ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Massachusetts

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April 18, 2023

Via Email and First Class Mail

Board of Selectmen
Town of North Brookfield
Chair, Jason Patraitis
Vice Chair, John Tripp
Member and Clerk, Elizabeth Brooke Canada
215 North Main Street
North Brookfield, MA 01535
Via: https://www.northbrookfield.net/user/83/contact

Re: Unconstitutional withdrawal of permit for Small Town Pride Event on Town Common to the extent it includes any drag performance

Dear Members of the Select Board of North Brookfield:

I write on behalf of the American Civil Liberties Union of Massachusetts, Inc. ("ACLUM") to request that this Board immediately restore to the Rural Justice Network ("RJN") the previously approved permit for an LGBTQ+ Pride event on the North Brookfield Town Common on June 24, 2023, that includes drag performance.

The rescission by a 2-1 vote on April 11, 2023 of the previously approved permit to the extent it allowed for inclusion of a "drag show" clearly violates the free speech guarantees in Article 16 of the Massachusetts Declaration of Rights and the First Amendment to the United States Constitution, as well as the equal protection guarantees enshrined in Article 1 of the Massachusetts Declaration of Rights and the Fourteenth Amendment to the United States Constitution.

Moreover, it sends a horrible message of bigotry and bias, including to the children whose interests the majority asserted as justification for its action.[1]

[1] Video of the March 28, 2023 meeting in which the request for resources for the event including drag performance was approved is available at https://www.youtube.com/watch?v=0fluKP0jMcE. Although the Board gave their approval, comments at that meeting presaged what was to come on

Bases for concerns about permit rescission

The action of this Board clearly violates free expression rights. The North Brookfield Town Common is a traditional public forum where protection for free expression rights is at its height. *Mass. Coalition for the Homeless v. Fall River*, 486 Mass. 437, 441(2020) (quoting *Benefit v. City of Cambridge*, 424 Mass. 918, 926–27 (1997)); *see also Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"). The government's ability to limit expressive activity in a public forum is "sharply circumscribed." *Perry Ed. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

The event scheduled for June 24, 2023 on the Town Common—entitled "Small Town Pride"—is for the purpose of politically expressive activity concerning the need for recognition and support for LGBTQ+ members of the community. The decision by a majority of the Board to rescind the previously approved permit and approve a permit only on condition it does not include any drag performance is a plainly unconstitutional content-based and indeed viewpoint-based restriction on free expression. It was based on the majority's conclusion that a "drag show"—a term the majority never defined– is not "family friendly" and/or is "wrong." See video recording of April 11, 2023 meeting. This is censorship based on the content of the proposed speech and the viewpoint it expresses, including that gender identity may be fluid and individuals should be treated equally and accepted regardless of how they choose to express their identity.

Such restrictions are forbidden by Article 16. *Barron v. Kolenda,* __ Mass. __, 203 N.E.3d 1125, 1138, 1139 (2023) (strict scrutiny always applies to content-based restrictions on political speech under Article 16 and "art. 16, like the First Amendment, certainly does not permit viewpoint discrimination"). In the *Barron* case, the SJC just recently emphasized how robust free expression protection is under Article 16, regardless of whether the content of speech meets individual government officials' notions of what is sufficiently civil or appropriate.

There is no compelling government interest in preventing people dressed in clothes typically associated with a gender other than the one assigned to them at birth from appearing in a traditional public forum,

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April 11, 2023, which can be viewed here: https://www.youtube.com/live/kggrvDTSdZo?feature=share.

including a public forum where children will be. Such performance simply and joyfully expresses the views that one need not be bound by one's gender identity as assigned at birth and, more generally, that those who may not conform to stereotypical societal expectations in other ways should be accepted and welcomed in our communities. There is no compelling governmental interest in squelching those views, regardless of the personal views of members of the Board or other members of the public. *Barron, supra.* Indeed, the asserted interest is antithetical to a compelling governmental interest, particularly given data referenced at the March 28 Board meeting about how holding inclusive events reduces societal harms, including depression and suicide among LGBTQ+ children and adults.

