021, https://www.citizen-times.com/story/news/local/2021/12/27/asheville-north-carolina-homeless-encampments-clearing/8995469002/ (last accessed May 28, 2023). Those recommendations went to the City Council, but according to the Commission's chairperson, they "disappeared into the ether." Id.

17. On December 8, 2021, the Asheville Police Department participated in the removal of a homeless encampment near I-240. Sarah Honosky, "'Over and over again': Asheville homeless encampment razed off I-240," ASHEVILLE CITIZEN-TIMES, December 9,

2021, https://www.citizen-times.com/story/news/local/2021/12/09/asheville-homeless-encampment-i-240-haywood-congregation-cleared/6448139001/ (last accessed May 28, 2023). According to reporting, "the area was razed [and] reduced to a raw stretch of turned earth as a North Carolina Department of Transportation crew cleared remnants with an excavator." Id. Rev. Amy Cantrell, co-director of BeLoved, is quoted as saying: "It's the very last place you think could be safe, and then it's taken away. People are pushed to the last edges, and then you can't even be there." Id.

18. It was reported that according to public records, the police participated in the removal of more than 20 homeless encampments in 2021, not including the incident on Christmas Day of that year in Aston Park. Ursula Wren, "Asheville Officials Removed More Than 20 Homeless Camps in 2021," THE ASHEVILLE FREE PRESS, January 10, 2022, https://www.ashevillefreepress.com/city-cleared-more-than-20-homeless-encampments-in-2021-public-records-show/ (last accessed May 28, 2023).

19. The December 8 camp sweep led to even more press and public scrutiny of the City and the police's actions with respect to the houseless population. City Council Member Kim Roney urged her fellow Council Members to formally ban encampment clearings at the Council's December 14 meeting, to no avail. https://council-minutes-archive.ashevillenc.gov/Minutes.2021-12-14.pdf (last accessed May 28, 2023).

20. The outrage from that December 8 camp clearing was so great that the City felt the need to issue a formal statement on December 10. In that statement, issued by Communications Specialist Polly McDaniel, the City cited "public safety and public health" as justifications for the camp sweep. "A message to our community: Regarding the I-240

homeless camp," https://www.ashevillenc.gov/news/a-message-to-our-community-regarding-the-i-240-homeless-camp/ (last accessed May 28, 2023).

21. The City's position as set forth in that statement was met with immediate pushback from community leaders. "Unsanitary conditions are not reasons to remove encampments; they are excuses to keep poverty out of sight and out of mind," Melanie Noyes, a member of the City's Human Relations Commission is quoted as saying. Wren, supra, ¶ 18. See also, Honosky, supra, ¶ 17 (quoting Rev. Brian Combs, founder of Haywood Street Congregation, saying: "It's traumatic. You're losing your home. There is an earth mover scraping your very existence away. Now you have to start all over again. That's an emotional injury that folks without housing have to endure over and over and over again.").

22. In response to what was deemed to be mean-spirited unjustified aggression toward people experiencing homelessness by City officials, exemplified by the December 8 camp sweep, a group of unhoused residents and housed volunteers gathered once again in Aston Park on December 19 "to make art, 'share space,' and 'make time for grief,'" according to a flyer created to advertise the event. Ursula Wren, "Community Art Party Leads to Multi-Day Demonstration Demanding 'Sanctuary Camp' at Aston Park," THE ASHEVILLE FREE PRESS, December 21, 2021, https://www.ashevillefreepress.com/community-art-party-leads-to-sanctuary-camping-demonstration/ (last accessed May 28, 2023).

23. The goal of the demonstration, according to its organizers, was to demand that the City allow "sanctuary camping" at Aston Park for people experiencing homelessless. Id. The event started in the early afternoon of December 19, and the participants were engaged

in various activities, including making art, and sharing food and supplies with unhoused people. Id.

24. At about 6p on December 19, officers from the Asheville Police Department arrived at the park and announced that all who had gathered there had to leave, because of a City ban on tent camping in its parks. Id. The police told the participants that the police would return at 10p when the park was scheduled to close, and that anyone refusing to leave would be arrested. Id. The police apparently did not follow through on that threat.

25. On the following day, December 20, participants once again gathered at Aston Park to create art, build support infrastructure for the unhoused, and demand that sanctuary camping be allowed at the park. Id. Included in the art were banners that called out the violence facing houseless communities, along with wider issues of gentrification and an over-saturated tourism market. David Forbes, "What the cameras showed," THE ASHEVILLE BLADE, March 29, 2023, https://ashevilleblade.com/?p=4670 (last accessed May 28, 2023).

26. Two days later, on December 22, an estimated 60 people showed up at Aston Park to continue the demonstration, which was by that point known as "the Aston Park Build," with the stated intent to "keep making space available to everyone that doesn't have shelter." David Forbes, "Christmas night crackdown," THE ASHEVILLE BLADE, December 30, 2021, https://ashevilleblade.com/?p=4121 (last accessed May 28, 2023). That afternoon, a high-ranking official with the Asheville Police Department advised those who were making art that what they were doing constituted "litter" and that they would be subject to arrest if they did not pack up immediately, although park closing time was still several hours away. Id.

27. Defendant Bliss was one of the reporters covering the events at Aston Park that week. She reported on the police official's threats on the Asheville Blade's Twitter account on the following day, calling out the official by name. https://twitter.com/AvlBlade/status/1474041846229839873 (last accessed May 28, 2023).

28. On Christmas Day 2021, Defendant Bliss visited Aston Park several times throughout the day and did not see any police present during the daylight hours. Forbes, supra, ¶ 25. Defendant Bliss returned to Aston Park a little before 10p, just as police were arriving in large numbers, with numerous vehicles and personnel. Id. At the District Court trial in this case, the night watch commander for the police, who was in charge of the operation, testified that every available unit was dispatched to the park for this event.

29. Defendant Coit was taking a break from covering the events at Aston Park, but she decided, because it was Christmas, to bring Defendant Bliss some food, knowing that she might not have time to get food herself. Both Defendants watched as the officers assembled in the park. Ms. Bliss was audio recording, and Ms. Coit was recording video and audio.

