December 22, 2003

Police Chief Dominic Spigarelli
Springfield Township Police Department
50 Powell Rd.
Springfield, PA 19064
Via facsimile to (610) 544-6905

RE: Assault of Michael Marcavage and Unlawful Destruction of Property on December 21, 2003

Dear Chief Spigarelli:

Michael Marcavage of Repent America has requested our assistance as allies of the Alliance Defense Fund[1] with respect to actions occurring on December 21, 2003 on a public sidewalk along Baltimore Pike in Springfield Township.

On Sunday, December 21, 2003, at approximately 10:00 a.m., Mr. Marcavage was standing on a public sidewalk holding a sign in protest of abortion. At approximately 10:50 a.m., two police officers pulled up to his location in their squad car. The officers walked towards Mr. Marcavage and asked him what he was doing. Mr. Marcavage explained that he was on the sidewalk to show people driving by on Baltimore Pike, the horrific realities of abortion.

One of the officers responded to Mr. Marcavage that his signs were pretty graphic. Mr. Marcavage agreed with the officer and stated that he does not enjoy holding the signs, but it "grieves my heart that over 4,000 babies are killed every day through abortion and people need to see the truth." After listening to the officers, Mr. Marcavage volunteered to move to a different location and gave the officers some of his ministry literature containing the ministry's contact information.

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[1] The Alliance Defense Fund is a not-for-profit public interest law and educational group. The organization exists to educate the public and the government about the right to freedom of speech, particularly in the context of the expression of religious sentiments. The Alliance Defense Fund has numerous allied attorneys throughout the United States who assist the organization.

As the officers began to protest Mr. Marcavage's presence in this public area, Mr. Marcavage openly activated his cassette recorder. As he recorded what he was being told by the officers, one officer informed Mr. Marcavage that he had not asked the officers for permission to record the conversation. This officer was apparently operating under the mistaken belief that conversations in which there are no expectations of privacy cannot be recorded. The officers attempted to intimidate Mr. Marcavage into turning off the tape by citing the wire tapping act.[2]

As these discussions were unfolding, more police cruisers arrived on the scene until there were three cars there and four officers. One officer then informed Mr. Marcavage that he could not be on the sidewalk because it was public property. Mr. Marcavage asked if there were another sidewalk he could stand on to which the officer responded, "Not in Springfield. They are all owned by the Township."

A fourth police car arrived on the scene carrying Sergeant Purcell. SGT Purcell informed Mr. Marcavage that he was in charge and that Mr. Marcavage could not be on the public sidewalk. He then advised Mr. Marcavage that he was going to take his signs. One of the officers assaulted Mr. Marcavage by bending his hand behind his back inflicting pain and causing him to release his signs. Mr. Marcavage fell backwards and the officers snatched Mr. Marcavage's tape recorder as well as his signs. The officer then began breaking his signs and folding them up and stashing them in his police cruiser. Mr. Marcavage demanded the return of his property, but the police ignored him and left him behind dazed and amazed such conduct would occur in this country.

The purpose of this letter is to highlight to you how these actions violated the United States Constitution and to suggest a resolution to this matter.

The legal principles relevant to this particular situation have been set forth in numerous Supreme Court decisions. As you will see in the pages that follow, many Supreme Court decisions attest to the fact that religious expression, speech and assembly are sanctioned in the public arena consistent with the First Amendment.

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[2] As you are aware, in order for Pennsylvania's Wire Tap and Electronic Surveillance Act to apply to Mr. Marcavage, there must be an expectation of privacy in the conversation. *See Kline v. Security Guards, Inc.*, 2003 U.S. Dist. LEXIS 15476 (E.D. Pa. July 30, 2003) ("to establish an unlawful interception of an oral communication . . . a plaintiff must demonstrate (1) that plaintiff engaged in communication; (2) that plaintiff possessed an expectation that the communication would not be intercepted . . .). *See also Com. v. Henlen*, 522 Pa. 514 (1989) ("The definition of 'oral communication' and 'interception' . . . make it clear that such an expectation [that the communication will not be intercepted] must be justified under the circumstances.") Given that Mr. Marcavage publicly displayed his recorder and that the conversation took place in a public place, the officers had absolutely no expectation that their words would remain private or that they would not be recorded. If they were concerned that they may say something inappropriate, they should have said nothing at all.

THE U.S. SUPREME COURT ON THE SUBJECT OF FEE SPEECH

The Supreme Court has repeatedly recognized streets, sidewalks and parks to be quintessential traditional public fora. Such places are the "public square," and are reserved under the jurisprudence of our nation as forums for the free expression of ideas. *See, e.g. Frisby v. Schultz,* 487 U.S. 474,480-81, 101 L.Ed.2d 420 (1988) (public streets recognized "as the archetype of a traditional public forum"); *Boos v. Barry,* 485 U.S. 312,99 L.Ed.2d 333 (1988); "[T]ime out of mind, such locations have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Boos,* 485 U.S. at 318 (*quoting Hague v. CIO,* 307 U.S. 496, 515 (1939)) (plurality opinion). "All public streets [and sidewalks] are held in the public trust and are properly considered public fora." *Frisby,* 487 U.S. at 481.

The Court recently re-affirmed, in the often disputatious pro-life context, that ***[l]eafleting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum.*** *Schenck v. Pro-Choice Network,* 519 U.S. 357, 137 L.Ed.2d (1997)(citation omitted).

Thus any infringement on the rights to express oneself in such "open to the public" areas must be judged against the stringent standards the United States Supreme Court has established for restrictions on speech in traditional public fora.

