



September 12, 2011

Mayor Lorenzo T. Langford City Hall of Atlantic City VIA Fax# 609-347-5638 and U.S. Mail 1301 Bacharach Blvd., Room 706 Atlantic City, NJ 08401	Bruce Ward, Esq., Atlantic City Solicitor Irving B. Jacoby, Esq., Asst. Solicitor VIA Fax# 609-347-5210 and U.S. Mail City Hall – Suite 406 1301 Bacharach Blvd. Atlantic City, N.J. 08401-3603
Christine M. Petersen Director of Public Safety VIA Fax# 609-347-1847 and U.S. Mail Atlantic City Public Safety Building 2715 Atlantic Avenue Atlantic City, NJ 08401	Ernest Jubilee Deputy Chief, Operations Atlantic City Public Safety Building 2715 Atlantic Avenue Atlantic City, NJ 08401

Re: Violation of Free Speech in Atlantic City

Dear Mr. Langford, Mr. Ward, Mr. Jacoby, Mr. Jubilee, and Ms. Peterson:

Pat Donlevy contacted the Alliance Defense Fund (ADF) regarding his desire to express his religious beliefs on the Boardwalk of Atlantic City and in public parks in Atlantic City. Mr. Donlevy is a citizen who desires to share his religious beliefs in these areas by speaking, distributing literature, and by displaying signs. He desires to do so as an individual and also in small groups of two to seven people.

On a Thursday evening in late June of 2011, Mr. Donlevy went to the Boardwalk in Atlantic City near the intersection of Boardwalk and Indiana Ave. There, he began to speak to others about his religious beliefs. At no time did Mr. Donlevy create any type of congestion or harass anyone or block any pedestrian traffic. A few minutes later, a police officer named Officer Ingargiolio (badge# 752) approached Mr. Donlevy and ordered Donlevy to stop his religious expression because he was not allowed to make eye-contact with anyone since that activity constitutes harassment. Officer Ingargiolio said that if Mr. Donlevy continued his expression, Officer Ingargiolio would “have to write him up.” Confused, Mr. Donlevy stopped his expression and left the Boardwalk for fear of arrest.

A few days later, Mr. Donlevy then called the Atlantic City Police Department and spoke with Lieutenant Vandenberg. Donlevy explained that he wanted to engage in religious expression on the Boardwalk and asked why he was not allowed to do so. Lieutenant Vandenberg responded that City Code §203-4

prohibited Mr. Donlevy from engaging in his desired activities. Atlantic City Code §203-4 is entitled "Services or Lectures Restricted" and states as follows:

No person or persons shall hold religious services or other secular meetings of any kind upon such lands unless a written permit therefor, designating the place where such services shall be held, shall have been first obtained from the Mayor, which permit shall be revocable at the will of the Mayor, and during such service, no horn, cornet, drum or other loud instrument shall be sounded or played upon. No person shall lecture or give addresses thereon unless such permit is first obtained therefor. In case the holding of any service or the giving of any lecture or address shall cause crowds to collect or gather upon the Boardwalk so as to obstruct the passage and use thereof, such service, lecture or address shall be immediately discontinued and held at places upon such lands as are not near or adjoining said Boardwalk. No permit shall be issued for holding such services in any place in front of lands, the owner of which objects thereto.

After reading this section, Mr. Donlevy realized that the Lieutenant was correct --- that Atlantic City had in fact required all persons attempting to conduct a religious service or attempting to give a lecture or address on the Boardwalk or elsewhere, to first apply and receive permission from the government. This situation is intolerable for Mr. Donlevy because he still desires to express his religious beliefs on the Boardwalk and in other public areas (including public parks) in Atlantic City. But he will refrain from doing so in the future because he refuses to obtain a permit beforehand, and therefore he fears arrest for violating City Code §203-4.

LEGAL ANALYSIS

THE FIRST AMENDMENT PROTECTS MR. DONLEVY'S DESIRED EXPRESSION

Mr. Donlevy desires to convey his religious beliefs in Atlantic City by speaking, displaying signs, and distributing literature. Religious expression is speech and is entitled to the same level of protection as other kinds of speech. *Capital Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 760 (1995). It is well-settled that oral and written dissemination of religious viewpoints are entitled to the utmost constitutional protection. *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). Likewise, the display of signs and distribution of literature constitute protected speech. *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 164 (1939); *Boos v. Barry*, 485 U.S. 312, 318 (1988). Thus, Mr. Donlevy's desired speech is covered by the First Amendment.