30. Shortly after 10p, the officers began approaching people in the park, telling them the park was closed and that they had to leave. According to officers' body cam footage, Defendants were the first people approached by officers. In one of the videos, an officer can be heard saying "Why don't we do [the journalists] first, since they're videotaping." Body cam video of Lt. McClanahan at approximately 17:32, https://youtu.be/SEcXcMUC1l8?t=1051 (last accessed May 29, 2023).

31. Both Defendants responded to the officers by asserting that they were members of the press. Ms. Bliss was wearing her press credentials. Ms. Coit produced their credentials as soon as the officers approached them.

32. The officers acknowledged in the District Court trial that Defendants had advised the officers of Defendants' status as journalists, but the officers refused to acknowledge any First Amendment considerations when dealing with Defendants. At trial, the night watch commander testified that it made no difference to him whether Defendants were press or not.

33. At approximately 10:29p, Defendant Coit was arrested, despite explaining to the officers that she was "working [and] covering a story about things that are happening." 4 – February 2023 Release at approximately 4:52, https://youtu.be/1UrKaP8J7HQ?t=292 (last accessed May 29, 2023). Moments before their arrest, Defendant Coit can be heard saying: "It's not illegal for the press to cover a story, which is what I am doing." Id.

34. As Defendant Coit was being arrested, another officer can be heard on the body cam footage saying: "This is your other member of the press. I wonder if he is going to wise up." 14 – February 2023 Release at approximately 20:22, https://youtu.be/nwpGVi3QStE?t=1222 (last accessed May 29, 2023). This officer was referring to Defendant Bliss, despite misgendering her and using the wrong pronoun for her.

35. Lt. McClanahan next approached Defendant Bliss, who was standing near a picnic area approximately 30 yards away from where the tents were located and clear of any police officers or other people in the park. Defendant Bliss was trying to observe the arrest of her colleague Defendant Coit, but she was keeping her distance so as not to interfere with any police activity. "Are you leaving, sir?" Lt. McClanahan called out to Defendant Bliss,

also misgendering her. 2 – February 2023 Release at approximately 20:34, https://youtu.be/SEcXcMUC1l8?t=1234 (last accessed May 29, 2023).

36. "I'm just covering the event as press," responded Defendant Bliss. "Clearly, I'm marked with identification as press," she continued, holding up her press badge. "Clearly, you are trespassing," said Lt. McClanahan, and ordered her placed under arrest at 10:30p. Id.

37. Ms. Bliss was taken to the paddy wagon first, and despite identifying as a woman and having a North Carolina Drivers License showing "F" for sex, was placed in the section of the vehicle designated for male prisoners.

38. Ms, Coit was placed in a separate compartment in the vehicle designed for just one prisoner.

39. Four other people were arrested that night. All four were charged with second trespassing (for remaining in the park after closing time) and resisting public officer (for not cooperating with the officers' instructions).

40. The vehicle then traveled to the Buncombe County Detention Center, where the Defendants were processed. Despite being the first arrested, Ms. Bliss was the last prisoner processed.

41. Defendants were both formally charged at the Detention Center with second degree trespass and released on a written promise to appear in court.

42. When Defendant Coit was being processed at the Detention Center, she witnessed an exchange between one of the arresting officers and the magistrate, in which the officer told the magistrate that Defendant Coit claimed to be a member of the press. The magistrate replied by asking, "Is she real press?" to which the officer replied, "No." It was

clear to Defendant Coit that this exchange showed that neither the arresting officer nor the magistrate considered Defendant Coit to be a "real" journalist.

43. When Defendant Bliss was arrested, her backpack containing her cell phone was seized from her. Despite repeated efforts to have that property returned to her, the police and District Attorney's Office refused to act, until more than two months had passed and the undersigned filed a motion for return of the property.

44. It was later learned through discovery that the police had sought and obtained a search warrant for Defendant Bliss' cell phone. In the search warrant application, the police revealed that they had conducted a "a review of Bliss's social media," that according to the affiant, revealed that "she has extensive links to anarchist extremist groups including Asheville Social Justice Schedules."

45. This action by the police in seizing and searching a journalist's phone, knowing that she is a journalist, indicates contempt for the journalist's role and an attempt to smear the journalist as a criminal actor, rather than a member of the press. Treating Defendant Bliss this way was a direct attempt to undermine her press credentials.

46. On January 11, 2022, the Asheville Police Department informed City Council that the seven-day notice requirement established in 2014 as official department policy was being reduced to 24-48 hours notice. Sarah Honosky, "Asheville police release new homeless policy: only 24-hour notice before camps cleared," ASHEVILLE CITIZEN-TIMES, February 17, 2022, https://www.citizen-times.com/story/news/local/2022/02/17/asheville-police-revise-homeless-policy-shorten-camp-removal-notice/6818082001/ (last accessed May 28, 2023). The actual policy was issued in written form on February 15, 2022, nearly two months after Defendants' arrests in this case. Id.

47. Over the past five years, the Asheville Police Department has received significant scrutiny from the press that has placed the Department in a bad light. In 2018, body cam footage of the arrest, tasing, beating and strangulation of a Black man named Johnnie Rush by white Asheville Police Department officers was leaked to the media. Joel Burgess, "Video shows Asheville police officer beating man suspected of jaywalking, trespassing," ASHEVILLE CITIZEN-TIMES, February 28, 2018, https://www.citizen-times.com/story/news/local/2018/02/28/video-shows-apd-officer-beating-man-suspected-jaywalking-trespassing/382646002/ (last accessed May 29, 2023). An international media firestorm ensued, and the incident was held up as emblematic of the kinds of cases that make Black communities distrust the police. See, e.g., German Lopez, "'I can't breathe': Black man pleads as police officer punches and chokes him," VOX, April 3, 2018, https://www.vox.com/2018/4/3/17192844/asheville-police-johnnie-rush-christopher-hickman (last accessed May 29, 2023).

