FIRST LIBERTY

CENTER FOR RELIGIOUS EXPRESSION

November 14, 2017

Doyle F. Lowe, Mayor **VIA U.S. Mail and Email** **dlowe@sweetwatertn.net** City Hall 203 Monroe St Sweetwater, TN 37874	Robert E. Byrum, Police Chief **VIA U.S. Mail and Email** **sweetwaterpd@sweetwatertn.net** Sweetwater Police Department P.O. Box 267 Sweetwater, TN 37874
John Cleveland, Esq., City Attorney **VIA U.S. Mail and Email** **cityattorney@sweetwatertn.net** 120 W. Morris St Sweetwater, TN 37874	Jessica Morgan, Recorder **VIA U.S. Mail and Email** **jmorgan@sweetwatertn.net** City Hall 203 Monroe St Sweetwater, TN 37874

Re: Free Speech Violation in Sweetwater

Dear Mayor Lowe, Chief Byrum, Mr. Cleveland, and Mrs. Morgan:

Please know Paul Johnson retained First Liberty Institute and the Center for Religious Expression regarding an unlawful restriction on his right to freely express his religious beliefs on public ways in Sweetwater, particularly, during public events.

On August 21, 2017, Johnson went to the public way along Main Street, near the intersection with Wright Street, and orally shared his religious views. Main Street was roped off and closed to vehicular traffic to facilitate public pedestrian access to the Solar Eclipse Festival. The festival was free and open to the public. Positioning himself along the east side of the road, Johnson did not enter the parking lot adjacent to him or the portion of the festival where booths were set up, but stayed on a public way. He did not in any way obstruct traffic or cause any other problems.

Notwithstanding, after only a few minutes of expressive activity, Johnson was approached by Mrs. Morgan, City Recorder for Sweetwater, as well as Mayor Lowe, Chief Byrum, and a few Sweetwater police officers. Mrs. Morgan informed Johnson that he could not continue his expression because he did not possess a permit for his expression. Backing Mrs. Morgan up, the police made clear that Johnson would be arrested if he did not cease his expression.

Concerned that city officials misunderstood his purpose, Johnson advised that he did not intend to enter the area where festival booths were located. But, Chief Byrum made clear that Johnson needed a permit to "demonstrate anywhere in the city of Sweetwater." Johnson then clarified that he was not demonstrating, merely sharing his faith, but Chief Byrum equated the two as the same, explaining that Johnson's expression was considered a "demonstration." Johnson also sought clarity as to whether he could speak anywhere else in Sweetwater, but Chief Byrum responded that he could not do so anywhere within the city limits because he did not have a permit from the recorder. After exhausting options, and fearing arrest, Johnson agreed to cease his expression, and eventually left.

Subsequently, Johnson sought a permit so he could speak in public way next to a public event. Though Johnson maintained his firm belief that a government-issued permit was not obligatory to exercise constitutional rights in public places, in an attempt to get his message out, he decided to obtain a permit to speak during the National Muscadine Festival, scheduled to occur in the same location approximately one month later.

Johnson went to Sweetwater City Hall and spoke with Mrs. Morgan about obtaining a permit to speak on public sidewalks and ways during the Muscadine Festival. Mrs. Morgan, however, informed Johnson that he was not eligible to receive a permit. For reason, Mrs. Morgan invoked the same ordinance referenced before, the permit requirement for "demonstrations" Sweetwater Ordinance 16-110, asserting that she could not issue a permit for his planned speech. Mrs. Morgan indicated that Johnson's speech was inappropriate because many people would be present for the festival and his expression could interfere with them. Mrs. Morgan advised Johnson that he could apply for a permit, but the request would most likely be denied.

That very day, Johnson submitted an application for a permit to speak during the Muscadine Festival, but he has yet to receive a response. Unable to obtain a permit and fearing arrest, Johnson has not returned to share his faith in Sweetwater since.

Without question, Sweetwater has violated Johnson's constitutional rights, prohibiting him from speaking in traditional public fora via application of an unconstitutional permit requirement, and continues to do so. Johnson sends this correspondence, through counsel, in an effort to secure his rights without the necessity of federal litigation.

LEGAL ANALYSIS

JOHNSON'S EXPRESSION IS CONSTITUTIONALLY PROTECTED

That the First Amendment protects the communication of religious views in public is beyond dispute. *Capitol Square Review and Advisory Board v. Pinette,* 515 U.S. 753, 760 (1995). And, oral speech is a protected means for conveying these viewpoints. *See Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *Edwards v. South Carolina*, 372 U.S. 229, 235-36 (1963) ("religious harangue" protected); *Parks v. City of Columbus*, 395 F.3d 643, 647 (6th Cir. 2005) ("preaching…has been recognized as protected speech under the First Amendment"). Consequently, Johnson's desired expression is entitled to full protection under the First Amendment.

