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Mr. Victor Bolden
Corporation Counsel
City of New Haven
165 Church Street
New Haven, CT 06510

Dear Mr. Bolden,

As a former New Haven resident and law clerk to the late Hon. Mark R. Kravitz, I have followed closely the litigation history and aftermath of *Mitchell v. City of New Haven*, a case that revealed the uniquely complicated governing structure of the New Haven Green: owned by the Committee of the Proprietors but largely managed, with the Proprietors' input, by the City. When New Haven evicted the Occupy encampment from the Green in 2012, Judge Kravitz held that the rules then in effect, "standing alone, would not provide anything close to enough guidance to survive a First Amendment challenge." The very question of whose rules governed—the City's or the Proprietors—was itself something Judge Kravitz referred as a "murky matter[]."

In light of this background, I was pleased to learn that that you are now attempting to remedy the "serious shortcomings in the text of the rules governing the Green" that Judge Kravitz called to the City's attention in *Mitchell*. And yet, as a professor of constitutional law who teaches the First Amendment, I find troubling several of the ordinances that have now been proposed. **Two of the proposed ordinances plainly violate the First Amendment; one seems to disallow a longstanding use of the Green; and none strikes me as effective in clarifying, in any legally binding way, the murkiness of which Judge Kravitz complained.**

More specifically, my four worries are these:

1. As currently proposed, Section 19-7(c) would require permit applicants to agree to pay for police protection, park security, and insurance "as deemed necessary by the Director in consultation with the appropriate city departments." **This is flatly unconstitutional.** *See Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992); *Transportation Alternatives, Inc. v. City of New York*, 340 F.3d 72, 77-78 (2d Cir. 2003). Aside from the unconstrained discretion given to the Director to determine what speakers will be charged, *but see Forsyth County*, 505 U.S. at 133 ("The First Amendment prohibits the vesting of such unbridled discretion in a government official."), charging demonstrators for their own protection forces unpopular speakers to pay more for their right to speak than those whose expression is less controversial, *but see id.* at 134-35 ("Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit. ...Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.") By penalizing speech based on its

communicative impact, Sec. 19-7(c) would impose a content-discriminatory burden on expression, in violation of the First Amendment.

2. The amended ordinances would remove the Park Director's ability to waive—due to financial hardship—the requirement that park users provide a bond to indemnify the City for any potential liability, as determined by the Director. *See* Sec. 19-9 (proposed). The attempt to cabin the Director's discretion here is completely one-sided: the Director still has the unfettered ability to determine potential liability, but he or she no longer has the discretion to waive the resulting financial burden on speakers who cannot afford a bond. **Aside from the effects this ordinance will surely have on speakers of limited means, the bond requirement suffers the same constitutional flaws as the permit application requirements** discussed above. Insofar as speakers' "potential liability" stems in part from the hostile reaction their speech might provoke, the bond requirement cannot be described as content-neutral. For this reason and because of the unconstrained discretion given the Director in predicting this liability, the bond requirement is unconstitutional under *Forsyth County*.

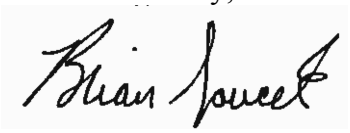
3. Section 19-26(g)(1) (proposed) proscribes "commercial activity, including but not limited to the sale or marketing of any goods or services" on the Green. I do not read this to be discretionary: although the Proprietors are given the power to decide what uses of the Green to approve, such use cannot be inconsistent with the Green's non-commercial purpose. Ticket sales and sponsorship opportunities at the International Festival of Arts and Ideas, to give one prominent example, would seem to violate this provision. Admittedly, Section 19-26(g) *could* be read to say that the Proprietors must approve activities that are consistent with the "character of the Green," but still may approve activities that are not consistent with its character—*e.g.*, commercial activities or activities that involve camping. While this reading would save the commercial activities associated with the Festival, it would reintroduce a level of discretion into the permit application process that may prove constitutionally problematic. If the City grants the Proprietors the unconstrained ability to decide what commercial or camping activities it will allow, the possibility of content or viewpoint discrimination remains; nothing in the Ordinances would constrain the Proprietors' power to make exceptions as they saw fit.

4. Finally, it remains unclear, at least to me, how the newly proposed ordinances treat the ill they were meant to cure. The newly-drafted Section 19-26 claims to "memorialize[] the rights and obligations of the Committee and the City" and "expressly authorizes"—*purportedly on the Proprietors' behalf*—"the Director to issue permits for the use of the Green." Sec. 19-26(b)-(c) (proposed). Still murky is how an ordinance passed by the Board of Aldermen can expressly authorize anything at all on behalf of the Committee of the Proprietors. I do not understand the Proprietors' ownership claim over the Green well enough to know whether the City, on its own, could decide to take over the Green's management. But I am quite sure that a city ordinance cannot speak *for* the Proprietors and agree, on their behalf, to hand over such power to the City. Surely some kind of contemporaneous agreement between the City and the Proprietors would be necessary to give legal effect to Section 19-26.

The proposed ordinances take serious, and valuable, steps towards: 1) affirming that the Green is a public forum; 2) constraining the City's discretion in denying permit applications; and 3) giving legal force to the Proprietors' Regulations, which previously governed in practice but had an ambiguous legal status. **These are all welcome improvements.**

The constitutional worries I have raised are serious ones, however. While the City undoubtedly has interest in ensuring that speakers who violate its valid regulations should be made to pay for damage they cause to public property, **speakers cannot, under the First Amendment, be held responsible for costs that stem from the communicative impact of their speech**. As Justice Blackmun said so well in *Forsyth County*, "views unpopular with bottle throwers" cannot be charged more than views that are less controversial—and thus less costly to protect. The newly proposed ordinances violate this basic constitutional principle. I urge you to reconsider these ordinances so that members of the public can continue to exercise—on equal terms—what Judge Kravitz called "their most important civic rights in New Haven's most important public space."

Most sincerely,



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cc: Hon. Jorge Perez, President, Board of Aldermen
Hon. Sarah Eidelson, Alderperson, Ward 1
Committee of the Proprietors of Common and Undivided Lands in New Haven

* Title and affiliation given for identification purposes only. The views here are mine, not those of the University of California or the UC Davis School of Law.