48. In the Summer of 2020, several protests occurred in downtown Asheville in response to the killing of George Floyd by police. The Asheville Police Department's actions during those protests came under withering media scrutiny. The wanton destruction of a medic tent is discussed previously in this brief and was covered in the national media. John Boyle & Katie Wadington, "Fact check: Police did destroy a medic area during protests in Asheville, North Carolina," USA TODAY, June 3, 2020, https://www.usatoday.com/story/news/factcheck/2020/06/03/george-floyd-protests-police-destroy-medic-station-asheville/3124847001/ (last accessed May 29, 2023). Tear gas and rubber bullets were deployed against protesters. "Tear gas, rubber bullets at Asheville protest for a second straight night," WYFF 4 NBC, June 2, 2020,

https://www.wyff4.com/article/crowds-gathered-in-asheville-for-a-second-straight-night-of-protest/32736317 (last accessed May 29, 2023). At least one protester was blinded when a police officer fired a nonlethal munition at his head, resulting in a lawsuit against the City that was recently settled. Joel Burgess, "Suit over blinded Asheville George Floyd protester may be close to settlement," ASHEVILLE CITIZEN-TIMES, March 20, 2023, https://www.citizen-times.com/story/news/2023/03/20/suit-of-blinded-asheville-george-floyd-protester-in-settlement-talks/70020939007/ (last accessed May 29, 2023).

49. In August 2020, Defendant Coit was dragged out of her car and arrested by the Asheville Police Department while she was attempting to cover one of the protests for the Asheville Blade. Veronica Coit, "A Blade reporter's arrest," THE ASHEVILLE BLADE, August 16, 2020, https://ashevilleblade.com/?p=3904 (last accessed May 19, 2023). The undersigned represented Ms. Coit in that matter, and all charges were voluntarily dismissed by the District Attorney.

50. The cumulative effect of all this negative media coverage has been officially acknowledged by the City. In September 2020, as part of its after-action analysis of the police department and the city's response to the George Floyd protests, the City released the results of a survey of the police department in which officers were asked "What does safety mean to you?" Among the top answers were "No scrutiny from media" and "Knowing your decisions will not be scrutinized." Posted by the City at https://drive.google.com/file/d/1eWsJn3v-8FBmDQwzVAXRisOfdMIXFIsK/view, last accessed May 10, 2023.

51. The Asheville Blade has been in operation since 2014 and has a long history of expressing anti-police sentiment. Blade editorials have advocated for not only defunding

the police, but abolishing the police altogether. An article from earlier this month in the Asheville Blade refers to the officers who violently arrested a Black man as "murderous." David Forbes, "Southside crowd halts murderous cops," THE ASHEVILLE BLADE, May 17, 2023, https://ashevilleblade.com/?p=4741 (last accessed May 29, 2023).

52. The Asheville Police Department appears to have a policy in place that directs their officers to block any attempt by the public or the press to videotape their actions.[2]

Legal Argument

I. The Asheville Park Curfew Relied Upon by APD to Arrest The Defendants Is Unconstitutionally Overbroad As A Prior Restraint On First Amendment Activities Because It Sweeps Within Its Prohibition Clearly Protected Speech and Press Activity Without Any Exception For First Amendment Activity.

Chapter 12 of the Asheville City Code of Ordinances, which governs "Parks, Recreation and Public Places," contains the following section, which the APD relied upon to arrest Defendants in this case:

> **Sec. 12-41. Closing time.**
>
> a) All public parks within the corporate limits of the city shall be closed to the general public between the hours of 10:00 p.m. and 6:00 a.m. daily, and it shall be unlawful for any person to remain in or to enter such public parks between such hours, provided that the provisions of this section shall not apply to the following:
>
> (1) Employees or those employed by the city to maintain, protect or conserve such public parks in the regular performance of their duties.
>
> (2) Any public park or portion thereof where prior permission has been obtained from the director of parks,

[2] See video contained in https://www.citizen-times.com/story/news/2023/05/17/video-white-asheville-police-pin-black-man-by-neck-no-gun-found/70229000007/?utm_source=pash-DailyBriefing&utm_medium=email&utm_campaign=daily-briefing&utm_term=hero&utm_content=1122CT-E-NLETTER65

> recreation and public facilities for an activity to extend beyond 10:00 p.m.
>
> (b) Violation of this section shall be a misdemeanor and shall be punishable as provided in N.C. Gen. Stat. § 14-4.

Defendants contend that this ordinance is overbroad as a prior restraint on their First Amendment rights because it vests unbridled discretion in the City's director of parks and recreation as to whether to grant permission to be in a public park after 10pm. Such a facial challenge to legislation has been expressly permitted by the United States Supreme Court in FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990).

A. The Asheville Park Curfew Ordinance Fails the Prior Restraint Principle

The Asheville park curfew ordinance contains two exceptions to its general application. It provides that it does not apply (1) to City employees or (2) where "prior permission has been obtained from the director of parks, recreation and public facilities." Asheville City Code § 12-41(a)(2).

Thus, the only exception to the Asheville park curfew for non-employees of the City is to get permission from the director of parks and recreation. However, that exception fails the doctrine of prior restraint. In FW/PBS, Inc., the Supreme Court wrote:

> While "[p]rior restraints are not unconstitutional *per se*. . . [a]ny system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity." Our cases addressing prior restraints have identified two evils that will not be tolerated in such schemes. First, a scheme that places "**unbridled discretion in the hands of a government official or agency constitutes a prior restraint** and may result in censorship." "`It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees **contingent upon the uncontrolled will of an official — as by requiring a permit or license which may be granted or withheld in the discretion of such official** — is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.'"

FW/PBS, Inc., 493 U.S. at 225-26 (emphasis added) (internal citations omitted).

In this case, the City's director of parks and recreation has unbridled discretion as to whether to grant permission for anyone to remain in or enter a City park after 10pm. The ordinance contains no limitation on the time within which the director must make the decision on a request for permission. See Freedman v. Maryland, 380 U.S. 51, 56-57, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965) (holding that failure to limit decision-making time "contains the same vice as a statute delegating excessive administrative discretion."). Nor does the ordinance provide any standards that the director must apply when making the decision. The ordinance simply gives the director unbridled discretion in the matter.

The scheme established by the ordinance, with its absence of a time limitation on the director's decision, "creates a 'risk of delay,' such that 'every application of the [ordinance] create[s] an impermissible risk of suppression of ideas." FW/PBS, Inc., 493 U.S. at 223-24, quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 798 n.15, 104 S.Ct. 2118, 2125 n.15, 80 L.Ed.2d 772 (1984); see also Vance v. Universal Amusement Co., 445 U. S. 308, 316 (1980) (holding statute unconstitutional because it failed to place limits on the time within which the decisionmaker must issue the decision so that it restrained speech for an "indefinite duration").

