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Via email only

Re: Occupy Delaware

Dear John and Rosemaria,

As you know I represent The Rutherford Institute ("TRI"). Among other issues, on its behalf we have over the years addressed with your office the removal of the bar to distributing religious literature in the Wilmington public parks; content based restrictions on picketing outside clinics which render abortion medical services, and most recently the unfortunate killing of Sgt. Derek Hale by the WPD and the DSP.

On behalf of TRI I write to you about the denial of the freedoms of assembly, petition and speech by the City and the WPD regarding the Occupy Delaware protesters who seek to use Peter Spencer Park for their demonstrations on a continuing overnight basis. I demand that the City and the WPD immediately allow these citizens to use this public space and park for their legitimate expressive activity under the assembly, petition and speech clauses of the First Amendment to the U.S. Constitution. Threats of arrest of these peaceable citizens must immediately cease. Unreasonable and unjustified time place and manner restrictions on their protected activity must stop also. Otherwise, be prepared to justify your actions in federal court in a TRO/PI proceeding to stop all illegal restrictions of the rights of these good citizens.

If you have any legal justifications for these actions in case law, statute or ordinance provide it to me immediately for my review. But my research which follows establishes the illegality of your actions.

Any alleged Wilmington permit requirement is subject to constitutional challenge to the extent it restricts spontaneous assemblies or imposes a non-waivable fee, and so would prevent the indigent or assemblies with no central organization from exercising their First Amendment rights in public parks.

Third Circuit

In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. In such traditional public fora the state may not prohibit all communicative activity. Indeed, “[s]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.” *Startzell v. City of Philadelphia*, 533 F.3d 183, 196 (3d Cir. 2008) (quoting *Carey v. Brown*, 447 US. 455, 460 (1980)). While in a traditional public forum the government may impose content-neutral time, place, or manner restrictions, this is only so 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.” *Startzell*, 533 F.3d at 197 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

There are no alternate channels for communication for these protesters. Putting them down in the Brandywine Park where there is no one to receive their message is an obvious attempt to shut out their message. The same consequence applies to placing them at Fletcher Brown Park, down on the deserted part of North Market Street.

Occupy Delaware has a message for the State and City Governments and the place to make that communication is directly outside those governmental offices at historic Peter Spenser Park.

Other Authority

A city could not without violating freedom of speech and assembly flatly ban groups of people from spontaneously gathering on sidewalks or in public parks in response to a dramatic news event. But it can require a permit for a planned event on public property, especially a large-scale demonstration or march, provided it does not use the requirement to stifle demonstrations by imposing unreasonable conditions. *Vodak v. City of Chicago*, 639 F.3d 738, 749 (7th Cir. 2011).

In *Central Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir. 1985), the court held unconstitutional an ordinance under which a city charged a protest organizer over \$1400 for a permit to conduct a march and rally in a traditional public forum. “Although license fees are proper for the costs of administering an event, under the Supreme Court’s decision in *Cox v. New Hampshire*, [312 U.S. 569 (1941)], we read *Cox* as authorizing only nominal charges for the use of city streets and parks to further First Amendment activities. An ordinance which charges more than a nominal fee for using public forums for public issue speech, violates the First Amendment.” Cent. Fla., 774 F.2d at 1523. Additionally, the court held that the permit ordinance was constitutionally deficient because it did not have a provision ameliorating its provisions for the indigent, who would be denied the equal opportunity to be heard within the traditional public forums at issue.

In *Nemo v. City of Portland*, 910 F. Supp. 491 (D. Or. 1995), the court struck down a requirement that applied to gatherings of four or more persons in a public park. The court held it was not narrowly tailored because groups of this size would not create the kind of problems which justify imposing a permit requirement, i.e., managing the competing uses of the park and maintaining safety. Additionally, the court held that a flat \$25 permit fee was not constitutional because it was not related to the extra costs to the city associated with the event and did not contain a provision for a waiver of the fee for the indigent.

Public places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered without more, to be “public forums. In such places, the government’s ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place and manner regulations as long as the restrictions “are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *United States v. Grace*, 461 U.S. 171, 177 (1983).

TRO/ Preliminary Injunction Standards:

To obtain a TRO there must be a showing of (1) a reasonable probability of eventual success in the litigation and (2) that the movant will be irreparably injured *pendente lite* if relief is not granted. Moreover, while the burden rests upon the moving party to make these two requisite showings, the district court “should take into account, when they are relevant, (3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest. *Professional Plan Examiners of New Jersey, Inc. v. Lefante*, 750 F.2d 282, 288 (3d Cir. 1984); *OVC, Inc. v. Your Vitamins, Inc.*, 714 F. Supp. 2d 291, 297 (D. Del. 2010).

To obtain a preliminary injunction, a plaintiff must show: “(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief. *Rogers v. Corbett*, 468 F.3d 188, 192 (3d Cir. 2006).

I have no doubt that we will succeed in obtaining a TRO and a PI against the Mayor and the Police Chief and any others engaging in this illegal conduct, and ultimately compensatory and punitive damages relief against them and the City because the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. *Stilp v. Contino*, 613 F.3d 405, 409 (3d Cir. 2010) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

The City's actions here are lawless and demeaning to the citizens of Delaware. The excuses given for these illegal actions are baseless and a pretext.

Immediately cease and desist from these actions and use the police instead to protect the exercise of precious rights to assembly, petition and speech.

Since time is of the essence here, I anticipate a response from your office to these demands by Thursday morning November 10, 2011.

Very truly yours,

A handwritten signature in blue ink that reads "Thomas S. Neuberger". The signature is written in a cursive, flowing style.

Thomas S. Neuberger, Esq.

Cc: John W. Whitehead, Esq. (TRI)
Douglas R. McKusick, Esq. (TRI)