ACLJ
American Center
for Law & Justice

July 28, 2011

Michael A. Cardozo
Corporation Counsel
City of New York Law Dept.
[redacted]

VIA FAX AND FEDERAL EXPRESS

Re: Violation of Christian Action Network's First Amendment Rights

Dear Mr. Cardozo,

The American Center for Law and Justice (ACLJ) represents the Christian Action Network (CAN) concerning its First Amendment right to use New York City public parks for expressive purposes on a nondiscriminatory basis. As explained herein, the Department of Parks and Recreation has violated CAN's First Amendment rights by refusing to approve several validly completed applications to air a documentary in city parks due to the viewpoints expressed in the documentary. We demand prompt action to remedy this situation if the City wants to avoid litigation in federal court.

By way of introduction, the ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion.[1] As you are likely aware, the ACLJ recently obtained a preliminary injunction in federal court prohibiting New York City from implementing Local Law 17, a statute that violates the First

[1] *See, e.g.*, *Pleasant Grove v. Summum*, 555 U.S. 460 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors have First Amendment rights); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities).

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Amendment rights of pro-life crisis pregnancy centers. *Evergreen Association v. City of New York*, 11-CIV-2055 (July 13, 2011).

STATEMENT OF FACTS

CAN, a Virginia non-profit corporation, is a Christian organization dedicated to protecting America's religious and moral heritage through educational efforts. CAN has produced various documentaries, including one entitled, "Sacrificed Survivors: The Untold Story of the Ground Zero Mega-Mosque," which addresses the controversy surrounding the mosque at Ground Zero from the perspective of individuals who lost loved ones in, or who were on the scene during, the terrorist attacks of September 11, 2001. The documentary is timely, considering the approaching ten year anniversary of the tragedy as well as the ongoing controversy, discussion, and media attention surrounding the mosque and related litigation.

On June 6, 2011, Jason Campbell of CAN submitted four separate applications to the New York City Department of Parks and Recreation to air the Sacrificed Survivors documentary in different city parks for one night (along with the application fee for each request). Numerous city parks have designated areas where a variety of films are regularly shown to the public free of charge. Tim Brown, a retired NYFD firefighter and a 9-11 first responder who recounted his experience narrowly avoiding death in Sacrificed Survivors, would introduce the documentary. Mr. Campbell submitted an additional three applications (with the requisite fees) on June 30. The seven applications submitted collectively request permission to show the documentary in one park each night for seven nights, with the first airing on September 5 in Central Park on the Great Lawn and the last airing on September 11 in Battery Park.

The Parks Department website states, "[f]rom the smallest birthday party to the largest concert, special events take place every day in New York City parks[.]" The website indicates that event applications take 21-30 days to process. To date, however, CAN's applications have not been acted upon. Communications between the Parks Department and CAN's representatives reveal that the Department's concern over the documentary's content and viewpoint is the issue.

At one point, Mr. Campbell was told that all the parks were "booked" on all of the requested dates. That explanation was clearly not correct. In fact, examination of the Department's publicly available schedule of special events in the parks proves the point (see attached document listing all Parks events scheduled for September 5-11, 2011). None of the parks sought for use by CAN in its filed applications is currently the site of a conflicting and inconsistent, previously scheduled, special event.

In fact, subsequent to claiming that the parks sought were unavailable, the Department's representative stated that, on the dates proposed for the screenings, New York schools would be back in session with greater likelihood of children and youth viewing the documentary, that children viewing the documentary might become upset, and that it touched on a sensitive subject near the tenth anniversary of the 9-11 attacks.

On July 1, 2011, David Carroll, General Counsel for CAN, sent a letter to Ms. Claudia Pepe, Director of Special Events and Permits of the Parks Department, stating:

> You spoke with Jason Campbell of Christian Action Network, telling him that the applications could not be approved. It is our belief that the reason for the denial (presumably with a written denial to follow) of the applications *is because of the film content* which is a documentary on a matter of public interest and does not contain indecent or obscene material.

CAN is still awaiting approval of its applications.

STATEMENT OF LAW

The City's refusal to approve CAN's applications due to disagreement with the content and viewpoint of the documentary violates CAN's First Amendment rights. The First Amendment to the United States Constitution prohibits the government from "abridging the freedom of speech." U.S. Const., amend. I. This prohibition applies to state and local governments through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Lovell v. Griffin*, 303 U.S. 444, 450 (1938).