B. A Park Curfew Without Meaningful Exceptions Is Unconstitutional.

Courts have been generally careful and prudent in assessing whether curfews are valid and constitutional exercises of government control over its citizens. But in many cases, curfews have been held unconstitutional. One type of curfews that have received substantial judicial review is those restricting the rights of juveniles. Those curfews are usually applicable to every

juvenile and apply to entire cities, unlike in our case, where the curfew only applies to public parks, which are traditionally considered to be public fora.

One example of a court invalidating a juvenile curfew is Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1981). There, the Fifth Circuit wrote that:

> "A law is void on its face for overbreadth if it 'does not aim specifically at evils within the allowable are of (government) control, but . . . sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of protected expressive or associational rights."

Johnson, 658 F 2d at 1071 (internal citations omitted).

The Johnson court noted that the curfew at issue had only an exception for "emergency errands." Id. at 1072. The court then held that "[s]ince the absence of exceptions in the curfew ordinance precludes a narrowing construction, we are compelled to rule that the ordinance is constitutionally overbroad." Id. at 1074; see also State v. J.P., 907 So.2d 1101, 1118 (Fla. 2004) (holding curfew unconstitutionally overbroad for not being narrowly tailored because it covered otherwise innocent and legal conduct by minors); W.J.W. v. State, 356 So.2d 48, 50 (Fla. 1st Dist. Ct. App. 1978) (holding curfew unconstitutional as "an arbitrary invasion of the inherent personal liberties of all citizens").

Another case where a juvenile curfew was found to be unconstitutional is Nunez v. City of San Diego, 114 F.3d 935 (9th Cir. 1997). That case concerned a then-fifty-year-old ordinance that essentially prohibited minors from being out of their homes between the hours of 10pm and daylight. Nunez, 114 F.3d at 938. The ordinance contained exceptions for when the minor was with their parent or custodian, on an emergency errand, returning home from a school function, or if the minor was employed. Id. The court took issue with several aspects of the ordinance, but most pertinent to our case is the Nunez court's examination of "whether the ordinance's

restrictions on legitimate exercise of minors' First Amendment rights makes the ordinance unconstitutionally overbroad." Id. at 949. The court found that the curfew implicated minors' First Amendment rights because it restricted access to any and all public fora. Id. at 950.

The court then applied the traditional three-part test to determine whether the ordinance was a reasonable time, place, and manner restriction, i.e., (1) whether it was content-neutral, (2) whether it was narrowly tailored to a significant government interest, and (3) whether it left open ample alternative channels for legitimate expression. Id. at 951 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 2753-54, 105 L.Ed.2d 661 (1989)). Applying that analysis, the court found that:

> The City did not create a robust, or even minimal, First Amendment exception to permit minors to express themselves during curfew hours without the supervision of a parent or guardian, apparently preferring instead to have no First Amendment exception at all. This is not narrow tailoring. We therefore need not reach the question of whether the ordinance leaves open adequate alternative channels of expression. The ordinance is not a reasonable time, place, and manner restriction under the First Amendment.

Id. The same is true about the ordinance in our case. The City has not created any First Amendment exception to permit anyone to engage in any First Amendment-protected activities in City parks after 10pm. Accordingly, the ordinance in this case is not a reasonable time, place, and manner restriction under the First Amendment, and must be struck down.

A third example of a juvenile curfew being found unconstitutional is the case of Hodgkins v. Peterson, 355 F.3d 1048 (7th Cir. 2004). There, the court struck down a curfew in Indiana that provided for an affirmative defense for minors arrested while participating in, going to or returning from a First Amendment activity. Hodgkins, 355 F.3d at 1051. The Seventh Circuit found that even with that affirmative defense, the threat of arrest unconstitutionally

chilled protected First Amendment activity. Id. Here, it is more than the threat of an arrest that served to chill Defendants' First Amendment rights. They were actually arrested for trying to exercise those rights, which is the ultimate chilling of those rights. Following the reasoning of Hodgkins, the ordinance in this case must be struck down.

The constitutional principle of requiring enough exceptions to a curfew statute to allow it pass constitutional muster was discussed and applied in Schleifer v. City of Charlottesville, 159 F.3d 843 (4th Cir. 1998), where the court found that the challenged curfew was constitutional because it contained eight detailed exceptions including the exception to "engage freely in any activity protected by the First Amendment." Schiefer, 159 F.3d at 852.

Asheville's limited exemption to the park curfew ordinance is an impermissible prior restraint, because there are no exceptions to the curfew for First Amendment activities, no time limit is set for the director to decide on a request for permission to remain in a park after 10pm, and the decision as to whether to grant that permission is within the sole unbridled discretion of the director. Accordingly, the ordinance must be struck down as unconstitutional.

The juvenile curfew cases are instructive for at least two reasons. First, those cases make clear that the inclusion of exceptions to a curfew ordinance is required to protect First Amendment activities, and protection for all citizens must be broader than protection for just juveniles. Second, protection for conduct in public fora must be stronger still than protection for other locations. That brings us back to the Asheville ordinance. Defendants ask the simple and dispositive question: does the Asheville park curfew ordinance protect news gathering, news reporting, assembly, political speech or religious behavior? The answer is unequivocally no.

Another reason that the exceptions contained in the ordinance are insufficient is that newsworthy events are seldom known about in advance. As here, the request for permission

would not have been a useful approach to allow a reporter to cover newsworthy action, because the police clearing of the encampment was not known in advance. Even if a reporter's request to cover that news might hypothetically have been granted, the grant would have come too late, especially given that there is not even a time limit specified for the director's decision on a request. Since news often occurs without warning, the exception allowing consideration of a request for permission is completely meaningless to protect reporters' rights to gather news.

Furthermore, the exception for government action by City employees is stated clearly and definitively. But that government activity, while certainly lawful, and perhaps in some cases protected by the Due Process Clause and the Eleventh Amendment, is no more entitled to protection than the First Amendment rights of free speech and freedom of the press.

The Asheville park curfew ordinance is overbroad as a matter of law, because it contains no protection for the well-established rights of the public, the press and the religious under the First Amendment.

