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Dear Dr. Branch and Mr. Field:

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I write on behalf of the American Civil Liberties Union of Maryland and interested Baltimore County residents, regarding concerns that policies and practices at Baltimore County Animal Services (BCAS) are suppressing the free speech rights of shelter volunteers and members of the public generally. Specifically, the ACLU has received a number of complaints that volunteers are being chilled in their free speech rights through retaliation, or threats of retaliation, when they raise concerns about shelter practices. Relatedly, both volunteers and members of the public allege that their rights are being infringed through a ban against photography of animals and conditions at the BCAS shelter. Given the broad protections for free speech afforded by the U.S. Constitution in places open to the public and the duty of government to be accountable to the communities it serves, such policies are troubling and raise significant legal concerns, which we would like to discuss with you.

Summary of Facts

As detailed below, several individuals, as well as the activist group Reform Baltimore County Animal Services (“Reform BCAS”)¹, have complained to the ACLU about difficulties volunteers and members of the public have encountered over the past two years with respect to the exercise of First Amendment freedoms at BCAS. Those who have contacted us are passionate advocates for the lost and abandoned animals of Baltimore County, dedicated to aiding the County in returning lost pets to their families and finding new homes for those animals that

¹ As you may be aware, Reform BCAS is an animal welfare organization focused on improving conditions and reducing euthanasia rates at BCAS. In order to accomplish its goals, Reform BCAS engages in a variety of activities, such as maintaining a website, a Facebook page, and a blog entitled “Their Voice.” Group members gather signatures on petitions, organize street protests and rallies, create online videos, distribute information about the need for reform, and file Public Information Act requests in order to make information about shelter practices more widely available to the public.

have been abandoned, so as to reduce the County's need to resort to euthanasia. As you know, the conditions of confinement, adequacy of BCAS efforts to find homes for abandoned animals, and high euthanasia rates at BCAS are subject of controversy and concern among animal welfare activists, as well as some shelter volunteers. We understand that BCAS has been attempting to make improvements to its shelter programs over the last few months, and disputes some of the advocates' claims and positions. However, it is not appropriate for County officials to squelch complaints by curtailing the First Amendment freedoms of those with whom they disagree. In fact, we believe BCAS restrictions on speech not only limit the shelter's accountability to the citizens of Baltimore County, but also can be counterproductive to the interests of the animals in its charge. That is, BCAS interference with activists' speech rights limits their ability to assist the County in finding homes for animals at the shelter, thus thwarting the shelter's own mission.

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Examples of the incidents, practices and policies that concern us include:

- BCAS's removal of volunteer Sarah Hardy (formerly Nickol) from her position after she invoked her right, *as a member of the public*, to photograph animals in public areas at BCAS. This action was instituted even though Ms. Hardy's sole purpose in taking pictures at BCAS was the laudable one of spreading information as widely as possible about animals available for adoption;

- The shelter's firing of volunteer Kathy Soul in July 2013, after Ms. Soul raised concerns with BCAS management about problems, and specifically, about the lack of cleanliness at the shelter. Ms. Soul's termination also followed a period during which her duties at the shelter were restricted -- she believes due to her efforts to document conditions there through photographs and written reports.

- Claims to the ACLU and Reform BCAS from a number of volunteers, who wish not to be named, that they are afraid to speak out about problems they see at BCAS, for fear that if they do so, their positions will be terminated -- as they have seen happen to others -- leaving animals they care for at BCAS to suffer due to their absence;

- BCAS action instituted, reportedly at the behest of official Tom Scollins, against Anne George, a frequent visitor to the shelter and advocate for those animals she believes to be in need. Last winter, Ms. George advised BCAS that it had come to her attention that a particular dog was urgently in need of medical care. Another advocate overheard this, and offered to make her veterinarian available to treat the dog, if BCAS was unable to provide the care needed. Mr. Scollins rejected this offer. So, later that day Ms. George telephoned him to inquire about the matter and to reiterate her view that the dog in question needed urgently to see a veterinarian. A few weeks later, an animal control officer arrived at Ms. George's home, saying he had been directed by Mr. Scollins to investigate Ms. George's home as a possible case of "animal

hoarding." Ms. George feels strongly that this "enforcement action" was undertaken in retaliation for her advocacy efforts. She also objects to restrictions placed upon her ability to photograph the animals at the shelter, along with their kennel tags, a practice she engages in to enable her to track what happens to animals at the shelter, given her deep concerns about the shelter's high euthanasia rate.