**INDIVIDUALS HAVE THE RIGHT TO FREELY EXPRESS
THEMSELVES IN TRADITIONAL PUBLIC FORA
SUCH AS SIDEWALKS AND PEDESTRIAN MALLS**

The government's ability to regulate speech on public property depends "on the character of the property at issue." *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (citation omitted). Mr. Donlevy desires to speak on the Atlantic City Boardwalk, other public ways and sidewalks, and in public parks in Atlantic City. Federal courts have consistently characterized such public ways, sidewalks, and parks as "prototypical" examples of traditional public fora. *Schenk v. Pro-Choice Network of Western N. Y.*, 519 U.S. 357, 377 (1997). See also *Hill v. Colorado*, 530 U.S. 703, 715 (2000) (noting that "Public sidewalks, streets, and ways . . . are 'quintessential' public forums for free speech.") (emphasis added); *United States v. Grace*, 461 U.S. 171, 179 (1983) (sidewalk in front of Supreme Court); *Hague v. CIO*, 308 U.S. 496, 515 (1939) (noting that parks have for "time out of mind" been used for "purposes of assembly, communicating thoughts between citizens, and discussing public questions."); *Perry v. Los Angeles Police Dep't*, 121 F.3d 1365, 1368, 1369 (9th Cir.1997) (holding that the Venice Beach Boardwalk was a traditional public forum). Therefore, the areas in which Mr. Donlevy wants to speak are traditional public fora.

This categorization is significant because speech in a traditional public forum deserves the highest level of protection, and any infringement of speech activity there must overcome great scrutiny. *United States v. Kokinda*, 497 U.S. 720, 726 (1990). The ability of the city to regulate Mr. Donlevy's speech on public sidewalks and pedestrian malls is severely restricted. *Boos*, 485 U.S. at 318. In order to meet this high standard, the city must prove that its regulation is 1) content-neutral 2) narrowly tailored to serve a significant government interest and 3) leave open ample means of alternate communication. *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983).

**ATLANTIC CITY'S PERMIT SCHEME IS
OVERBROAD AND LACKS NARROW TAILORING**

To be narrowly tailored, a content neutral regulation cannot "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). But a permit scheme lacks narrow tailoring if it does not make an exception for individuals and small groups. In other words, small groups and lone individuals do not have to obtain a permit before expressing their beliefs in public fora. The reason is simple: individual and small group expression does not create any traffic, administrative, or any other problem that would justify applying a permit requirement to them. See, e.g., *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1039 (9th Cir. 2006). In contrast, a permit requirement greatly hinders expression by

eliminating spontaneous expression. *See, e.g., Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150, 165-66 (2002).

For these reasons, every single Federal court to consider the issue has invalidated permit requirements if they do not exempt individuals and small groups. “It is therefore not surprising that we and almost every other circuit to have considered the issue have refused to uphold registration requirements that apply to individual speakers or small groups in a public forum.” *Berger v. City of Seattle*, 569 F.3d 1029, 1039 (9th Cir. 2009) (en banc). *Accord Boardley v. U.S. Dept. of Interior*, 615 F.3d 508, 520-24 (D.C. Cir. 2010); *Knowles v. City of Waco*, 462 F.3d 430, 436 (5th Cir. 2006); *Cox v. City of Charleston*, 416 F.3d 281, 284-87 (4th Cir. 2005); *American-Arab Anti-Discrimination Committee v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005); *Douglas v. Brownell*, 88 F.3d 1511, 1524 (8th Cir. 1996); *Grossman v. City of Portland*, 33 F.3d 1200, 1205-08 (9th Cir. 1994).