II. The Curfew Ordinance Was Used by the APD to Deny Defendants Their Constitutional Rights as Journalists for Access to an Important Event in which the Public Had An Interest and a Right to Know

If this Court finds that the park curfew ordinance is constitutional on its face, Defendants contend that its application to Defendants is unconstitutional. The police applied the ordinance specifically and intentionally to thwart Defendants' coverage of the police's actions that night in such a way that it violated Defendants' constitutional rights. The police took full advantage of the ordinance. They scheduled their clearing of the Aston Park encampment, which they knew to be controversial and of great public interest, for 10pm on Christmas night specifically to weaponize the curfew against reporters who had a history of openly and directly criticizing the police. The police did this in order to avoid media and public scrutiny. Defendants' sin, it seems,

in the view of the police, was not so much their presence in the park, but their recording of what they saw.

The recent Fourth Circuit case in People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed'n, 60 F.4th 815 (2023) (hereinafter "PETA"), is particularly instructive on this point. In PETA, the Court considered a North Carolina statute that sought to criminalize newsgathering on private property as trespassing. See generally PETA, 60 F.4th at 832-33. North Carolina contended that the statute was "'generally applicable law[]' and such laws 'do not offend the First Amendment simple because their enforcement against the press has incidental effects on its ability to gather and report the news.'" Id. at 825.

The PETA court rejected that argument, finding that:

> While Associated Press[v. United States, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945)], for example, held that newspapers cannot use their press status as defense to antitrust law, Eastern Railroad Presidents Conf. v. Noerr Motor Freight Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and United Mine Workers v. Pennington, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), clarified that speakers—press or not—can raise as defense the fact that antitrust laws are being applied to them because of their speech.
>
> * * *
>
> Laws cast in broad terms can restrict speech as much as laws that single it out. . . . But legislatures do not write themselves out of the First Amendment analysis simply by extending a statute's reach**. General or not, the First Amendment applies when the Act is used to silence protected speech.**

Id. at 826-28 (emphasis added). That is exactly what happened in this case. The police used the park curfew ordinance to silence Defendants' protected right to gather the news.

The Fourth Circuit continued on to state that:

> If the First Amendment has any force, such "creation" of information demands as much protection as its "dissemination." . .

> . "Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." And the right to publish a recording would be "largely ineffective, if the antecedent act of making the recording is wholly unprotected." No surprise, then, that scores of Supreme Court and circuit cases apply the First Amendment to safeguard the right to gather information as a predicate to speech.

Id. at 829 (internal citations omitted).

Applying the reasoning from PETA to the instant case, we see that although the Asheville park curfew ordinance is written broadly, with no content-based restrictions and appears to be generally applicable, it still can be used to "silence protected speech," as it did in this case when the police used the ordinance to prevent journalists from doing their protected jobs as guardians of the public trust.

Furthermore, as the PETA court recognized, the right to free speech is intertwined with the right to record, gather information and publish as that right to gather information is a predicate to speech. Defendants were not only working for themselves, but they were working for and in the public's interest. To punish the Defendants by arresting them, the City of Asheville and the APD effectively struck a punitive blow on its citizens. The message to the public from the police is, let us do our job, secretly, and with no accountability. And if you try to make us accountable, we will punish those who seek to bring scrutiny to our ranks. This type of thinking would find a home more comfortably in Russia than in the United States.

A. The Role of the Press in Our Democracy

The role of the press is integral to a working, functioning democracy. Some have called the press the Fourth Branch of government or "the Fourth Estate." This is because the press is not a mere passive reporter of facts, but rather a powerful actor in the political realm. A free press is essential as a critical check on the power of the other three estates and serves as a

watchdog to hold elected and unelected officials accountable for their actions. We, as citizens, would like to believe there is a stark difference between the United States and Russia, a country where journalists who speak out against the government are arrested and detained.[3] That is the question before this Court. Should the police be allowed to weaponize a law such as the park curfew in this case to arrest journalists for doing their job, a job essential to the proper workings of a democratic society and government?

The courts have weighed in on the role of the press and the power of government to suppress press access from public fora, such as the public park in this case:

> The Supreme Court has repeatedly observed that excluding the media from public fora can have particularly deleterious effects on the public interest, given journalists' role as "surrogates for the public." *Richmond Newspapers, Inc. v. Virginia* , 448 U.S. 555, 572–73, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980); *Cox Broad. Corp. v. Cohn* , 420 U.S. 469, 492, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) ("Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.").

Index Newspapers LLC v. U.S. Marshals Serv., 977 F.3d 817, 830 (9th Cir. 2020).

> "The free press is the guardian of the public interest," and "[o]pen government has been a hallmark of our democracy since our nation's founding." *Leigh* [v. Salazar], 677 F.3d [892,] . . . 897, 900. "In a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations." *Cox Broad. Corp*. , 420 U.S. at 490–91, 95 S.Ct. 1029. Transparency assures that the government's response is carried out "fairly to all concerned," and public access discourages "misconduct of participants, and decisions based on secret bias or partiality." *Richmond Newspapers*, 448 U.S. at 569, 100 S.Ct. 2814.

[3]Joe Parkinson & Drew Hinshaw, "Evan Gershkovich Loved Russia, the Country That Turned On Him," THE WALL STREET JOURNAL, March 31, 2023, https://www.wsj.com/articles/wsj-reporter-evan-gershkovich-detained-russia-cd03b0f3 (last accessed May 15, 2023).

Index Newspapers, 977 F.3d at 831.

It cannot be stated more succinctly. The press is the guardian of the public interest. The Court has a duty to protect that interest.

B. Access of the Press

As the attached Declaration of Gregg P. Leslie makes clear, news gathering is an expressly protected activity under the First Amendment. Leslie Declaration ¶¶ 6-11. Professor Leslie points out that: "for journalists, a great deal of importance has always been placed on covering newsworthy events first-hand and talking to all involved, even if that meant risking their own safety in many cases." Id. at ¶ 9. "Journalists will often feel their article will only be fair and complete if they get close to the action." Id. at ¶ 11.

The Court in Index Newspapers noted that:

> [T]he Supreme Court articulated a two-part test to determine whether a member of the public has a First Amendment right to access a particular place and process. *Press-Ent. Co. v. Superior Court of Cal.*, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). First, a court must ask "whether the place and process has historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular process in question." *Id*. at 8, 106 S.Ct. 2735. If a qualified right of access exists, the government can overcome that right and bar the public by showing that it has "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 9, 106 S.Ct. 2735.