I. New York City's Parks are Traditional Public Fora for Free Speech Purposes.

The New York City parks in which CAN seeks to air its documentary are quintessential public fora for purposes of the First Amendment. *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983). As early as 1939, the Supreme Court recognized that,

> [w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of privileges, immunities, rights, and liberties of citizens.

Hague v. C.I.O., 307 U.S. 496, 515 (1939) (plurality opinion).

Public parks have been centers of lively discussion of issues of public importance since before our nation was founded, when soap box speeches in public parks were commonplace.[2] In the public parks of our modern society, the literal "soap box" of the colonial era has largely been replaced by the use of concerts, rallies, movies, leafleting and other forms of mass media to

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[2] *See, e.g., FTC v. Super. Ct. Trial Lawyers Assoc.*, 493 U.S. 411, 448 (1990) (Brennan, J., dissenting in part) ("soapbox oratory in the streets and parks . . . [is a] traditional means of 'communicating thoughts between citizens' and 'discussing public questions.'"); *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 162 (1973) (Douglas, J., concurring) ("[P]arks are . . . in the public domain[,] . . . [y]et people who speak there do not come under Government censorship. It is the tradition of Hyde Park, not the tradition of the censor, that is reflected in the First Amendment.").

disseminate social, political, and religious messages to park goers. The First Amendment's robust protection of the freedom of speech in public parks, however, remains the same.[3]

Cases dealing with speech restrictions in a traditional public forum have drawn a clear line between content-neutral restrictions (limiting the time, place, and manner of expression without reference to the content of speech) and content or viewpoint-based restrictions (limiting expression in response to, or because of, its message). For example, in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the Supreme Court held that exclusive city control of sound equipment and personnel to limit excessive noise at outdoor concerts in Central Park, New York City, was a neutral regulation despite potential limitations on expression such as music performances. The Court held that,

> even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

Id. at 791 (internal quotations omitted). The Court noted that prevention of excessive noise is a valid interest properly protected by the government "even in such traditional public forums as city streets and parks."[4]

On the other hand, restrictions on transitory speech (meetings, speeches, parades, leafleting, concerts, etc.) in a traditional public forum that are based on the content or viewpoint of the expression are unconstitutional unless they are narrowly tailored to achieve a compelling government interest.

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . The essence of this forbidden censorship is content control. . . . [G]overnment may not grant the use of a forum to people whose views it finds

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[3] *See generally Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 802-03 (1996) (Kennedy, J., dissenting in part) ("Giving government free rein to exclude speech it dislikes by delimiting public forums . . . would have pernicious effects in the modern age. Minds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media."); *Saia v. New York*, 334 U.S. 558, 561-62 (1948) (noting that the First Amendment's protection of transitory expression in traditional public fora must be applied to modern communication methods of the day; "Loud-speakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. It is the way people are reached."); *Tong v. Chicago Park Dist.*, 316 F. Supp. 2d 645 (N.D. Ill. 2004) (a public park held a fundraiser in which individuals purchased bricks engraved with a personal inscription for inclusion in the park; the park violated a couple's First Amendment rights by denying their request to buy a brick that would have "Jesus is the cornerstone" included on the inscription).

[4] 491 U.S. at 796; *see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295-97 (1984) (holding that a neutral prohibition on sleeping and camping in federal parks in Washington, D.C., as applied to a symbolic event designed to raise awareness for the homeless, was a permissible content-neutral regulation).

> acceptable, but deny use to those wishing to express less favored or more controversial views. . . . Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972) (citations omitted). This is particularly true where, as here, the speech at issue addresses an issue of public concern. Judge William Pauley, United States District Judge, recently observed in enjoining New York City from enforcing a law that violates the First Amendment, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Evergreen Assoc.*, Op. at 8 (quoting *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011)).

In the present matter, it is clear that the Parks Department has withheld approval of CAN's applications due to the content and viewpoint of the documentary. While verbal explanations have shifted, there is no reasonable, content-neutral basis for all seven applications to be denied. Unlike in the *Ward* case, the restriction on CAN's speech is solely "because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791. Although some individuals who view the documentary may disagree with the viewpoints expressed or be distressed by its message, that is not a justification for viewpoint discrimination. "The First Amendment protects expression, be it of the popular variety or not. . . . And the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000).[5]

In addition, any belated reliance upon neutral-sounding reasons for denying the applications would be a sham. For instance, the promotion of aesthetic values is a substantial governmental interest, but not a compelling interest that would justify the City's viewpoint discrimination. *See, e.g., City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 816-17 (1984) (a content-neutral ban on the posting of temporary signs on public utility poles was a valid regulation due to the important interest in maintaining aesthetic values and safety); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (plurality) (city's aesthetic interests justified a viewpoint-neutral restriction on the location of commercial billboards).