JOHNSON SEEKS TO SPEAK IN TRADITIONAL PUBLIC FORA

Restrictions on speech are analyzed in light of the status of the forum at issue. *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (citation omitted). It is well established that public streets and sidewalks are "quintessential public forums" for speech. *See Parks*, 395 F.3d at 648 (streets) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)); *Saieg v. City of Dearborn*, 641 F.3d 727, 734 (6th Cir. 2011) (sidewalks). As a public street, Main Street, along with its abounding sidewalks, and other similar locations in Sweetwater, classify as traditional public fora.

This forum status is not alterable at the leisure of the government. *See United States v. Grace*, 461 U.S. 171, 179-180 (1983) (government cannot destroy traditional forum status by "*ipse dixit*"). Rather, it is inherent in the make-up, history and open nature of such locations. "No particularized inquiry into the precise nature of a specific street is necessary[because] all public streets are held in the public trust and are properly considered traditional public fora." *Frisby*, 487 U.S. at 481. For this reason, the Sixth Circuit and other appellate courts have repeatedly acknowledged that traditional public fora retain their traditional status as long as they remain free and open to the public, even when a permitted event is transpiring in that location. *E.g., Parks*, 395 F.3d at 652; accord *Teesdale v. City of Chicago*, 690 F.3d 829, 834 (7th Cir. 2012) *Startzell v. City of Philadelphia*, 533 F.3d 183, 196 (3d Cir. 2008); *Gathright v. City of Portland*, 439 F.3d 573, 579 (9th Cir. 2006).

The status of traditional public forum carries with it significant weight, severely limiting the government's ability to restrict expression. *Id.* at 653 (citation omitted). To be upheld, any restriction on expression must be content-neutral,

narrowly tailored to achieve a significant government interest, and leave open ample alternative channels for communication. *Parks*, 395 F.3d at 653. Additionally, a permit requirement on speech must refrain from vesting unbridled discretion in the licensing official. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). The restriction imposed on Johnson does not meet any of these requisites.

PERMIT REQUIREMENT ON INDIVIDUAL EXPRESSION IS NOT A NARROWLY TAILORED MEASURE

Narrow tailoring demands a restriction on speech 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). By imposing a permit requirement on individual expression, Sweetwater's scheme fails this test. Sweetwater considers Johnson's speech a "demonstration" that is prohibited absent a permit obtained in advance.[1] Although a permit may be appropriate for large events, like a parade, rally, or concert (*see Forsyth Cnty.*, 505 U.S. at 130), courts have unanimously held permit requirements for individual and small group expression are not narrowly tailored measures. *See, e.g., Marcavage v. City of Chicago*, 659 F.3d 626, 635 (7th Cir. 2011) (recognizing growing and "powerful consensus" among circuits that permit schemes applicable to groups of ten and under to be constitutionally suspect); *Knowles v. Waco*, 462 F.3d 430, 436 (5th Cir. 2006) ("[O]rdinances requiring a permit for demonstrations by a handful of people are not narrowly tailored to serve a significant government interest."); *Cox v. City of Charleston*, 416 F.3d 281, 285 (4th Cir. 2005) ("[T]he unflinching application of the Ordinance to groups as small as two or three renders it constitutionally infirm"); *Grossman v. City of Portland*, 33 F.3d 1200, 1206-07 (9th Cir. 1994) (permit requirement for individuals "making an address" in public places not narrowly tailored). The Sixth Circuit is among this consensus. *See American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005) (permit scheme applicable to peaceful expression by small groups not narrowly tailored because such groups do not threaten safety and traffic control interests).

Compounding the concern, Sweetwater Ordinance 16-110 requires would-be speakers apply for permission 10 days in advance. Again, while such requirement might be suitable for a parade or some other large event, imposing this requirement

[1] Application of the permit requirement to Johnson's expression is also void-for-vagueness under the Fourteenth Amendment because it fails to give fair notice of a criminal penalty. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Johnson's public speaking does not fall within the normal meaning of "demonstration," or any of the other terms in the ordinance ("meeting, parade,…or exhibition"). Because the ordinance fails to inform that Mr. Johnson's expression is covered by it, enforcement against him is unconstitutionally vague as-applied.

on an individual speaker like Johnson unduly burdens free expression, deterring speakers from speaking at all. *Boardley v. U.S. Dep't of Interior*, 615 F.3d 508, 523 (D.C. Cir. 2010); *see Santa Monica Food Not Bombs v. City of Santa Monica,* 450 F.3d 1022, 1034, 1039 (9th Cir. 2006) (explaining that advance notice requirements do not further legitimate interests when applied to small groups). A ten-day advance notice requirement, as applied to individual expression, is much more burdensome than necessary. *See, e.g., Grossman* 33 F.3d at 1208 (invalidating seven day advance notice requirement to demonstrate in public park); *Douglas v. Brownell,* 88 F.3d 1511, 1524 (8th Cir. 1996) (struck down five day advance notice requirement).

