



April 8, 2008

Alan K. Berk  
Berk, Whitehead, Kerr & Turin, P.C.  
115 North Main Street  
Greensburg, Pennsylvania 15601

*Re: Equal Access to Public Park Grounds and Facilities*  
Reverend Paul A. Baer, Sr. Pastor  
Suburban Community Church

Dear Mr. Berk:

Reverend Paul A. Baer, the Senior Pastor of Suburban Community Church (collectively, the "Church") has retained the American Center for Law and Justice ("ACLJ") with regard to the Church's access to the Borough of Irwin's public parks, which are traditional public fora. We have reviewed your letter of March 17, 2008, addressed to Reverend Baer. Because your letter is ambiguous as to whether the Church will be permitted to meet in either Bell Park or any public park in the Borough of Irwin to observe the National Day of Prayer on **May 1, 2008**, we write to clarify the Church's First Amendment right to access the Borough's public parks for prayer, which is considered both a form of religious exercise and speech.

By way of introduction, the American Center for Law and Justice ("ACLJ") is a public interest law firm dedicated to educating the public and the government about the constitutional rights of citizens, particularly in the context of the expression of religious sentiments. 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. For example, in *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987), the Court unanimously struck down a public airport's ban on First Amendment activities. In *Board of Education v. Mergens*, 496 U.S. 226 (1990), the Court held 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. In *Lamb's Chapel v. Center Moriches School District*, 508 U.S. 384 (1993), the Court unanimously held that denying a church access to public school premises to show a film series on parenting violated the First Amendment. Also, in *McConnell v. FEC*, 540 U.S. 93 (2003), the Court unanimously held that minors enjoy the protection of the First Amendment.

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The Borough's March 17 letter gives the ACLJ pause for concern. If the Borough only intends to state that it will not "reserve" space for the Church's intended activity, we expect that the Church and its members may access Bell Park or another Borough of Irwin Park without needing to seek permission. However, if your intention is to refuse the Church—a vital part of the Borough of Irwin Community—access to any of the Borough's public parks to engage in protected First Amendment speech and religious activities, such a ban violates the constitutional rights of the Church and its members. If such is the case, our letter serves as a demand that the Borough of Irwin rescind its position and grant access to the Church and other members of the community to one of the Borough's parks for the purpose of observing the National Day of Prayer; such access should be subject only to reasonable time, place and manner restrictions.

### **STATEMENT OF FACTS**

By letter dated March 14, 2008, the Suburban Community Church (the "Church") made a written request to the Irwin Borough Manager, Mary Benco, seeking to use Bell Park as the site for a National Day of Prayer gathering for the community. Borough Manager Benco responded with a blank form letter, not dated, stating that the Church's request could not be approved; also, handwritten at the bottom of the denial, the Manager referenced the Borough attorney's name and phone number. The Church subsequently received a formal letter, dated March 17, 2008, from your office on behalf of the Borough, stating that the Borough has never granted permission to any organization to use the Borough's property, and that the Borough's "parks and playgrounds have been exclusively reserved for sports, recreation and entertainment activities to be enjoyed by the community generally."

The Church's March 14, 2008 request explained the Church's plans: The VFW will be supplying an Honor Guard, and the Knights of Columbus will be providing their Precision Team; there will also be two (2) vocalists, as well as prayer offered by various community pastors and individuals. The event is for the community and is open to the community to observe the National Day of Prayer.

Between the time that the Church received Manager Benco's response and your March 17, 2008 letter, the Church was given the impression in speaking with Manager Benco that they would be able to access Bell Park without express permission, although written permission could not be granted. If that is the case, and if the intent of your March 17, 2008 letter merely expressed that the Borough would not "reserve" Bell Park or any other of its parks, this is wholly a different question. However, as mentioned above, if the Borough's intent is to deny the Church and other community members access to its public parks to observe the National Day of Prayer, this position violates the Church's and its members' constitutional rights, as explained in the Statement of Law below.

## STATEMENT OF LAW

### **PUBLIC PARKS ARE TRADITIONAL PUBLIC FORA, TRADITIONALLY DEVOTED FOR PUBLIC ASSEMBLY AND DEBATE, AND AS SUCH, GOVERNMENT MAY NOT WHOLLY BAN THE EXERCISE OF 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). As such, the Borough of Irwin is subject to the Supreme Court’s First Amendment jurisprudence with regard to access of public fora.