Here, City Code §203-4 forces individuals attempting to hold “religious services or other secular meetings” to first obtain a permit. There is no definition of a “religious service.” Thus, this ordinance can evidently apply to persons speaking a religious message or even to two people gathering to pray. *See, e.g., Cox*, 416 F.3d at 283-84 (invalidating a permit requirement needed to conduct a “parade, meeting, exhibition, assembly or procession of persons” for encompassing small groups); *Knowles*, 462 F.3d at 435-36 (invalidating permit requirement that applied to “a procession of pedestrians, vehicles, and animals or any combination thereof” for encompassing small groups); *Dearborn*, 418 F.3d at 603 (invalidating permit requirement applying to “any walkathon, bikeathon, or jogging group, or other organized group having a common purpose or goal, proceeding along a public street or other public right-of-way” for encompassing small groups). The application of City Code §203-4 to Mr. Donlevy’s expression --- religious expression engaged in as a lone individual --- confirms this point.

Even more important, City Code §203-4 also says that “[n]o person shall lecture or give addresses” until he first applies and obtains a permit. This provision unquestionably applies to lone individuals who wish to speak orally in public fora. Once again, the application of City Code §203-4 to Mr. Donlevy’s expression confirms that this ordinance applies even to individuals and thus requires individuals to seek and obtain a permit before engaging in expression. Such a requirement cannot withstand First Amendment scrutiny. The First Amendment simply does not allow Atlantic City to impose a permit requirement on individuals and small groups wishing to express their beliefs in traditional public fora.

ATLANTIC CITY'S PERMIT SCHEME IS CONTENT-BASED AND ALLOWS UNBRIDLED DISCRETION

A regulation is content based if is adopted or enforced because of disagreement with the message it conveys. *Ward*, 491 U.S. at 791 (citation omitted). But, as ample cases explain, regulations that turn on listener reaction are content based restrictions and subject to strict scrutiny. *See, e.g., Forsyth County*, 505 U.S. at 134; *Boos*, 485 U.S. at 335. These regulations are commonly called heckler's vetoes and they rarely pass constitutional muster. *See Ctr. for Bio-Ethical Reform, Inc., v. L.A. County Sheriff's Dep't*, 533 F.3d 780, 787 (9th Cir. 2008) ("If the statute, as read by the police officers on the scene, would allow or disallow speech depending on the reaction of the audience, then the ordinance would run afoul of an independent species of prohibitions on content-restrictive regulations, often described as a First Amendment-based ban on the 'heckler's veto.'").

Atlantic City's ordinance is a prime example of a heckler's veto because it forbids anyone from "holding such [religious] services in any place in front of lands, the owner of which objects thereto." In other words, §203-4 conditions the ability to speak in a public forum on the whims of a private party, who can object or withhold objection for any reason, including content and viewpoint-based reasons. For example, a landowner can object to a person preaching against abortion and the speaker cannot obtain a permit. But that same landowner can not object to a person preaching in favor of abortion and the speaker can then obtain a permit and go ahead with their expression. As a result, §203-4 empowers one person to silence a message as to willing listeners. Even if every person in an area wants to receive a speaker's message except for one landowner, that one landowner could object and thereby silence the speaker's message. Courts view this scenario as improper because it allows for unbridled discretion and content based restrictions on expression. *See, e.g., Reno v. ACLU*. 521 U.S. 844, 880 (1997) (invalidating ordinance that allowed one person to object to and thus silence expression in a chat room); *Hill*, 530 U.S. at 735 n.43 (explaining that courts do not allow "a single, private actor to unilaterally silence a speaker even as to willing listeners."); *Gathright v. City of Portland*, 439 F.3d 573, 577 n.3 (9th Cir. 2006) (invalidating permit scheme that enabled "private citizens to exclude people from events in public forums solely on the basis of the content of their speech.").

DEMAND

I trust this information helps clarify the rights and responsibilities of the City. In summary, the First Amendment does not allow Atlantic City to enforce its content-based permit requirement, as contained in §203-4. Because Mr. Donlevy retains a strong desire to express his religious beliefs in the future in Atlantic City, both as an individual and in small groups, we demand that you notify us in writing – no later than three weeks from the date of this letter – that you will allow Mr.

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Donlevy to engage in his expression without first having to obtain a permit and that you will revise or revoke §203-4. If we do not hear from you in writing before the specified deadline, we can only assume that the City approves of and intends to continue its unconstitutional policies by forcing individuals and small groups to obtain a permit before speaking. Under that scenario, we would have no choice but to take legal action to ensure the protection of Mr. Donlevy' First Amendment rights.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jonathan Scruggs', with a large, stylized flourish at the end.

Jonathan Scruggs

JAS/mk
cc: Pat Donlevy