The lack of tailoring here is self-evident, especially given the innocuous nature of Johnson's expression. All Johnson wants to do is orally speak while standing on a public way where he and the rest of the pedestrian public are free to be. Such speech in no way causes any harm. Thus, banning Johnson from engaging in his expression without obtaining a permit in advance (of 10 days) cannot narrowly serve any legitimate interest of Sweetwater, much less a significant one. There is no justification for requiring Johnson to obtain Sweetwater's permission in advance to speak in public.

SWEETWATER ORDINANCE 16-110 VESTS UNBRIDLED DISCRETION

As a prior restraint on speech, Ordinance 16-110 bears "a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). Prior restraints must provide "narrow, objective, and definite standards" to guide the licensor. *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 150-51 (1969).

On its face, Ordinance 16-110 provides no criteria or guidelines explaining whether or when a permit should issue. Lacking explicit guidelines, Sweetwater officials retain *carte blanche* authority to grant or deny permits however they deem best, including content and viewpoint discrimination. This discretion does not pass muster. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763-64 (1988) (ordinance that allows licensors to grant or deny permits based on content or viewpoint vests unbridled discretion and is unconstitutional).

The pernicious effects of such an ordinance are manifest here. Johnson was stopped from preaching on a public way at a time when the rest of the public was at liberty to be there and speak. He was singled out and silenced because he did not have a permit to demonstrate. Yet, when he applied for a permit to speak at a future event, he was arbitrarily refused one. Vesting unbridled discretion,

Ordinance 16-110 has violated and continues to violate Johnson's constitutional rights.

RESULTING TOTAL BAN ON JOHNSON'S SPEECH IS UNCONSTITUTIONAL

In application, Sweetwater's permit requirement effectuates a total ban on the public dissemination of views in traditional public fora while public festivals are taking place. Far from "target[ting] and eliminat[ing] no more than the exact source of the 'evil' it seeks to remedy," *Frisby*, 487 U.S. at 486, Sweetwater outright bans, through its refusal to issue permits, virtually all expressive activity during public festivals. In a traditional public forum, such a broad ban is not narrowly, or even remotely, tailored. *See, e.g., Lederman v. United States*, 291 F.3d 36, 44-46 (D.C. Cir. 2002) (ban on "demonstrations" defined broadly to include "leafletting" and "speechmaking" by a lone individual on sidewalks around capitol building not narrowly tailored). Neither the presence of a public event nor generic crowding concerns are sufficient to alter this conclusion. *Bays v. City of Fairborn*, 668 F.3d 814, 823-25 (6th Cir. 2012) (ban on expression, including "stationary preaching" in public park during public festival not narrowly tailored to pedestrian traffic flow and reducing congestion). In orally addressing people on public ways during public festivals, Johnson takes up no more space than his mere presence, affording no justification for banning him from speaking. *Lederman*, 291 F.3d at 45 (government cannot "distinguish between demonstrators and pedestrians on a wholesale and categorical basis, without providing evidence that demonstrators pose a greater risk to identified government interests than do pedestrians.") (citation and quotation marks omitted).

The total ban on Johnson's speech also fails to leave open ample alternative channels of communication, representing an additional infirmity. "The First Amendment protects the right of every citizen to reach the minds of willing listeners and to do so there must be opportunity to win their attention." *Heffron*, 452 U.S. at 655. Banned from preaching in public at public events, Johnson has no opportunity reach his intended audience: people attending public events. *See Edwards v. City of Coeur d'Alene*, 262 F.3d 856, 866 (9th Cir. 2001) ("If an ordinance effectively prevents a speaker from reaching his intended audience, it fails to leave open ample alternative means of communication."). That Sweetwater may issue a Johnson a permit to speak elsewhere or at some other time when there are fewer people for him to reach, is legally insufficient. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. New York*, 308 U.S. 147, 163 (1939). Prohibiting Johnson from reaching his audience, Sweetwater fails to leave open any sufficient alternatives for his message.

DEMAND

As demonstrated, Sweetwater's permit scheme, and its application and enforcement to ban Johnson from speaking on public ways during public events, violates Johnson's constitutional rights. Because Johnson is eager to return to Sweetwater to share his religious beliefs with people attending public events, we respectfully request you provide written assurance – no later than three weeks from the date of this letter – that Sweetwater will allow him to peacefully share his religious beliefs at future events without imposing the unconstitutional permit requirement for "demonstrations" on him.

Should we not hear from you by the deadline, we must assume Sweetwater will continue to enforce its unconstitutional policy and practice, leaving Johnson with no other recourse but to pursue legal action.

Sincerely yours,

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cc: Paul Johnson