Id. at 829.

In this case, Defendants were told they would have to leave the park entirely to avoid arrest. That would have completely prevented them from either seeing or hearing anything that went on in the park. Therefore, the police, by their actions, directly prevented Defendants from having any access to the news they were there to cover.

The issue of houselessness in Asheville is a topic of prime concern to the public.[4] The public wants to know how the government will deal with people who have become homeless or houseless. There has been debate and criticism of the heavy-handed approach by the APD. [5]

Aston Park is a public park and thus is a

> [q]uintessential example[] of a "public forum" . . . to which the public generally has unconditional access and which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purpose of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Committee for Industrial Organizations,* 307 U.S 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939) (opinion of Roberts, J.). Public parks, streets and sidewalks are public forums because open access by all members of the public is integral to their function as central gathering places and arteries of transportation. Public access is not a matter of grace by government officials but rather is inherent in the open nature of the locations.

United States v. Kokinda, 497 U.S. 720, 743 (1990) (Brennan, J., dissenting).

In applying the Supreme Court's two-part test from Press-Enterprise II to this case, it is clear that Aston Park has been historically open to the press and general public and as a public park it has "play[ed] a significant positive role in the functioning" of the gathering of people to either enjoy the park, gather, or gather to protest in utilizing their First Amendment rights. Press-Enterprise II, 478 U.S. at 8-9. Thus, a qualified right of access exists, and the first prong of Press-Enterprise II has been met.

The second prong of the Press-Enterprise II test places the burden on the State to show it has "an overriding interest based on findings that closure is essential to preserve higher values

---

[4]https://www.ashevillenc.gov/department/community-economic-development/homeless-initiative/overview-of-homelessness-in-asheville/

[5]https://wlos.com/news/local/public-safety-coalition-asheville-police-misrepresented-homeless-issue-crime-advocacy

and is narrowly tailored to serve that interest." Id. In this case, the State must show that the actions of the APD in arresting the Defendants and thus denying them First Amendment press access to the incident and actions of the police was "essential to preserve higher values and [was] narrowly tailored to serve that interest." Id. The State cannot do so in this case.

The facts of this case show that the APD weaponized the curfew to curtail the rights of the press to videotape and report the actions of the police to the public. Defendants were peaceful, they did not get in the way of the APD, they carried clearly marked press passes and clearly and consistently identified themselves as members of the press, and as they stated and reported to the police at the incident, were there to only videotape and record the actions of the police. Defendants' purpose for being in the park was to serve the public's interest.

C. The Defendants Were and Are Unquestionably Journalists

As indicated by the exchange in the Detention Center between the officer who arrested Defendant Coit and the magistrate, and the seizure and subsequent search of Defendant Bliss' phone, the police did not consider either Defendant to be "real" or "legitimate" journalists, and therefore, the police felt that they were not violating any First Amendment protections by their actions against Defendants. Accordingly, it is necessary for Defendants to present the expert testimony of Professor Leslie on that point.

Professor Leslie notes that this question of who is a journalist is a relatively new one. In the past, the police would issue press passes to reporters who worked for traditional media outlets, so they would know who on the scene was there as a journalist. Leslie Declaration at ¶ 12. But now that so many people get their news from online sources, the police and entities such

as the U.S. Congress and the White House have gotten out of the business of making such determinations. Id. at ¶¶ 13-15.

But sometimes, for the purposes of statutes such as the North Carolina reporter's shield law, legislatures have sought to define the term. For instance, the North Carolina General Statutes provides the following definition of who is to be considered a "Journalist":

> **§ 8-53.11. Persons, companies, or other entities engaged in gathering or dissemination of news.**
>
> (a) Definitions–The following definitions apply in this section:
>
> (1) Journalist. – any person, company, or entity, or the employees, independent contractors, or agents of that person, company, or entity, engaged in the business of gathering, compiling, writing, editing, photographing, recording, or processing information for dissemination via any news medium.

Leslie Declaration at ¶ 16. Similarly, the federal regulations implementing the Federal Freedom of Information Act provide that the term:

> Representative of the news media means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term 'news' means information that is about current events or that would be of current interest to the public.

Id. at ¶ 17 (quoting 45 CFR § 1602.2(k)).

By either of these definitions, both Defendants are journalists. Neither definition focuses on the employment status or organizational affiliation of the person. Id. at ¶ 18. Nonetheless, both Defendants have been paid employees for a period of time of an established media company, The Asheville Blade, which has been publishing news in Asheville for nearly ten years.

At the time of the incident, Defendant Bliss wore a clear and distinct press badge and displayed it to the officers she encountered. Defendant Coit communicated clearly they were press. Both Defendants were actively recording the police action against the homeless encampment that night.

The opinions of the magistrate and arresting officer expressed in the Detention Center and the results of the police's "review" of Defendant Bliss' social media do not alter the fact that both Defendants are journalists. As Professor Leslie points out, a journalist need not be politically neutral for the First Amendment to apply to them. Id. at ¶¶ 21-27. Historically, Professor Leslie notes, journalists worked directly with political parties and openly displayed their opinions and biases. Id. at ¶ 22. Even today, journalists such as Rachel Maddow of MSNBC "proudly flaunt[s her] particular political agenda." Id. at ¶ 23. But that fact makes her no less a journalist.

In this case, the Defendants' political leanings were well known to the police and other City officials. In fact, it appears that their treatment by the police was directly motivated by their politics and their affiliation with the Asheville Blade and its openly anti-police sentiments. Thus, the police's actions against Defendants appear to have violated not only their rights as journalists, but also their rights to free speech and freedom of association, leading to multiple First Amendment violations.

Notably, at no time did Defendants interfere or get in the way of the police operation. Defendants were there to perform their duties as journalists and nothing more. The police knew they were journalists, agreed that they were journalists, yet arrested them first before the police took any other actions against any of the protesters and campers. The timing of the arrest was geared to deny the public the benefit of the press at the police action.

The APD's targeting of Defendants and weaponization of the park curfew against them violated their rights under the First Amendment. Because the park curfew ordinance was unconstitutionally applied to Defendants, the charges against them must be dismissed.

