ALLIANCE DEFENSE FUND
Defending Our First Liberty

June 20, 2011

Mayor Donald L. Plusquellic City of Akron **VIA Fax# 330-375-2468 and U.S. Mail** 166 South High Street, Suite 200 Akron, OH 44308	James Nice, Chief Akron Police Dept. 217 S. High St. Akron, OH 44308
David A. Lieberth Deputy Mayor - Administration City of Akron 166 South High Street Akron, OH 44308	Cheri B. Cunningham, Director of Law **VIA Fax# 330-375-2041 and U.S. Mail** City of Akron 161 South High Street, Suite 202 Akron, OH 44308

Re: Violation of Free Speech in Akron

Dear Mayor Plusquellic, Mr. Lieberth, Chief Nice and Ms. Cunningham:

Jason Robinson contacted the Alliance Defense Fund (ADF) regarding his desire to display signs and distribute literature on public sidewalks in downtown Akron. Mr. Robinson is a citizen who desires to express his religious beliefs in these public areas but was prevented by Akron police officers.

On July 4, 2010, Jason Robinson went to the Akron Ohio fireworks display in order to express his religious beliefs by distributing literature and displaying signs. This fireworks display was located in a public park and on the public sidewalks of downtown Akron. Mr. Robinson stayed on the public sidewalks nearby the event. During this event, there was no admission charged to enter onto the public sidewalks. At all times, the event and the sidewalks in question remained free and open to the public.

When Mr. Robinson arrived on the sidewalks downtown, he began to express his religious beliefs by displaying his sign and distributing literature. Eventually, a police officer approached Robinson and told him that he could not conduct any of his expressive activities because the event was considered a private event. Under the threat of arrest, Mr. Robinson refrained from expressing his beliefs and left downtown Akron.

LEGAL ANALYSIS

THE FIRST AMENDMENT PROTECTS MR. ROBINSON'S DESIRED SPEECH

Mr. Robinson desires to convey his religious beliefs through activities protected by the First Amendment of the United States Constitution. 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. Robinson's desired speech is covered by the First Amendment.

INDIVIDUALS HAVE THE RIGHT TO FREELY EXPRESS THEMSELVES IN TRADITIONAL PUBLIC FORA SUCH AS PUBLIC SIDEWALKS

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). Robinson desires to speak on the public sidewalks in Akron. The United States Supreme Court has consistently characterized such places—public sidewalks—as "quintessential" public fora for speech. *United States v. Grace,* 461 U.S. 171, 179 (1983) (sidewalk in front of Supreme Court); *Acorn v. City of Phoenix,* 798 F.2d 1260, 1266 (9th Cir. 1986) (noting that the Supreme Court has "listed 'sidewalks' separately as an additional example of traditional public fora..."). "[T]ime out of mind," those locations "have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO,* 308 U.S. 496, 515 (1939). Therefore, the area in which Robinson wants to speak is a traditional public forum.

This categorization is significant because expression 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 Akron to regulate Robinson's speech on a public sidewalk is severely restricted. *Boos v. Barry,* 485 U.S. 312, 318 (1988). In order to meet this high standard, Akron 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).

THE CITY MAY NOT TRANSFORM THE NATURE OF THE TRADITIONAL PUBLIC FORUM WITH A PERMIT SCHEME OR FESTIVAL

It is also worth noting that the city may not change the character of a traditional public forum simply by conducting a festival or giving a private party a permit to conduct a festival. The city "may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums...." *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 133 (1981). *See Irish Subcommittee v. Rhode Island Heritage Com'n*, 646 F. Supp. 347, 353 (D.R.I. 1986) (government cannot change essence of public forum).

When public streets and parks remain open to the public, they retain their status as traditional public fora. For example, in *Parks v. City of Columbus*, Columbus held an arts festival open to the public but required all participants in the festival to obtain a permit. 395 F.3d 643, 645-46 (6th Cir. 2005). Columbus then prevented a street preacher from speaking and distributing literature at the festival. *Id.* Columbus argued that the festival altered the character of the public streets. *Id.* at 649. But this argument was flatly rejected by the Sixth Circuit in its ruling against Columbus:

> The City cannot, however, claim that one's constitutionally protected rights disappear because a private party is hosting an event that remained free and open to the public. Here, Parks attempted to exercise his First Amendment free speech rights at an arts festival open to all that was held on the streets of downtown Columbus. Under these circumstances, the streets remained a traditional public forum notwithstanding the special permit that was issued to the Arts Council.

Id. at 652. Put simply, Akron does not void the First Amendment by giving a private party a permit to control a public sidewalk or a public park. *See also Startzell v. City of Philadelphia*, 533 F.3d 183, 194-95 (3d Cir. 2008); *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 899 (9th Cir. 2008); *Gathright v. City of Portland*, 439 F.3d 573, 579 (9th Cir. 2006).