- A June 2014 policy statement posted online – on the Facebook page of Reform BCAS -- by Don Mohler, Chief of Staff to Baltimore County Executive Kevin Kamenetz, stating that "Citizens who visit the shelter may not take photos of the animals."

- BCAS's use of a PowerPoint presentation to train shelter volunteers, warning that volunteers at the shelter may not take photos of animals and conditions at the shelter, and requiring them to sign paperwork agreeing to abide by this rule.

- Recent reports that photography restrictions have been lifted for a few individuals who shelter officials trust will not use photography to document problems or post any pictures that place the shelter in a negative light, while BCAS continues to maintain restrictions against others, including both volunteers and members of the public.

- To further "test" the BCAS policy on photography by members of the public, two ACLU volunteers, outfitted with large cameras and posing as a couple looking to adopt a pet, went to the shelter in late July. After they entered the facility and began photographing cats available for adoption, the two were confronted by BCAS official Laura Culbertson, who asked about what they were doing and why they wanted to take photographs. Ms. Culbertson informed the ACLU testers that she was Acting Director of the Shelter, and is brought in by BCAS staff to investigate whenever members of the public try to take pictures, because many people try to take "inappropriate" pictures, aimed at making the shelter look bad. While Ms. Culbertson permitted the ACLU testers to photograph animals for their stated purpose of showing available pets to their young niece, she stated that this would not have been allowed for a different, "inappropriate" purpose, such as "if you were from Channel 2."

In combination, these examples show a government agency endeavoring to limit its exposure to criticism and public accountability, and to stifle any perceived criticism that does arise, even where the agency's purpose of serving the animals of Baltimore County is undermined as a result. As explained below, this violates the First Amendment. While BCAS can speak out publicly on its own behalf to dispute arguments or allegations of critics that it considers misplaced, it cannot lawfully suppress political speech directed at its shelter or retaliate against individuals who raise concerns about the shelter's policies and practices.

Shelter Policies or Practices that Selectively Restrict Criticism are Unconstitutional.

The complaints received by the ACLU suggest that BCAS imposes restrictions against speech and photography selectively, disfavoring speech that County officials fear might reflect badly upon the shelter and its management. This constitutes impermissible discrimination based upon viewpoint, because it allows speech that officials consider positive for the shelter, while disallowing that considered negative. Viewpoint-based regulation is presumptively unconstitutional because it empowers the government to “effectively drive certain ideas or viewpoints from the marketplace,” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387, 391 (1992), threatening to “manipulate the public debate through coercion rather than persuasion.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1986). A rule or governmental action is viewpoint based “if it is motivated by the desire to suppress a particular viewpoint or it distinguishes between speakers based on the viewpoint expressed.” *Animal Legal Defense Fund v. Otter*, 2014 WL 4388158 (D. Idaho 2014) (finding Idaho “Ag-Gag” law viewpoint based due to its disfavoring of critical speech about agricultural operations), *citing Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009) (*en banc*).

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BCAS’s intent to restrict only certain speech is belied by its actions, such as Ms. Culbertson’s express statements to the ACLU testers that the photo ban is selectively applied to restrict the media² and others taking photos she might consider “inappropriate.” This is unlawful.

