FIRST LIBERTY

October 23, 2024

Mayor Al Koon
Town of Chapin
PO Box 183
157 NW Columbia Avenue
Chapin, SC 29036
Via US Mail & Email: [redacted]

Police Chief Thomas W. Griffin
Town of Chapin
PO Box 183
157 NW Columbia Avenue
Chapin, SC 29036
Via US Mail &
Email: [redacted]

Re: Unconstitutional Permit Requirement on Free Speech in Chapin, South Carolina

Dear Mayor Koon and Chief Griffin:

First Liberty Institute is the nation's largest law firm dedicated exclusively to defending and restoring religious liberty for all Americans. Ernest Giardino contacted us regarding Chapin's permit requirement that infringes on his fundamental right to carry religious signs on public sidewalks.

On June 20, 2024, Mr. Giardino was on a public sidewalk at the intersection of Old Lexington Highway and Chapin Road in the Town of Chapin, South Carolina. He was holding a 20 inch by 24-inch sign attached to a short handle stating "Trust Christ He paid the price" on one side and "He Saved Others – Jesus – He'll Save You" on the other side. He had held similar signs on Chapin sidewalks for the previous 8 months without incident. However, on this day, as Mr. Giardino was leaving a Chapin police officer approached him and informed him that he needed Chapin's permission to share his message via sign.

The next day, Mr. Giardino spoke with the Code Enforcement Officer and the Chief of Police in person about this surprising development. Though cordial, both confirmed the need for a permit for his speech, handing Mr. Giardino a permit application for Chapter 14-Article X, Parades, Demonstration, Picketing. The permit limits Mr. Giardino's time to hold his sign to 30 minutes. He was also advised that – even with a permit – he must change sidewalk corners every 15 minutes while holding a sign.

With this letter, Mr. Giardino seeks immediate relief from the ordinance and the ongoing violation of his constitutional rights.

LEGAL ANALYSIS

A government entity bears the burden of justifying a restriction on speech. *Ranch House, Inc. v. Amerson*, 238 F.3d 1273, 1283 (11th Cir. 2001). Chapin is unable to meet this burden. The propriety of a speech infringement is assessed through the lens of forum analysis, contemplating the protection afforded the speech, the suitability of the venue for the speech, and the scrutiny applied to the restriction. *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 797 (1995). This analysis reveals Chapin's permit scheme is unconstitutional.

The First Amendment Protects Mr. Giardino's Desired Speech

Mr. Giardino wants to share his religious beliefs through signs. Religious expression 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) (plurality). To be sure, "[r]eligious expression holds a place at the core of the type of speech the First Amendment was designed to protect." *DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 570 (7th Cir. 2001). And signs, in particular, garner constitutional safeguarding. *Boos v. Barry*, 485 U.S. 312, 318 (1988). The protection is sure, even if others happen to find the signs offensive. *See Hill v. Colorado*, 530 U.S. 703, 715 (2000) ("fact that the messages conveyed by those communications may be offensive to their recipients does not deprive them of constitutional protection").

Chapin Sidewalks are Traditional Public Fora

The government's ability to regulate speech on public property turns "on the character of the property at issue." *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (citation omitted). Mr. Giardino wants to hold a sign on public sidewalks located in Chapin, spaces that represent "quintessential" traditional public fora for free speech. *Hill*, 530 U.S. at 715; *One World One Family Now v. City of Miami Beach*, 175 F.3d 1282, 1285 (11th Cir. 1999). *See, e.g.*, *Boos*, 485 U.S. at 318 (public way within 500 feet of foreign embassy); *United States v. Grace*, 461 U.S. 171, 179 (1983) (sidewalk in front of Supreme Court). For "time out of mind," such 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).

Speech in traditional public fora deserves the highest level of protection, and an infringement on speech activity in these areas trigger the highest level of scrutiny. *United States v. Kokinda*, 497 U.S. 720, 726 (1990) (plurality). Therefore, the government's ability to regulate Mr. Giardino's speech on public sidewalks is "very limited." *Boos*, 485 U.S. at 318.

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Chapin's Permit Scheme is an Unconstitutional Prior Restraint

"A prior restraint on expression exists when the government can deny access to a forum before the expression occurs." *United States v. Frandsen*, 212 F.3d 1231, 1236-37 (11th Cir. 2000). Chapin ordinance § 14.1001, *et. seq*. is a prior restraint because it prohibits any person from engaging in a demonstration or picket "unless a permit to perform such actions has been secured."

The classification is significant because a prior restraint "bear[s] a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The presumption is fitting. Permit schemes, like the one found in Chapin, have the effect of freezing speech before it is uttered. Permit schemes are thus viewed skeptically, being "the most serious and least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). A prior restraint like Chapin's ordinance can survive challenge only if it does not delegate overly broad licensing discretion to government officials. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). Chapin's permit scheme falls short of this standard, in multiple ways.

A prior restraint that lacks narrow, objective, and definite standards to guide the licensing authority is unconstitutional on its face. *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 150-51 (1969). Whenever a permit scheme "involves appraisal of facts, exercise of judgment, and the formation of an opinion," the risk of censorship is simply too great. *Forsyth County*, 505 U.S. at 131 (internal citations omitted). Vague or non-existent criteria empower government officials to "decide who may speak and who may not be based upon the content of the speech or the viewpoint of the speaker." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763-64 (1988).

Notably, the necessary guidelines or criteria are not found in Chapin's permit scheme. An initial example of this is the terms "picketing" and "demonstrations" being left undefined in the ordinance. In the absence of certain meaning, Chapin enforces the scheme in unexpected ways, as illustrated with its uneven application of "demonstration" to Mr. Giardino's evangelistic religious speech on June 20, 2024, but not in the prior 8 months he held the sign in the same location. The unfettered discretion to stretch terms in this manner is what subjects Mr. Giardino to the strictures of the permit scheme in the first place.

