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Ken Slaughter
General Counsel, District of Columbia Housing Authority
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Re: *Barring Notices*

Dear Mr. Slaughter:

We write in response to Chief Maupin's November 4th temporary waiver of the sixty-day bar notice imposed upon our client, Schyla Pondexter-Moore.

On October 7, 2016, D.C. Housing Authority police officers served Ms. Pondexter-Moore, a public housing organizer, with a barring notice banning her from attending public meetings of the DCHA Board of Commissioners. The basis for this barring order was a September 14, 2016, DCHA Board meeting, at which Ms. Pondexter-Moore testified in opposition to a proposal to approve $13 million in "predevelopment funding" for the Barry Farm public housing complex and was later ejected based on her emotional, vocal response to the proposition's passage. On November 3, 2016, we wrote to Chief Maupin on Ms. Pondexter-Moore's behalf, arguing that the barring order was an unconstitutional prior restraint on her First Amendment right to free speech and a violation of her right to due process of law under the Fifth Amendment, and demanding that the barring order be lifted immediately so that Ms. Pondexter-Moore could attend the November 9, 2016, DCHA Board meeting at Barry Farm.

We are pleased that Ms. Pondexter-Moore was permitted to attend the public DCHA Board Meeting held on November 9. However, Chief Maupin's contention that Ms. Pondexter-Moore was "mistaken" in her claim that the initial barring notice violated her due process and First Amendment rights is incorrect. As we explained in our November 3 letter, Ms. Pondexter-Moore has an actionable claim for damages against the DCHA for unconstitutionally prohibiting her attendance at the DCHA Board Meeting held on October 12, 2016.

First, the prospective bar on Ms. Pondexter-Moore's attendance at future public meetings based on past conduct was an unconstitutional restriction on free speech. *See Surita v. Hyde*, 665 F.3d 860, 868-71 (7th Cir. 2011) (bar invalid as content-based regulation; would also be invalid if it were content-neutral); *Theyerl v. Manitowoc Cty.*, 41 F. Supp. 3d 737, 738-45 (E.D. Wis. 2014) (same); *Brown v. City of Jacksonville*, 2006 WL 385085, at *1-8 (M.D. Fla. Feb. 17, 2006) (bar invalid as content-neutral regulation); *Barna v. Bd. of Sch. Directors of the Panther Valley Sch. Dist.*, 143 F. Supp. 3d 205, 207-29 (M.D. Pa. 2015) (same); *Stevens v. Sch. City of Hobart*,

2015 WL 4870789, at *14 (N.D. Ind. Aug. 6, 2015) (same); *Cyr v. Addison Rutland Supervisory Union*, 60 F. Supp. 3d 536, 544-50 (D. Vt. 2014) (same); *Reza v. Pearce*, 806 F.3d 497, 502-05 (9th Cir. 2015) (bar unreasonable even under analysis applicable to nonpublic forum); *Walsh v. Enge*, 154 F. Supp. 3d 1113, 1126-34 (D. Or. 2015) (same); *see also Cuellar v. Bernard*, 2013 WL 1290215, at *2-4 (W.D. Tex. Mar. 27, 2013) (whether content-based or -neutral, bar not narrowly tailored).

Second, the barring order violated Ms. Pondexter-Moore's right to due process of law under the Fifth Amendment. Ms. Pondexter-Moore has both a First Amendment and a D.C. Code-created liberty interest in attending and speaking at DCHA Board meetings. *See Sherrill v. Knight*, 569 F.2d 124, 130-31 (D.C. Cir. 1977) ("The first amendment interest undoubtedly qualifies as liberty which may not be denied without due process of law under the fifth amendment." (footnote omitted)); D.C. Code § 6-211(w) (statutory requirement that DCHA meetings be conducted in public and provide a period for public comment). Under the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), there is a high risk of erroneous deprivation of rights because the D.C. Code and related regulations do not provide for any hearing for barred individuals; provide no process whatsoever by which to appeal the bar notice; and give no guidance regarding what factors or policies should inform the Chief of the DCHA Office of Public Safety in deciding whether to grant or deny a request to lift the bar. *See Cyr*, 60 F. Supp. 3d at 552. These factors, combined with Ms. Pondexter-Moore's significant interest in attending DCHA meetings as a housing activist and DCHA resident, outweigh any burden on the government of providing minimal additional procedural safeguards. *See Cyr*, 60 F. Supp. 3d at 550-53 (balancing these factors in the context of a public meeting ban); *Stevens*, 2015 WL 4870789, at *14-15 (same).

Although Ms. Pondexter-Moore could therefore file a lawsuit seeking damages, which would establish the fact that her constitutional rights had been violated, she is more interested in obtaining policy changes that will help avert problematic uses of barring notices in the future. We therefore ask that the DCHA amend its current barring notice document and procedure to provide recipients with a 30-day period before a bar goes into effect, during which time subjects of barring notices may request and receive a "fair hearing providing the basic safeguards of due process," 14 DCMR § 6307, using the same basic system articulated in DCHA's established grievance procedures. *See id.* We ask that the notice document clearly inform recipients of these rights, so that individuals will know that they can request a hearing and can properly prepare for one. Because the DCHA already allows residents to challenge bar notices using these established grievance procedures, the burden on the DCHA in providing access to this process before a bar takes effect is minimal. Furthermore, our proposal does not seek to impose specific substantive constraints on the circumstances in which the DCHA may seek to bar someone from its property; rather, Ms. Pondexter-Moore believes that broader procedural protection for individuals barred from DCHA property is the most effective means of ensuring a fairer system.

Providing a pre-barring hearing opportunity not only will help prevent constitutional violations going forward but also will help DCHA enforce valid bars. The D.C. Court of Appeals has recently clarified that in order for an individual barred from DCHA property to be convicted for subsequent unlawful entry, the government must prove that a barred individual was on DCHA property "in derogation of the law that establishes who has (and who lacks) lawful authority to be

on DCHA property." *Winston v. United States*, 106 A.3d 1087, 1090 (D.C. 2015). To establish lack of lawful authority, the prosecution must provide evidence regarding "the original date of the barring" and show that the defendant was in fact an "unauthorized person" under "the regulation that governs barring notices." *Id.* In *Winston*, the defendant's unlawful entry conviction was overturned because "the evidence did not establish that the barring order was authorized under" DCHA regulations. *Id.* at 1092. Specifically, the prosecution did not present evidence that the defendant was, at the time of the initial barring order, "'on DCHA property at a location or unit not specified on the guest pass' and, for that reason, was properly subject to being barred from the [public housing] complex." *Id.* (quoting 14 D.C.M.R. § 9600.5(b)(2)). An administrative hearing would provide an evidentiary record for an underlying barring order and would buttress subsequent enforcement of a lawful barring order in the form of criminal prosecution for unlawful entry. By enhancing the ability of DCHA to obtain convictions for violations of barring orders, this system would thereby create a greater incentive for lawfully barred individuals to remain away from DCHA premises.

We look forward to receiving your response by February 15, 2017. Otherwise, we intend to begin legal action to redress Ms. Pondexter-Moore's rights. Please feel free to let me know of any other germane facts or legal authorities that you feel have bearing on this matter.

We look forward to hearing from you.

Sincerely,

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