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Via Email/ c.j.nairn-mahan@roswell-nm.gov
Roswell City Attorney

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Roswell City Clerk

March 16, 2026

RE: ROSWELL ORDINANCE NO. 10-99

Dear Mr. Nairn-Mahan,

We write to urge the City of Roswell to rescind Roswell City Ordinance 10-99 and its unlawful requirement that Food Not Bombs Roswell (FNBR) cease food sharing at Pioneer Plaza or on any other city property unless it obtains a permit and insurance.

For two years FNBR has peacefully shared food on Roswell public property, engaging in constitutionally protected expressive conduct, while providing much-needed food to Roswell residents experiencing hunger. On November 7, 2025, you informed FNBR that it must obtain a permit and liability insurance to continue food sharing.

The City cited Roswell City Ordinance 10-99, which prohibits any person from "sell[ing], offer[ing] for sale, dispens[ing] or purvey[ing] refreshments, food, beverages, or goods wares and merchandise of whatever description" without a franchise or concession agreement from the City. This ordinance is unconstitutionally overbroad, infringing on constitutionally protected expressive conduct. For example, a person distributing know-your-rights material on public property - a quintessentially protected activity - would be required to obtain a permit. As applied to FNBR, this ordinance unlawfully restricts public food sharing, expressive conduct protected by the First Amendment of the United States Constitution and Article II Section 17 of the New Mexico Constitution.

The New Mexico Center on Law and Poverty is an advocacy organization that works with New Mexico communities to increase opportunities and protect the rights of those experiencing poverty. The ACLU-NM is the state affiliate of the ACLU, the nation's premier civil rights and civil liberties organization. The ACLU-NM protects and advances justice, liberty and equity as guaranteed by the constitutions of New Mexico and the United States. Smith &

Marjanovic Law is a civil rights law firm that frequently collaborates with other civil rights groups to advocate for the constitutional protections of New Mexicans. We represent FNBR in addressing the City of Roswell's unlawful restrictions on the organization's constitutionally protected food sharing.

I. City Ordinance 10-99 Unconstitutionally Restricts FNBR's Food Sharing, Which is Protected by the First Amendment and Section 17.

A. FNBR is Engaged in Protected Expressive Conduct under the First Amendment and Section 17.

FNBR is an unincorporated association which engages in peaceful direct action through food distributions to communicate its message that our society can end hunger and poverty if we redirect our collective resources from the military and war and recognize that food is a human right. Federal courts have consistently held that this expressive conduct is constitutionally protected speech. *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale ("Fort Lauderdale Food Not Bombs I")*, 901 F.3d 1235 (11th Cir. 2018) (outdoor food sharing by Fort Lauderdale Food Not Bombs is expressive conduct protected by the First Amendment of the U.S. Constitution); *see also Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale ("Fort Lauderdale Food Not Bombs II")*, 11 F.4th 1266 (11th Cir. 2021) (holding that a park rule barring "social service food sharing" without written authorization by the city was unconstitutional as applied to Fort Lauderdale Food Not Bombs under the First Amendment of the U.S. Constitution); *see also Jimenez v. City of Daytona Beach*, No. 615CV1494-ORL-31-KRS, 2016 WL 11626974 (M.D. Fla. Feb. 1, 2016) (denying city's motion to dismiss case brought by religious ministry challenging the constitutionality of the city's policy banning outdoor food sharing in public parks).

Like the City of Roswell, Fort Lauderdale attempted to require permits for outdoor food sharing offered at little or no cost. *Fort Lauderdale Food Not Bombs I*, 901 F.3d at 1238-39. The Eleventh Circuit rejected Fort Lauderdale's attempt, recognizing that the First Amendment protects food sharing because it is inherently expressive. *Id*. at 1240, 1243 ("Like the flag, the significance of sharing meals with others dates back millennia."). Ultimately, the 11th Circuit held that Food Not Bombs' outdoor food sharing was expressive conduct protected by the First Amendment. *Id*. at 1245.

New Mexico Courts would reach the same conclusion under the State Bill of Rights. Article II, Section 17 provides that "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." Unlike the federal First Amendment, Art. II, Section 17 is framed in affirmative, not prohibitive, terms. The New

Mexico Court of Appeals has held that Section 17 "extends broader protection to freedom of expression than the First Amendment of the United States Constitution." *City of Farmington v. Fawcett*, 1992-NMCA-075, ¶ 35, 843 P.2d 839 (internal quotations and citations omitted).