Shelter Volunteers Have a First Amendment Right To Comment Upon Matters of Public Concern, Including Shelter Policies

While animal welfare advocacy can be controversial, speech of this nature is considered political speech, and as such, it is accorded the highest degree of constitutional protection. *Connick v. Myers*, 461 U.S. 138, 145 (1983) (“speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”) There can be no dispute here that

² While Ms. Culbertson emphatically told the ACLU testers that Channel 2 would not be allowed in to photograph or videotape unsupervised, we note that BCAS has in some instances invited the media to the shelter for photo opportunities under its control. *See, e.g.*, Jennifer Franciotti “Animal Advocates Claim Poor Conditions at Baltimore County Animal Shelter,” available at <http://www.wbaltv.com/news/animal-advocates-claim-poor-conditions-at-baltimore-county-animal-shelter/25328514>. That the County might permit photography by invitation does nothing to establish the legality of its position. Rather, it reinforces the selectivity of its policy’s applicability. Rules “that single out the press, or certain elements thereof, for special treatment pose a particular danger of abuse by the State, and so are always subject to at least some degree of heightened First Amendment scrutiny.” *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 640-41 (1994).

government policies on animal sheltering and control are matters of public concern, given the amount of public interest and media attention shelter policies and practices generate. Indeed, shelter policy has become a “hot button” issue -- not just in Baltimore County, but nationwide. National groups, such as the American Humane Society and the Humane Society of the United States, have engaged in extensive public campaigns concerning best practices for animal shelters.³ State legislatures across the United States, including the Maryland General Assembly, have passed laws regulating the conduct of animal shelters.⁴ Likewise, advocacy efforts by Reform BCAS have attracted substantial media attention, indicating the extent of public interest in these issues locally.⁵

Where matters of such concern are at issue, federal courts have ruled that government employees enjoy a First Amendment right to comment as citizens upon them, notwithstanding their public employment. *See Pickering v. Board of Education* 391 U.S. 563 (1968) (Reinstating a teacher fired for writing a letter to the editor about school board policy); *Branti v. Finkel* 445 U.S. 507 (1980) (Reinstating assistant public defenders who were fired for being members of the Republican Party); *Rankin v. McPherson*, 483 U.S. 378 (1987) (Reinstating a deputy constable fired for inflammatory criticism of Ronald Reagan’s cutting of social programs); *Andrew v. Clark*, 561 F.3d 261, 268 (4th Cir. 2009) (*Pickering* analysis applied to police officer claiming he was wrongfully terminated for talking to newspaper reporter about complaint on police issue of public concern.). Certainly, volunteers should retain at least as much speech freedom as do employees, given that any workplace “disruption” their speech might cause is likely to be less than that caused by an employee’s critique. Thus, like an employee, a shelter volunteer cannot be terminated or rebuffed simply because he or she has criticized shelter management, or posted information online that officials think is somehow unflattering to the shelter. *Lynch v. Town of Southampton*, 2008 WL 5083010* (2d Cir. 2008) (upholding jury verdict finding that Town’s removal of animal shelter volunteer based on her criticism of management policies and practices violated volunteer’s rights under First Amendment).⁶

³See “Stop Gassing, *American Humane Society*, available at <http://www.americanhumane.org/animals/stop-animal-abuse/advocacy/campaigns/stop-gassing-campaign.html> (American Humane Society Campaign to enact state legislation to mandate animal shelters to engage in euthanasia by injection as opposed to gassing); Animal Sheltering, <http://www.animalsheltering.org> (Website run by the Humane Society of the United States advocating for and against a variety of animal shelter policies).

⁴ See Ann. Code of Maryland, Crim. Law Art., §10-611: Killing of dog or cat -- Prohibited means.

⁵“News and Articles,” Reform Baltimore County Animal Services, <http://www.reformbcas.org>

⁶ The *Lynch* case is on all fours with this one as to any claims ousted volunteers might make, in that it involved a volunteer terminated from a government shelter because she criticized shelter conditions and euthanasia practices. A federal court jury found that

In order to overcome a claim that a volunteer like Sarah Hardy was improperly terminated based upon exercise of her speech rights, BCAS would have to satisfy the *Pickering* balancing test, by showing that its interest in effective operation of the shelter outweighed the interests of Ms. Hardy and the general public in communicating and receiving, respectively, the information. *Cirelli v. Town of Johnston Sch. Dist.*, 897 F.Supp. 663 666 (D.R.I. 1995)(discussing analysis applicable to teacher’s claim that she was wrongfully terminated for videotaping poor conditions at school where she worked). This would seem impossible here, given that Ms. Hardy was terminated for exercising her rights to take photographs of animals in need of adoption, in order to *assist* BCAS in carrying out its important mission. By barring her from taking photographs in her capacity as a private citizen and advocating for the animals as a volunteer, BCAS not only failed to further effective operation of the shelter, it undermined its own goal.