Nor does it matter if the public sidewalks are fenced off. As long as the public sidewalks are free and open to the public, these sidewalks remain traditional public fora. *See, e.g., Gathright v. City of Portland*, 482 F.Supp.2d 1210, 1215-16 (D.Or. 2007) ("Additionally, the First Amendment analysis that the Ninth Circuit upheld in Gathright II provides no basis for distinguishing fenced events from other events open to the public. The same competing rights are at issue whether or not an event is fenced...Defendants' contention that fencing or gating an otherwise public event transforms it into a closed event is untenable. Such a ruling would allow defendants to defeat plaintiffs' rights under the First Amendment merely by fencing every public event.").

This situation in Akron is no different from the situation addressed in *Parks* and *Gathright*. Thus the logic of *Parks* and *Gathright* holds here: the sidewalks in question are traditional public fora.

BAN IMPOSED ON ROBINSON IS NOT NARROWLY TAILORED TO ACHIEVE THE CITY'S INTEREST

Because Robinson attempted to speak in a traditional public forum, any regulation on his speech must be narrowly tailored to serve a significant government interest and leave open alternative avenues for communication. To be narrowly tailored, a regulation may not "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). According to the Supreme Court, narrow tailoring requires "carefu[l] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition." *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993) (internal quotation marks omitted).

The regulation imposed by Akron cannot satisfy this test because Akron officials banned all of Robinson's desired speech ---literature distribution and displaying signs. This ban is way too broad. *See, e.g., United States v. Grace*, 461 U.S. 171, 180-84 (1983) (invaliding ban on displaying signs on public sidewalks around Supreme Court building); *Schneider v. New Jersey*, 308 U.S. 147, 157-64 (1939) (invalidating ban on literature distribution occurring on public sidewalks); *Lederman v. United States,* 291 F.3d 36, 44-46 (D.C. Cir. 2002) (invaliding ban on "demonstrations" including "speechmaking" and "leafleting" on certain sidewalks near capital building because those activities did not necessarily cause congestion or threaten safety); *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 573-74 (9th Cir. 1993) (invalidating ban on literature distribution in part of public park). There is no reasonable justification for a complete ban on all speech, whether it be literature distribution or displaying signs. Indeed, such broad bans are not even allowed in non-public fora, much less the traditional public forum at issue here. *See, e.g., See Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 680-683 (1992) (invalidating ban on literature distribution in nonpublic forum airport terminal); *Norfolk v. Cobo Hall Conference and Exhibition Center*, 543 F.Supp.2d 701, 712 (E.D.Mich. 2008) (invalidating total ban on leafleting in nonpublic forum, city convention center).

And this same logic applies even inside a gated festival. *See, e.g., Saieg v. City of Dearborn*, No. 10–1746, --- F.3d ----, 2011 WL 2039157 (6th Cir. May 26, 2011) (invaliding ban on literature distribution on public sidewalks open to public, even though located inside gated festival). Nor does it matter if the Akron police officers acted at the request of festival organizers. Government officers may not silence speech because of hostile private parties. Such action is clearly prohibited by the First Amendment as an improper heckler's veto and as an exercise of improper

delegation to private parties and of unbridled discretion. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *Boos*, 485 U.S. at 335. *See also Hill v. Colorado*, 530 U.S. 703, 735 n.43 (2000) (noting that "governmental grants of power to private actors constitutionally problematic" when those "regulations allowed a single, private actor to unilaterally silence a speaker even as to willing listeners.").

RESTRICTIONS ON MR. ROBINSON'S SPEECH ARE NOT NECESSARY TO PRESERVE THE RIGHTS OF EVENT PARTICIPANTS

Akron may be concerned about the free speech rights of those participating in the fireworks display event. But this concern does not justify the suppression of Mr. Robinson's own free speech rights. Mr. Robinson does not desire to participate in the event. He does not desire to obtain a booth or to participate in any festival activities. Nor does Mr. Robinson wish to dilute the message of the festival event with his own message. Rather, Mr. Robinson desires to walk through on the public sidewalks and engage in his own activities distinct from the festival activities. In so doing, Robinson presents his own, clearly distinct message by distributing literature and displaying signs. And therefore, Mr. Robinson's speech in no way infringes on the speech of festival participants. *See Parks*, 395 F.3d at 651; *Gathright*, 439 F.3d at 577.

DEMAND

I trust this information helps clarify the rights and responsibilities of the City. In summary, the First Amendment does not allow Akron to bar Mr. Robinson's expression on public sidewalks downtown during the Akron fireworks event. Because Robinson retains a strong desire to share his message at future fireworks displays, including the 2011 fireworks display which is imminently approaching, we demand that you notify us in writing immediately that you will allow Robinson to enter onto downtown public sidewalks and distribute literature and display signs during the time of the fireworks display. If we do not hear from you in writing before the specified deadline, we can only assume that Akron approves of the ban on Robinson's expression and that Akron intends to continue its unconstitutional policies and practices by banning Robinson's expression in the future. Under that scenario, we would have no choice but to take legal action to ensure the exercise of Mr. Robinson's First Amendment rights.

Sincerely,

Jonathan Scruggs

JAS/mk
cc: Jason Robinson