Even assuming the Board's prohibition were supported by any compelling interest (which it is not), restrictions on any and all drag performance in public forums are overbroad and not narrowly tailored to serve any compelling interest. For related reasons, what is being prohibited is too vague to withstand constitutional challenge, particularly given the intersection with free expression rights.[2] What exactly does the rescission mean is forbidden at the June 24 event? What is the definition of drag that is being used? Is the Board purporting to prohibit anyone coming to the event in clothing associated with a gender not assigned at birth or something else? What is the definition of a "show"? [3] Is the Board purporting to prohibit any person who attends in drag from dancing or singing along to music while there? Or are they prohibited "only" from dancing in some specific way? Or is the Board purporting "only" to prohibit RJN from designating a space for people specifically designated as drag performers? This vague, viewpoint and content-discriminatory, and overbroad restriction on free expression is unconstitutional. *See, e.g., Friends of George's, Inc. v. Tennessee,* __ F. Supp. 3d __, 2023 WL 2755238 (March 31, 2023)(court enters preliminary injunction against statute making adult cabaret entertainment unlawful in any place where could be observed by a child because it engages in content and viewpoint discrimination and is too vague).

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[2] Vagueness concerns apply with particular force in this context. *See United States v. Williams*, 553 U.S. 285, 304 (2008); *Vill. Of Hoffman Ests. V. Flipside, Hoffman Ests., Inc.,* 455 U.S. 489, 499 (1982) ("[P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply"); *Commonwealth v. Abramms*, 66 Mass. App. Ct. 576, 581 (2006) ("An additional principle to be noted is that '[w]here a statute's literal scope . . . is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts'").

[3] Would a performance like this one on Sesame Street count? https://www.youtube.com/watch?v=f-YxjLUnnP0

Certainly, the rescission of the permit for an event including any drag appearance cannot be justified by the assertion that such performance constitutes "adult entertainment," as the majority sought to do. For one thing, the provisions of the zoning code that were cited apply only to "Commercial and Industrial Uses." See Table 2, p. 16. The Small Town Pride event is not a commercial or industrial use. And the cited provisions are not applicable to use of the traditional public forum of the Town Common. In addition, while it is not entirely clear what definition of "adult entertainment" the Board was referring to,[4] no such definition could constitutionally be applied to bar protected expression based on its content and viewpoint in a traditional public forum. The fact that some members of the Board or the public find the expression "not family friendly," "wrong" or "not appropriate" (as one member of the public said at the April 11 meeting) cannot justify free expression restrictions. While speech that rises to the level of true obscenity under strict standards set by the U.S. Supreme Court is unprotected expression, *Miller v. California,* 413 U.S. 15 (1973)(among other things, must lack "serious literary, artistic, political or scientific value"), there can be no argument that the drag performance planned for this event qualifies as such. And if individual parents do not wish their children to view such performances, they can direct them not to, including those who live across the street from the Common. The fact that someone chooses to live across the street from a traditional public forum, or to engage in activities there, does not give them a right to control what other members of the public can express on property owned by and dedicated to use and expression by the public as a whole.[5]

In addition to violating free expression, the restriction against drag performance also constitutes unlawful discrimination on the basis of sex under Article 1 of the Declaration of Rights as amended. *Commonwealth v. Carter*, 488 Mass. 191, 202 (2021) (holding equal protection guarantees apply

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[4] To the extent the zoning by laws were amended as proposed in 2021 to add a definition of "adult entertainment," *see* https://www.northbrookfield.net/sites/g/files/vyhlif3576/f/news/specialtownmeetingwarrant120321.pdf (referring to "depicting, describing or relating to specified sexual activities or specified anatomical areas"), there is no reason to believe the planned performance would qualify. Certainly the dance at the West Brookfield event in 2022 available on video would not qualify. And in any event this definition is overbroad and unconstitutional as applied to political speech in a traditional public forum, where by its terms it could be used to suppress a wide variety of constitutionally protected expression, including about preventing breast or prostate cancer for no compelling governmental reason).

[5] The Board's action is also inconsistent with the right to assemble in a "peaceable and orderly manner" to "consult upon the common good" enshrined in Article 19 of the Declaration of Rights. *Barron,* 203 N.E.3d at 1134-37.

to sexual orientation and transgender status under Declaration of Rights). But for the gender, sexual orientation and/or gender identity of the performer, someone dressing up in flamboyant clothes and performing would not constitute "drag" and therefore would not be proscribed.