Public parks, sidewalks, and streets are “traditional public fora.” As early as 1939, the Supreme Court recognized that the right of assembly in such fora belongs to the people:

*Wherever 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 the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.*

*Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939) (plurality opinion) (emphasis added). Streets, sidewalks, and parks represent quintessential public forums. *Perry Educ. Ass’n v. Perry Local Educator’s Ass’n*, 460 U.S. 37, 45 (1983).

A government may only restrict speech in a traditional public forum, such as the public parks of Borough of Irwin, if the restriction is reasonable as to the time, place, and manner of the speech. A three part test governs this inquiry:

[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided that 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.’

*Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citation omitted). In the Church’s case, a complete ban can hardly be viewed as reasonable. A complete ban emphatically does not qualify as “narrowly tailored to serve a significant governmental interest”; nor does a complete

ban “leave open ample alternative channels for communication of the information.” Quite the contrary—a ban leaves no ample alternative open.

***A. Speech Regulations In Traditional Public Fora Must Be Content-Neutral.***

A “traditional” public forum such as a sidewalk or public park—is a “place[] which by long tradition or by government fiat [has] been devoted to assembly and debate . . . .” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). In traditional public fora, such as the Borough of Irwin’s public parks, restrictions on speech and speech activities may rarely be based on content.

[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. . . .

Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds 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).

Content-based restrictions are highly disfavored, and consequently, must survive the most rigorous of First Amendment judicial standards, strict scrutiny. Government cannot enforce a content-based exclusion unless it can “show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” *Id.* Content-neutral restrictions, on the other hand, require the lesser reasonableness standard. *Perry*, 460 U.S. at 45. Consequently, any content-based restriction on the Church’s protected religious speech is “presumptively invalid.” *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

To determine whether restrictions are content-neutral, courts must examine “whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” *Ward*, 491 U.S. at 791. Because the Borough of Irwin has stated that it does not grant access to any particular group, the Borough’s position is seemingly content-neutral—however, if the permissible recreation and entertainment includes speech, the Borough’s denial is not content neutral. For example, if other activities such as concerts, art shows, or the like are granted permission to access the Borough’s public parks as “entertainment,” the Borough’s current refusal to grant the Church access for the National Day of Prayer presents an unconstitutional, content-based regulation. Moreover, the Borough cannot state a compelling interest in excluding the Church’s religious activities and speech.

***B. The Borough of Irwin has not espoused a compelling interest sufficient to ban the Church and its members use of the Borough's public parks.***

To determine whether a regulation is “narrowly tailored to serve a significant governmental interest,” courts examine the restrictions in light of the governmental interests that justify them. A restriction will be considered narrowly tailored only if it has “target[ed] and eliminate[d] no more than the exact source of the ‘evil’ it [sought] to remedy.” *Frisby v. Schultz*, 487 U.S. 485 (1988). In other words, regulations must further a “substantial government interest that would be achieved less effectively absent the regulation,” but it cannot “burden substantially more speech than is necessary to further the government’s legitimate interests.” *Ward*, 491 U.S. at 799.

Should one of the Borough’s concerns lie in the religious nature of the National Day of Prayer, that concern may be laid to rest. The Establishment Clause does not provide the Borough with any compelling or significant state interest in this instance. One of the most frequently advocated positions for the exclusion of religious speech in the name of a “compelling state interest” is that of achieving the “separation of church and state.” The Supreme Court, in *Widmar*, directly addressed the inability of the government to engage in content-based discrimination in the name of this “interest” by stating:

[T]he state interest asserted here—in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well. In this constitutional context, we are unable to recognize the State’s interest as sufficiently “compelling” to justify content-based discrimination against respondents’ religious speech.

*Widmar v. Vincent*, 454 U.S. 263, 276 (1981).

As such, efforts to deny access to a traditional public forum because of concerns about violating the Establishment Clause are unjustifiable.