Also, upon subjecting religious speech to the permit requirement by labelling it as a demonstration, § 14.1002 reserves discretion for the Mayor and Council to deny a permit based on their own notions of "public convenience and public welfare." As held by the U.S. Supreme Court in *Shuttlesworth*, this sort of discretion is not "narrow, objective, and definite" criteria for decision-making. 394 U.S. at 150-51.

Chapin's Scheme is Not a Reasonable Time, Place, or Manner Regulation

Moreover, to pass constitutional muster, the town must show its ordinance is content-neutral, narrowly tailored to serve a significant government interest, and leaves open ample alternative means of communication. *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983). Chapin cannot meet these requisites either.

First, the restriction is not a content-neutral measure. Per § 14.1003, town officials automatically deny a permit request from anyone they perceive to be part of a cult or that practices discrimination. Presently, it is unknown whether Chapin believes § 14.1003 would disqualify Mr. Giardino for a permit, but the prospect of this application is chilling. The content-based qualifiers are patently unconstitutional. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). No government entity is at liberty to restrict speech based on the topic or idea expressed. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). Chapin does so with this provision.

Second, the permit restriction is not narrowly tailored. A restriction is "narrowly tailored" only if it "eliminates no more . . . 'evil' [than] it seeks to remedy." *Frisby*, 487 U.S. at 485. Chapin's permit scheme does not clear this constitutional bar because it applies to individual and small group speech. Courts considering application of permit requirements to small group or individual speech have unanimously held that such restrictions lack narrowly tailoring. *See, e.g., Smith v. Exec. Dir. of Ind. War Memorials Comm'n.,* 742 F.3d 282, 289 (7th Cir. 2014) ("fourteen-person limit on demonstrations without a permit is not narrowly tailored"); *Marcavage v. City of Chicago*, 659 F.3d 626, 635 (7th Cir. 2011) (observing growing and "powerful consensus" among circuits finding 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"); *Parks v. Finan*, 385 F.3d 694, 705-06 (6th Cir. 2004) (held permit scheme applicable to lone individual engaged in expression not narrowly tailored); *Grossman v. City of Portland*, 33 F.3d 1200, 1206-07 (9th Cir. 1994) (held permit requirement for individuals "making an address" in a public place not narrowly tailored); *Cmty. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1392 (D.C. Cir. 1990) (struck down permit requirement because it could conceivably apply to groups as small as two); *Diener v. Reed*, 232 F. Supp. 2d 362, 387-88 (M.D. Pa. 2002) (held permit requirement applying to individual making public speech in park invalid). *See also*

Douglas v. Brownell, 88 F.3d at 1511, 1524 (8th Cir. 1996) (in concluding parade permit ordinance was not narrowly tailored, espoused doubt as to whether permit requirement could be constitutionally applied to groups as small as ten).[1] The Eleventh Circuit has noted this trend approvingly. *Burk v. Augusta-Richmond Cnty.*, 365 F.3d 1247, 1255 n. 13 (11th Cir. 2004) (holding application of permit scheme to group of five not narrowly tailored). These cases point to the inescapable conclusion that Chapin's application of a permit requirement to the speech of a single individual – Mr. Giardino with a sign – is not narrowly tailored.

Chapin's permit ordinance also lacks narrow tailoring because its advance notice requirement inordinately burdens spontaneous speech. "[W]hen an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth,* 394 U.S. at 163 (Harlan, J, concurring). For this reason, advance notice requirements are constitutionally dubious. *See, e.g., Brownell,* 88 F. 3d at 1511 (striking down five-day advance notice requirement); *Grossman* 33 F.3d at 1208 (invalidating seven-day advance notice requirement to participate in organized demonstration in public park). Advance notices are especially out of place when applied to individual or small group expression, as done here. They impose a much greater burden on individuals and small groups (as opposed to large groups). *Boardley v. U.S. Department of Interior*, 615 F.3d 508, 523 (D.C. Cir. 2010). Unlike large groups, which may create security and administrative concerns and require significant preparation time, individuals and small groups do not generate a need for notice in advance. *See, e.g.*, *Santa Monica Food Not Bombs v. City of Santa Monica,* 450 F.3d 1022, 1034, 1039 (9th Cir. 2006) (explaining that advance notice requirements only further traffic, congestion, and security interests when applied to large groups). There is no reason for the town to receive any advance notice – much less a 14-day advance notice – that Mr. Giardino will hold up a sign on one of the sidewalks in Chapin.

The ordinance further demonstrates insufficient tailoring with its time restraints. Section 14.1001b(9)(d) caps speech to a time limit of 30 minutes for no apparent reason. Additionally, town officials informed Mr. Giardino that he has to move to a different spot every 15 minutes. These arbitrary time limitations serve no legitimate purpose, making them overly broad as well.

DEMAND

[1] Application of the permit scheme to Mr. Giardino's individual speech is especially egregious given his religious intentions. "[R]equiring a permit as a prior condition on the exercise of the right to speak poses an objective burden of citizens holding religious ... views." *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 167 (2002). "[T]here are a significant number of persons whose religious scruples will prevent them from applying for such a license." *Id.*

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Chapin has violated and persists in violating Mr. Giardino's constitutional rights by forcing a permit requirement on his peaceful, non-obstructive religious expression on public sidewalks. He requires written assurance that Chapin will no longer ban his expression on public sidewalks through the aforementioned permit scheme.

We respectfully ask you respond to this letter by November 12, 2024, and confirm that Mr. Giardino is not subject to this permitting requirement.

Sincerely yours,

Nathan W. Kellum
Senior Counsel

cc: Ernest Giardino