III. Conclusion—The Court Should Dismiss the Charges Against Defendants as an Unconstitutional Application of an Overly Broad Statute

The Court should find that the Asheville park curfew ordinance is overbroad as a matter of law, because it contains no protection for the well-established rights of the public, the press and the religious under the First Amendment, and that for that reason, the charges against Defendants should be dismissed. In the alternative, the Court should find that the Asheville park curfew ordinance was unconstitutionally applied to Defendants, and for that reason, the charges against them should be dismissed.

As the Court found in PETA, the government's use of a generally broad statute to silence protected speech is impermissible and unconstitutional. The facts of this case clearly bear this out and should yield the same finding that the PETA court put forth.

- The Defendants were at the scene as press.
- They have a history of acting as press and are legitimate journalists under North Carolina statutes and federal law.
- They were at Aston Park solely for the purpose of being the guardians of the public trust; recording and publishing information important to the citizens of Asheville.
- APD singled out the Defendants to be the first citizens arrested, so as to prevent the Defendants from videotaping any other arrests or APD actions against the houseless encampment.

- APD unlawfully confiscated the cell phone of one of the Defendants and searched that cell phone without any justification, thus showing their contempt for members of the press.
- APD has publicly expressed the position that they do not want scrutiny from the press.
- APD has publicly shown that they will direct their officers to block the public and/or press's use of videotaping equipment to video tape APD incidents.
- APD knows who Defendants are and is aware of their criticism of APD.
- The Defendants did not in any way interfere with the actions of APD as they entered the park to encounter and arrest members of the encampment.

The Asheville park curfew ordinance is unconstitutionally overbroad. The City of Asheville and the APD should not be allowed to weaponize a generic and general ordinance, as held in PETA, to violate, suppress and prevent the Defendants from not only exercising their constitutional rights as journalists, but in the greater picture, from preventing the public to have its right to know and see what its government agents are doing in the public's name. If this Motion To Dismiss is not granted, Defendants reserve the right to assert an affirmative defense under PETA that a generally applicable ordinance was used to specifically target them.

WHEREFORE, the Defendants respectfully request these matters be dismissed.

Respectfully submitted,

This, the 30th day of May, 2023.

Ben C. Scales, Jr.
NC State Bar No. 34873
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served to the Buncombe County District Attorney's Office by hand-delivery in Court, by depositing in the U.S. Mail First Class, by facsimile, or through electronic means established by the District Attorney's Office.

This, the 30th day of May, 2023.

Ben C. Scales, Jr.

STATE OF NORTH CAROLINA COUNTY OF BUNCOMBE	IN THE GENERAL COURTS OF JUSTICE SUPERIOR COURT DIVISION 21 CRS 90691, -95
STATE OF NORTH CAROLINA, Plaintiff, vs. MATILDA RAE BLISS and, MELISSA ANN COIT Defendants.	**DECLARATION OF GREGG P. LESLIE**

I, Gregg P. Leslie, an attorney admitted to practice in Arizona and the District of Columbia, declare under penalty of perjury that the foregoing is true and correct, and would be my testimony if I were in a court of law:

1. I am a professor of practice and the Executive Director of the First Amendment Clinic at Arizona State University's Sandra Day O'Connor College of Law in Phoenix, Arizona. I have been in this position since 2018.

2. Before that, I was the Legal Defense Director for The Reporters Committee for Freedom of the Press, a nonprofit organization based in Washington, D.C., that was formed in 1970 by a group of journalists to defend the rights of the press before courts and legislatures. I served as a staff attorney and/or legal fellow at that organization since 1991, and as Legal Defense Director between 2000 and 2018.

3. In all of that time since 1991, I have been directly involved in helping journalists defend their rights, whether formally before courts or just with opposing

counsel (for instance, with threats of libel suits) or other authorities, including police (such as practices governing covering public demonstrations, protests and even riots).

4. Every four years from 1992 to 2016, I managed a hotline for the Reporters Committee for the Republican and Democratic national conventions, either in-person in the convention cities or from Washington, D.C., with a local law firm providing assistance at the event. Most of the issues that came up involved journalists covering the protests that always occurred at the conventions, and there were always at least a few instances of reporters getting swept up in mass arrests. Our job was to help get them released before being charged, or in a few instances, defending them after arrest. At all other times, I supervised the Reporters Committee's general hotline for reporters with legal questions.

5. I file this declaration to help clarify what rights journalists have when covering police activity and who should be considered a journalist for purposes of accommodating that right to cover newsworthy events.

Protections for newsgathering

6. It has never been perfectly clear as a legal matter as to what extent journalists are allowed to cover news during an emergency or ongoing police activity. Courts have long recognized that of course there is some level of constitutional protection for news reporting, and in 1972 the U.S. Supreme Court stated that, "Nor is it suggested that newsgathering does not qualify for First

Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665 (1972).

7. Typically, then, news reporters and photographers were not interfered with when they covered police activity, including riots. It was rare for journalists to be arrested or targeted, and when they were, that itself became a newsworthy story. Police knew journalists were watching as the eyes and ears of the public, and generally would not interfere with that activity.

8. In my time at the Reporters Committee, we always publicized and kept track of incidents where reporters were arrested. Today, that work continues through a collaborative effort called The U.S. Press Freedom Tracker, which shows for instance that there were 15 documented arrests of journalists in 2022. *See* https://pressfreedomtracker.us/

9. It is tempting for some members of the public and other public officials to think that journalists should not be anywhere near an event like a mass arrest, a protest, or any large-scale police activities. But for journalists, a great deal of importance has always been placed on covering newsworthy events first-hand and talking to all involved, even if that meant risking their own safety in many cases.

10. Getting information from a government briefing will never be satisfactory, simply because it means having to accept one side's narrative. There's a big difference between attending such a briefing and being at the place where news occurs – or more generally being "in the room where it happens," as

popularized by the musical *Hamilton*. Hearing how police say they conducted an operation is just not as credible as seeing how police actually acted.

11. Journalists will often feel their article will only be fair and complete if they get close to the action and even try to speak to those involved. And many times the comments they seek from officials or participants only come after pursuing their subject, even sometimes stubbornly repeating questions rather than taking a first "no comment" as the final word. Journalism is not a precise science, where questions can be offered and answered methodically; instead, it is a skill where sometimes you have to look a little bit like a bully and rephrase the question and then follow the person as they walk away. Some of the best journalism is done that way, and while it doesn't always look good, it's how you get a good story as a journalist and it's considered perfectly ethical behavior. That's how good journalism is done.