Conclusion and request

For the foregoing reasons, and in order to avoid potential litigation over this issue, we urge you immediately to restore the prior permit approval. **Please let us know on or before Wednesday, April 26, 2023, whether the Town intends to restore the prior approval for the event including drag performance**.

Although our reason for writing now relates to the partial permit rescission for the June 24 Small Town Pride event, we also urge you to take steps to more generally revise your bylaws, policies and practices concerning authorization for free expression in public forums. The bylaws are full of free expression problems and the policies, as we understand them, may require a permit applicant to pay public safety services and provide insurance covering damages that might be caused by people over whom the permit applicants have no control – perhaps even those who are seeking to disrupt their event. Such policies and practices violate constitutional free expression protections.

The Town bylaws[6] discuss permits only for "parades" on public sidewalks or streets, while providing no standards to guide when and under what conditions a permit will be granted, *see* Chapter VIII, Section 5, and prohibit use of alcohol in public parks, Chapter VIII, Section 8. Otherwise they are silent on if, when, and under what conditions a permit to use a public park is required and must be granted. Such lack of standards is anathema when free expression rights are involved. To qualify as a reasonable time, place or manner regulation, the provision must contain "narrow, objective, and definite standards" to guide discretion, *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (citation omitted). The absence of such standards is "inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." *Id.* at 130 (citation omitted).[7]

Requiring those seeking a permit to use a public park to pay for public safety services is also an unconstitutional abridgement on free speech and imposes an unlawful tax under state law for the reasons set forth in the Court papers filed in this former case against the City of Cambridge, available here: https://www.aclum.org/en/cases/massachusetts-peace-action-v-city-cambridge.

[6] https://www.northbrookfield.net/sites/g/files/vyhlif3576/f/uploads/general_by-laws_12-2018.pdf
[7] Sections 2, 3 and 4 in Chapter IX of the bylaws also raise very serious free expression concerns.

Similarly, requiring permit applicants or recipients to provide insurance for such events is not a narrowly tailored time, place or manner restriction, and thus also in violation of free expression principles. S*ee, e.g., See, e.g.*, *iMatter Utah v. Njord*, 774 F.3d 1258, 1268-1270 (10th Cir. 2014) (insurance requirement violated the First Amendment because it was not narrowly tailored to specific risks and "require[d] permittees to purchase insurance against risks for which the permittee could not be held liable," including the conduct of third parties).[8]

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We look forward to hearing from you at the earliest opportunity that the original permit approval is being restored. Feel free to contact me if you or legal counsel for the Town have any questions.

Sincerely,

Ruth A. Bourquin

cc: Town Clerk Tara Hayes, via
https://www.northbrookfield.net/user/1794/contact
Rural Justice Network, Inc.

[8]*See also Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont*, 700 F. Supp. 281, 285 (D. Md. 1988) (insurance requirement invalid because government "made no showing that insurance or a hold harmless agreement is even necessary"); *Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach*, 17 Cal. Rptr. 2d 861, 877-78 (Cal. Ct. App. 1993) (finding that the insurance requirement offered "extremely limited" financial protection to the city and went well beyond the possible parade hazards, like automobiles, that might traditionally call for insurance). In *Courtemanche v. General Services Administration,* 172 F. Supp.2d 251 (D. Mass. 2001), the court, in evaluating the legality of an indemnification/hold harmless provision as a condition of receipt of permit, highlighted that insurance requirements have often been struck down for infringing on free speech. *Id.* at 268-69 (citing *E. Conn. Citizens Action Grp. v. Powers*, 723 F.2d 1050, 1057 (2d Cir. 1983) (invalidating state transportation department's $750,000 liability insurance requirement for political march); *Collin v. Smith*, 578 F.2d 1197, 1207-09 (7th Cir. 1978) (concluding that the government's concession that it could not apply a $300,000 liability insurance requirement to a political march was "plainly mandated by the . . . pertinent caselaw"); *Wilson v. Castle*, 1993 WL 276959 (E.D. Pa. 1993) (insurance requirement unconstitutional because it was not sufficiently narrowly tailored); *Collin v. O'Malley*, 452 F. Supp. 577, 578-80 (N.D. Ill. 1978) (ordinance requiring individuals to obtain public liability and property damage insurance in order to hold assemblies in a public park was unconstitutional)).