Further, the Borough’s March 17 letter, if intended to ban the Church’s use completely, is doubly egregious. Not only has the Borough not set forth any compelling interest for regulating the Church’s access to the Borough’s parks, but the Borough’s complete denial of the Church’s request substantially burdens their speech and religious exercise in a traditional public forum – a forum which the Supreme Court has recognized as designated for purposes such as the Church’s stated purpose. The Church formally requested access to a public park, a place which has,

*immemorially been held in trust for the use of the public and, time out of mind, ha[s] 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 the privileges, immunities, rights, and liberties of citizens.*

*Hague*, 307 U.S. at 515-16 (emphasis added). The Church has not even requested use of a non-public forum or a limited public forum, such as the Borough's court house property or similar which may or may not have been opened for indiscriminate public use. While the Borough may constitutionally decide that it will not "reserve" sections of its parks for groups of people or organizations (whether large or small), the Borough may not constitutionally ban a group from accessing a public park because it hasn't traditionally permitted it – to the contrary, the Supreme Court has explained that our nation's tradition demands that such fora remain open for uses such as the Church's intended observance of the National Day of Prayer.

***C. An outright ban on the Church's First Amendment activity cannot qualify as a reasonable time, place and manner restriction in the Borough's public parks.***

Finally, even should the Borough's ban be considered content neutral, the Borough is still strictly limited in imposing reasonable time, place, and manner restrictions on use of its public parks. Restrictions on speech in its public parks must further the reasonable Borough interests in the parks.<sup>1</sup> There are doubtless many interests that the Borough could have in mind if imposing reasonable time, place and manner restrictions on its public parks. These interests may include keeping parks pleasant places for recreation,<sup>2</sup> ensuring that those who reserve an area of the park for a special event are not interfered with in their use by others, and ensuring that parking lots, roadways, and sidewalks are free for unimpeded movement. However, that is not what has occurred here – the Borough's response implies that none of its parks are open at any time for the Church's observance of the National Day of Prayer. At best, the Borough's March 17, 2008 letter is ambiguous on this point and must be clarified.

While some time, place and manner regulations may be found reasonable, for large groups and genuinely "special" activities within the parks, the Borough has stated no such interest and has left no alternative channel of communication open for its citizens. The Borough's March 17 letter refers to the "Borough parks and playgrounds" generally, and does not reject the Church's request for a *specific* park or suggest another larger park. Without providing the Church and other community members an alternative location or providing reasonable restrictions that would preserve stated legitimate interests, the Borough has not complied with constitutional strictures on the Church's First Amendment rights. Consequently, the Borough's response "burden[s] substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799.

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<sup>1</sup> For example, a government's interest includes the desire "to coordinate multiple uses of limited space, to assure preservation of the park facilities, to prevent uses that are dangerous, unlawful, or impermissible under the Park District's rules, and to assure financial accountability for damages caused by the event." See *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322 (2002).

<sup>2</sup> See *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (stating that the question is whether "the manner of expression is basically incompatible with the normal activity of a particular place at a particular time").

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## DEMAND

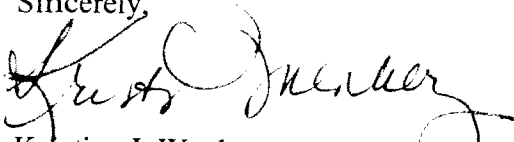
For the reasons stated herein, the Borough of Irwin's seeming denial of access to the Church violates the First Amendment. In light of the importance attached to these issues, we would appreciate in writing your assurances that the Church and its members will be permitted to access the Borough's public parks, whether Bell Park or the Main Irwin Park and Stage, subject only to reasonable time, place, and manner restrictions.

Because the National Day of Prayer is on **May 1, 2008**, if we do not receive these written assurances by or before **Tuesday, April 15, 2008**, we will advise the Church of its right to pursue litigation to vindicate its constitutional rights in U.S. District Court. As you are undoubtedly aware, the violation of an individual's constitutional rights, even for a moment, results in irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Should you have any questions regarding the contents of this letter, please do not hesitate to contact me directly:

Thank you for your attention to this matter.

Sincerely,



Kristina J. Wenberg, Associate Counsel

cc: Reverend Paul A. Baer, Suburban Community Church  
Vincent P. McCarthy, Senior Regional Counsel