B. City Ordinance 10-99 is also Unconstitutionally Overbroad.

City Ordinance 10-99 is unconstitutionally overbroad because it purports to require permits for any food sharing and a wide range of other protected conduct - including "disper[ing] … goods, wares and merchandise of whatever description," such as distributing know-your-rights materials - without articulating clear standards, thresholds, or limits. An ordinance is overbroad and facially unconstitutional when it regulates a substantial amount of protected speech or expression without a legitimate government purpose. *Village of Ruidoso v. Warner*, 2012-NMCA-035, ¶ 6, 274 P.3d 791 ("The concept of overbreadth is applicable to individual ordinances that fail to serve legitimate interests [through] narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms "(internal quotation marks omitted)); *see also United States v. Williams*, 553 U. S. 285, 292 (2008) ("According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech.").

Permit schemes affecting speech or expression are inherently suspect and must strictly limit official discretion to avoid "undetectable censorship." *Fort Lauderdale Food Not Bombs II*, 11 F.4th at 1295; *see also Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) ("A government regulation that allows arbitrary application 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.'" (internal citation omitted)). Even content-neutral time, place, and manner restrictions are invalid if they vest excessive discretion in government officials. *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002); *see also Village of Ruidoso v. Warner*, 2012-NMCA-035, ¶¶ 5, 22, 274 P.3d 791 (holding that a city ordinance prohibiting solicitation on public property to be overly broad where it provided unrestricted discretion for enforcement).

i) City Ordinance 10-99 Grants Unfettered Discretion to City Officials

City Ordinance 10-99 grants unfettered discretion to City officials over how and when protected expression can occur. The City has determined that FNBR must obtain a permit to share food on City property, but does not, in practice, require permits for picnics or other informal food sharing on City property. The City has not provided any rationale for this arbitrary distinction.

The permit process itself lacks clear criteria governing approval and thus subjects FNBR to further discretionary decision-making. Such unbridled discretion is unlawful, particularly in traditional public forums like Pioneer Plaza, where First Amendment Protections are at their zenith. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983) ("In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed."). Indeed, as written, the Ordinance would require a permit to share food with a single person.

In *FNB II*, the ordinance at issue was struck down because it imposed permitting requirements for food distribution without applying sufficient standards to guide city officials in their discretion. *Fort Lauderdale Food Not Bombs II*, 11 F.4th at 1295. The Court found that the city's Ordinance was not "narrowly tailored" to meet the city's interests in managing the use of their public parks. *Id*. at 1295-97. Thus, City Ordinance 10-99 is inconsistent with a narrowly tailored regulation, particularly in public forums like Pioneer Plaza, which occupy a special place for First Amendment protection. The City's "Special Events" policy requires applications be submitted 120 days prior to an event but imposes no deadline for City action and provides no guidance for recurring or ongoing activities. *See* City of Roswell Policy: Special Events, PA0001, effective Nov. 6, 2017. The absence of decision-making deadlines enables impermissible delay and "pocket vetoes, further compounding City Ordinance 10-99's constitutional defects. *See Utah Animal Rts. Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1258 (10th Cir. 2004) (prior restraints imposed by a permitting scheme must "be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial administration" (internal citation omitted)); *see also* Lady J. Lingerie, Inc. v. City of Jacksonville, 176 F.3d 1358, 1361 (11th Cir. 1999) ("An ordinance that permits public officials to effectively deny an application by sitting on it indefinitely is invalid." (internal citation omitted)); *see also Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1272 (11th Cir. 2005 ("The absence of any decision making deadline effectively vests building officials with unbridled discretion to pick and choose which signs may be displayed by enabling them to pocket veto the permit applications for those bearing disfavored messages").

ii) The City's Permit Process Imposes an Unlawful Fee

That City's permit application requires payment of an application fee prior to permit issuance. But to survive a First Amendment challenge, permit schemes must "provide narrowly drawn, reasonable and definite standards to guide the licensor's determination." *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 324 (2002) (internal citations and quotations omitted). Although you, in your capacity as then Deputy City Attorney, suggested a fee "might not" be imposed, allowing city officials unfettered discretion to decide whether and how much to charge is itself unconstitutional.

iii) The City's Insurance and Indemnification Requirement are Not Narrowly Tailored

The City's insurance and indemnification requirements impose substantial financial burdens on FNBR's political expression and are not narrowly tailored to serve a significant government interest. The Tenth Circuit has invalidated similar requirements where they burden protected speech without proper tailoring. *iMatter Utah v. Njord*, 774 F.3d 1258 (10th Cir. 2014); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 931 (1982).

Roswell's policy requires applicants to indemnify and defend the City for liability arising from activities connected to a permitted event and to purchase liability insurance naming the City as an insured party. *See* City of Roswell Policy: Special Events, PA0001, Section 10.0 "Indemnity," effective Nov. 6, 2017. These requirements improperly extend liability to third party conduct and improperly require a policy holder to cover claims against the City that exceed what is permissible under sovereign immunity, traditional agency and tort liability principles. *See iMatter Utah*, 774 F.3d at 1272; *NAACP*, 458 U.S. at 931. As such, the insurance requirements are not narrowly tailored to serve a significant government interest beyond the interest of limited liability already granted by other law.