II. Arbitrary Denial of Permission to Use a Public Park for Expressive Purposes is Unconstitutional.

No rule or written policy provides the basis for the Department's refusal to approve CAN's applications. If the standards for granting or denying approval are not "reasonably specific and objective," but instead "leave the decision 'to the whim of the administrator,'" then

[5] The Department's objection is clearly to the viewpoint of the documentary; there is no indication that the City reserves the parks' film equipment *exclusively* for City-sponsored productions. *See, e.g., Red Hook Films*, http://redhookfilms.org/ (an organization consisting of residents of Red Hook, Brooklyn, routinely selects movies that are shown at Valentino Pier on the Brooklyn waterfront). In addition, there is no basis for arguing that the documentary is government speech; the City is clearly not communicating its own message through the documentary.

the standards are unconstitutional. *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 324 (2002); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940) ("It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.").

In *City of Lakewood*, a newspaper publisher wanted to place mechanical newspaper dispensers on a city's sidewalks. An ordinance required a one year permit that the Mayor could either grant or deny, but "contain[ed] no explicit limits on the mayor's discretion." 486 U.S. at 769. The ordinance did not require the mayor to state his reasons for refusal with specificity; he could merely say "it is not in the public interest." *Id.* at 769, 771. The Court refused to "presume[] the mayor will act in good faith and adhere to standards absent from the ordinance's face." *Id.* at 770. Instead, it held unconstitutional the parts of the ordinance that gave "the mayor unfettered discretion to deny a permit application and unbounded authority to condition the permit on any additional terms he deems 'necessary and reasonable.'" *Id.* at 772.

By contrast, in *Thomas*, the Chicago Park District required permits for special events involving over fifty people. *Thomas*, 534 U.S. at 319. The District had thirteen specified grounds for refusal and could not deny a permit based on any other consideration, and a denial had to "clearly set forth in writing the grounds for denial." *Id.* The Supreme Court found the license requirement to be valid, noting that the requirement "does not authorize a licensor to pass judgment on the content of speech: None of the grounds for denying a permit has anything to do with what a speaker might say." *Id.* at 322.

In this case, the verbal denial of permission to use the parks to show CAN's documentary does not appear to be grounded in reasonable content-neutral written policies, but rather was an ad hoc denial based on the viewpoint of CAN's expression. The arbitrary nature of the decision is an additional reason why it violates CAN's First Amendment rights.

III. That CAN's Expression is Religiously Motivated is Not a Justification to Censor It.

The religious nature of CAN, and the religious themes in the documentary, do not change the outcome. The First Amendment prohibits a public park or other governmental body from discriminating against private speech or conduct for the sole reason that it is religious. *See, e.g.*, *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 543 (1993); *Lamb's Chapel*, 508 U.S. at 384; *Mergens*, 496 U.S. at 226; *Widmar v. Vincent*, 454 U.S. 263 (1981). The Supreme Court has observed:

> Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. . . . Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995); *see also Lamb's Chapel*, 508 U.S. at 395 (treating religious groups on the same terms as non-religious groups with respect to the use of public property and participation in government programs is consistent with the Establishment Clause); *Mergens*, 496 U.S. at 250 ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."); *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947) (the Establishment Clause "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary.").

CONCLUSION

The law is clear: the City has violated the Christian Action Network's rights under the First Amendment. Given the nature of the rights involved and the fast-approaching dates included in the applications, we request your written assurances **by 5 p.m. on Monday, August 1, 2011**, that the applications have been approved.

If we do not receive these assurances, we will discuss with our clients their right to pursue litigation in U.S. District Court to seek a remedy for the violation of their rights. Thank you for your attention to this matter.

Sincerely,

Erik M. Zimmerman
James Matthew Henderson, Sr.
American Center for Law & Justice

cc: Brett Joshpe, New York local counsel
Jason Campbell, Christian Action Network
Alessandro Olivieri, Department of Parks and Recreation General Counsel
Claudia Pepe, Department of Parks and Recreation

Enclosure: Listing of all Parks events scheduled for September 5-11, 2011