Defining who is a "journalist"

12. It used to be that everyone knew exactly who the journalists were, because they were working full time for a newspaper, broadcast station or a magazine. Traditionally, police agencies had press pass policies that allowed greater access to newsworthy events in exchange for registering with the police, so there was greater knowledge of who the journalists on any given scene were. With such a press pass, journalists were typically allowed to go where the general public were not, usually even beyond police tape at an emergency scene. It used to be when we

were doing these hotlines for journalists at the political conventions, we would say, "Make sure you register with the police department to get police credentials," because police credentials are meaningful in the sense that they get you behind a police line.

13. In the last few decades, of course, journalism has changed substantially, with most people getting their news from online sources. It became almost impossible for government agencies, including police departments, to determine who would be considered a "journalist," and most such groups stopped the practice of administering a credentials program.

14. In addition to the practical difficulties, government agencies also usually recognized that it was not their role to determine who should qualify as a journalist and benefit from constitutional protections.

15. And so many organizations have given up. In fact, the U.S. Congress and the White House long ago gave up the task of determining who was a journalist and turned that job over to the press galleries themselves to decide who is a journalist.

16. Nonetheless, sometimes courts and legislatures have to determine who is considered a "journalist" for purposes of allowing for a testimonial privilege from revealing sources (such as in the North Carolina reporter's shield law, N.C. Gen. Stat. § 8-53.11, as pointed out in the Defendants' Motion to Dismiss).

17. For purposes of the Federal Freedom of Information Act, "Representative of the news media means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials

into a distinct work, and distributes that work to an audience. In this clause, the term 'news' means information that is about current events or that would be of current interest to the public." 45 CFR § 1602.2(k).

18. This definition is clearly broad and specifically does not look to the employment status or organizational affiliation of a journalist, but instead concentrates on the function they are performing.

19. This is very similar to the standard that many federal courts have used when determining if a reporter has a First Amendment right not to testify in federal court, where there is no shield law. The most popular and influential decision in this area comes from a Second Circuit case, *Von Bulow by Auersperg v. Von Bulow*, 811 F.2d 136 (2d Cir. 1987), where the court found, "We hold that the individual claiming the privilege must demonstrate, through competent evidence, the intent to use material — sought, gathered or received — to disseminate information to the public and that such intent existed at the inception of the newsgathering process."

20. Again, the court looked to the function being performed, not the employment status of the individual. The *Von Bulow* standard has been used by many courts since then.

The role of opinion or bias in journalism

21. When courts and legislatures are trying to define journalists, they also do not attempt to impose a requirement of political neutrality. The definition of who is

a journalist does not have anything to do with whether a particular person is opinionated or tries to appear neutral.

22. There was historically a tradition that journalists were opinionated and even biased, often directly working in collusion with political parties. Yet those journalists still have First Amendment rights. And while traditional journalists for much of the 20th century prized the appearance of objectivity, there were always discussions of bias and political leanings and how they influenced journalism.

23. In the modern era, many Internet-based journalism organizations proudly flaunt a particular political agenda. Even more traditional organizations do not shy away from allowing commentary in their coverage. Rachel Maddow of MSNBC is often brought up as an example of this. It's clear what perspective she has and what opinion she's promoting, but she does good journalism at the same time. On the other side of the spectrum, publications like the Wall Street Journal also favor particular political positions while still maintaining credibility as good journalists. And of course there are plenty of other news organizations that have more political agendas while achieving lesser levels of credibility with the public, yet they still maintain the same First Amendment rights as any other speaker.

24. The standards of objectivity in journalism are often seen as an aspirational goal to always tell a complete story, rather than a specific requirement to remain apolitical. There's a long tradition in this country dating back to the founding era of newspapers endorsing candidates, and taking a position on an issue

is not the kind of "conflict of interest" that would keep some individual or organization from being defined and protected as a journalist.

25. Courts don't evaluate the opinions and biases of journalists when they determine who, for instance, gets to attend a public trial. They recognize that they shouldn't be making those kind of judgment calls because the public demands that all voices or all listeners be represented there. The public will always look for and judge biases in journalism, as they should. But that doesn't limit who has the legal rights of a journalist. As an ethical practice, it's always good to disclose any agenda or bias, or even if you are approaching something from a particular perspective and it's not obvious by the nature of the writing. But there is no absolute rule as to what you should or shouldn't publish, and an opinion should never lead to a news organization being denied the right to cover public events.

26. The biases and conflicts that journalists need to avoid are things like hiding the fact that they may be profiting off of particular events, like investments in corporations covered in the news. It's that kind of direct conflict of interest that's much more relevant to whether someone has the protections of the First Amendment, not whether they believe that, as in the present case, homeless people should not be subject to police action when they're camping in a park.

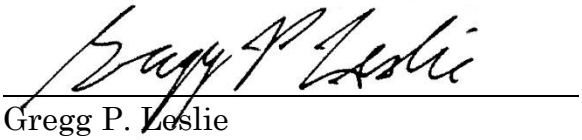
27. In this vein, a federal court in New York City held that a film crew that made a documentary about the "Central Park Five," a group of people accused of a vicious rape and beating that garnered national attention, deserved the protections of independent journalists despite a longstanding relationship between the

filmmakers and the accused individuals and statements made by the filmmakers that they sympathized with the group. *See In re McCray et al.,* 928 F. Supp. 2d 748 (S.D.N.Y. 2013). The court said that "consistency of point of view does not show a lack of independence where, for example, a filmmaker has editorial and financial independence over the newsgathering process. … Indeed, it seems likely that a filmmaker would have a point of view going into a project."

Conclusion

28. For the above reasons, this Court should recognize that the right to gather the news deserves protection and bars arrests simply for recording events and asking questions during a public event, even when the journalists involved come to the story with a particular political viewpoint.

I declare under penalty of perjury that the foregoing is true and correct.



Gregg P. Leslie
First Amendment Clinic
ASU Sandra Day O'Connor College of Law
111 E. Taylor St.
Phoenix, AZ 85013

Date: May 30, 2023