C. Less Restrictive Alternatives Are Readily Available.

The City has many less restrictive means to address concerns related to public space use, such as congestion and safety. Neutral, generally applicable park-use rules or simple ministerial reservation systems would suffice without singling out food sharing or other expressive conduct. The City's ordinance cannot withstand constitutional scrutiny on its face or as applied to organizations or people who share food to communicate a religious or political message or exercise their religious or political beliefs.

There is nothing inherently dangerous or harmful about associating with others in public spaces for the purposes of eating a meal together. Indeed, courts have recognized a long history of this symbolic expression, from "the Bible recount[ing] that Jesus shared meals with tax collectors and sinners to demonstrate that they were not outcasts in his eyes" to "President Abraham Lincoln establish[ing] Thanksgiving as a national holiday in 1863." *Fort Lauderdale Food Not Bombs I*, 901 F.3d at 1243.

II. The Actions by the City of Roswell Show an Intent to Stop Protected Speech.

Actions by the City and documents produced pursuant to our public records request clearly demonstrate that the City of Roswell acted with animus towards FNBR. FNBR shared food in public spaces for years without City interference. Enforcement began only after the reopening of the visitor center adjacent to Pioneer Plaza, when City staff began to subject FNBR

to heightened demands and legal requirements as compared to other organizations engaged in similar food sharing activities..

Internal City communications show that the City did not previously apply City Ordinance 10-99 to prohibit free food distributions. One city employee explicitly sought advice on how to remove FNBR from using the plaza on a specific date and asked whether there was an Ordinance that addressed this "situation." Attorneys for the City acknowledged that the Ordinance's title, "Sale of Goods on Public Property" meant that the ordinance was inapposite, but nonetheless attempted to apply it to FNBR as a means of prohibiting them from being in the Plaza "without following a proper process." Vickers, J., j.vickers@roswell-nm.gov, "Re: Fall Bash- Pioneer Plaza," October 27, 2025; *see also* Vickers, J., j.vickers@roswell-nm.gov, "Re: City Property," November 7, 2025. The deliberate misapplication of City Ordinance 10-99 evidences the City's intent to suppress protected speech.

Additionally, the City blocked access to Pioneer Plaza under the pretext of Christmas decorations. Records show no prior planning for holiday displays and indicate that decorations were procured only after FNBR was informed the plaza would be unavailable. There is no doubt that the City could have installed decorations so as not to restrict access to the grassy area where FNBR shares food.

III. The City's Regulations Are Void-For-Vagueness Under the Due Process Clause of the Constitution of the State of New Mexico.

City Ordinance 10-99 is void for vagueness under the Due Process clause of the New Mexico Constitution. N.M. Const. art. II, § 18. A law is unconstitutionally vague when it "(1) fails to provide persons of ordinary intelligence using ordinary common sense a fair opportunity to determine whether their conduct is prohibited, or (2) fails to create minimum guidelines for enforcement and thus encourages subjective and ad hoc application of the law." *State v. Julg*, 2021-NMCA-058, ¶ 24, 497 P.3d 678.[1] In prohibiting any person to "dispense or purvey food," or to dispense or purvey any goods of whatever description, without the City's permission, the ordinance is confusing and does not provide people a fair opportunity to understand whether their conduct is prohibited. People cannot reasonably determine what conduct requires a permit, rendering the ordinance unenforceable under due process. Communications between city employees demonstrate that the City applied the City Ordinance 10-99 only after forming the intent to prohibit FNBR from using Pioneer Plaza for its demonstrations. The city has no guidelines for applying City Ordinance 10-99, and was therefore able to engage in

[1] Additionally, a law will be void for vagueness under the Fourteenth Amendment if it fails to provide adequate notice of what conduct is actually being prohibited. *United States v. Williams*, 533 U.S. 285, 292 (2008), ("A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.").

unconstitutional, ad-hoc application of that ordinance. City Ordinance 10-99 is unconstitutional under the Due Process clause of the New Mexico Constitution.

Thank you for your attention to these important issues. **We ask that you respond to this letter by March 30, 2026** and let us know whether the City will refrain from imposing the unlawful ordinance against FNBR. If we do not hear from you, we are prepared to take legal action to protect the constitutional rights of FNBR.

Please contact us if you have any questions or wish for us to provide additional information. Thank you.

Sincerely,

/s/ *Marco Alarid White*
Marco Alarid White
New Mexico Center on Law and Poverty

/s/ *Kristin Greer Love*
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