A Ban on Certain Photography in Public Areas of the Shelter Impermissibly Burdens First Amendment Activity

BCAS’s restrictions against photography and video recording in areas of the shelter open to the public also unacceptably limits protected speech. *Animal Legal Defense Fund v. Otter*, 2014 WL 4388158*10 (D. Idaho 2014) (Idaho “Ag-Gag” law prohibiting audio visual recording of operations at agricultural facilities without permission of owner could withstand First Amendment challenge only if it survives strict scrutiny.) This would be true, even absent the selective enforcement that exists here, because the taking of a photograph or creation of an audiovisual recording is “included with the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.” *ACLU v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012). Videotaping and photography capturing images of poor shelter conditions or neglected animals are indistinguishable from “commenting” or “speaking out” on such conditions, as such images “speak for themselves.” *Cirelli, supra*, at 666 (teacher’s videotaping of school conditions protected by First Amendment); *Glik v. Cunniffe*, 655 F.3d 78, 84-85 (1st Cir. 2011)(videotaping of public officials discharging their duties is protected by the First Amendment and this protection is “fundamental and virtually self-evident”).⁷

Ms. Lynch was improperly terminated in violation of her rights under the First Amendment, and awarded emotional distress damages of \$251,000. Although the damages award was later remitted to \$50,000, the plaintiff also recovered some \$72,000 in attorneys’ fees and costs for work in the district court (and presumably more as a result of work defending the Town’s unsuccessful appeal.) *See Lynch v. Town of Southhampton*, 492 F. Supp. 2d 197, (E.D.N.Y. 2007).

⁷Also see *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (“The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.”); *Porat v. Lincoln Towers Community Ass’n*, 2005 WL 646093 at 4 (S.D.N.Y. 2005) (noting “communicative photography is well-protected by the First Amendment.”)

The purposes of volunteers and members of the public in taking photographs or audiovisual recording at the BCAS shelter are two-fold: First, in instances in which they observe something they think to be wrong or improper, they wish to document it, so they can provide visual proof of the problem and advocate that it be fixed. This includes efforts such as those of Ms. George to keep photographic records of animals at the shelter, in order to track the length and outcomes of their stays. Second, as animal lovers, they want to assist in the County's mission of finding homes for lost and abandoned animals throughout the region. Both of these purposes are entirely legitimate and entitled to protection under the First Amendment, whether undertaken by private individuals or by the media.

Perhaps it is for these reasons that other government-run animal shelters that have attempted to quell criticism by restricting photography have quickly reversed themselves amid public outcry or the prospect of legal challenge. *See, e.g.*, "Memphis Animal Services Reverses Photo Ban Policy," available at <http://www.localmemphis.com/story/d/story/memphis-animal-services-reverses-photo-ban-policy/42375/CuQuJLq0A0eWvGygynt1Bw> (May 2014 Photo ban reversed amid public protest on June 3, 2014); "Wise County (Texas) Sheriff Bans Photos of Animals at Shelter", available at <http://dfw.cbslocal.com/2011/06/28/wise-county-sheriff-bans-photos-of-animals-at-shelter/> (Sheriff's June 28, 2011 attempt to keep "unflattering" animal photos off the internet reversed within 10 days).

Conclusion

For all of these reasons, we find BCAS policies and practices aimed at undermining the shelter's public accountability troubling, and wish to discuss with you ways in which these problems can be remedied. Please contact me once you have an opportunity to review this matter, so that we might set this process in motion. We look forward to hearing from you.

Sincerely,



Deborah A. Jeon
Legal Director