PROTECTING UNPOPULAR MESSAGES

Most all of the First Amendment's jurisprudence rests upon the axiom that it is a violation of the Constitution for police and/or other government actors to silence a picketer, protestor or speaker in the public fora just because the message spoken is unpopular or invites dispute. In fact, the Constitution exists to protect the unpopular speaker, for popular speech, by definition, needs no protection.[3] There are certainly no grounds at all for the wanton destruction of the signs, the assault on Mr. Marcavage or the seizure of his tape recorder.

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[3] In *Terminillo v. Chicago,* 337 U.S. 1, 93 L.Ed. 1131 (1949), the arresting officers and the trial court believed picketers were guilty of breach of peace if their message fulfilled any one of the following: "if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quite by arousing alarm." *Id.* at 3. The Supreme Court disagreed, finding such content-based restrictions to be unconstitutional. The Court noted that the function of free speech under our system of government is to invite dispute . . . That is why freedom of speech . . . is . . . protected against censorship or punishment . . . There is no room under our Constitution for a more restrictive view." *Id.* at 4-5.

The fact that display of pro-family or pro-life literature, posters and symbols may offend some person does not lessen its constitutionally protected status. "The fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Simon & Schuster, Inc. v Members of New York State Crime Victims Bd.* 502 U.S. 105, 116 L.Ed.2d 476 (1991) (editing marks and citations omitted). *See also NAACP v. Clairborne Hardware,* 458 U.S. 886, 928, 73 L.ED.2d 1215 (1982); *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 11 L.Ed.2d 686 (1964). ***The Supreme Court has ruled that even graphic posters, explicit pamphlets and fetal models can be used to display the truth about abortion, for such displays are protected*** according to *Madsen v. Women's Health Center,* 512 U.S. 753, 129, L.Ed.2d 593, 114 S.Ct. 516, 2529 (1994). The religiously motivated intent that drives one to utilize such pictorial representations to shock the conscience of the community, in any public policy debate, renders the displaying of such material prime First Amendment protected behavior.

By way of example as to the breadth of this right, the Supreme Court recently found that even the Ku Klux Klan had the right to display their unlit cross in an Ohio publicly-accessed town square, overriding the veto of the local government and lower courts. Even though this symbol greatly disturbed the entire community, even representing racial oppression and murder to a significant minority, the Court protected the display because other groups were similarly given the right to display their symbolic messages in the public area. Justice Scalia, writing for the Court, ruled that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square v. Pinette,* 515 U.S. 753, 132 L.Ed2d 650, 115 S.Ct. 2440, 2446 (1995). Thus the same judicial logic which protects the Klan's racist symbolism, flag burning, Mapplethorpe art exhibits, union picket signs, "gay pride" festivals, panhandling, political displays outside post offices and "adult" bookstores also protects pro-lifers, anti-communists, and those airing the Truth about the consequences of homosexual conduct, as well as person sponsoring non-majoritarian religious displays. To enforce the law otherwise to is to enforce the law selectively, and thus to violate the constitutional rights of U.S. citizens.

PROTECTING UNPOPULAR MESSENGERS

Even if the speech, or the symbols employed to represent anti-government concepts (such as posters listing the Commandments of YHWH or pro-homosexual policies) results in community anger and the drawing together of a "lynch mob," still the police have the responsibility to protect the First Amendment rights of the protestors. *See, e.g. Forsyth County, Ga. v. Nationalist Movement,* 505 U.S. 123, 120 L.Ed.2d 101 (1992)("Speech cannot be...punished or banned simply because it might offend a hostile

mob"); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.,* 502 U.S. 105, 112 S.Ct. 501 (1991) ("The fact that society may find speech offensive is not a sufficient reason for suppressing it"); *O'Connor v. Donaldson,* 422 U.S. 563, 575 (1975) ("mere public intolerance or animosity cannot constitutionally justify deprivation of a person's physical liberty"); *Bachellar v. Maryland,* 397 U.S. 564, 25 L.Ed2d 570 (1970) (disorderly conduct conviction voided because charge permitted conviction for "saying that which offends, disturbs" based on evidence that some onlookers were angry or resentful).

Hedges v. Wauconda Community Unit School District No. 118, et al., 9 R.3d 1295 (7th Cir. 1993), well sums up the prevailing law on the "heckler's veto" in every circuit and as articulated by the United States Supreme Court. The court stated:

> Consider a parallel: the police are supposed to preserve order, which unpopular speech may endanger. Does it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is not heckler's veto...Just as bellicose bystanders cannot authorized the government to silence a speaker, so ignorant bystanders cannot make censorship legitimate.

9 F.3d at 1299-1300 (citations omitted). Thus the police are to manage any consternation in reaction to Mr. Marcavage's speech in such a fashion as to allow him and others to convey their message.

42 U.S.C. § 1983 AND CIVIL RIGHTS VIOLATION

Governments, and government agents, sometimes find themselves involved in expensive and time consuming 42 U.S.C. § 1983 litigation because they violated the First Amendment rights of persons accessing traditional public fora. These suits most often arise when ill-informed police officers (or other government agents dealing with citizenry) attempt to exercise their limited authority to trump constitutionally protected rights. These government actors often wrongly assume that the grant of authority delegated to them includes the ability to determine who is rightly exercising their First Amendment protected rights in a public forum. In reality, few such constitutionally valid grants of authority exist.

As a rule, unelected officials are not granted such authority. The Ninth Circuit so ruled in *NAACP v. Richmond,* 743 F.2d 1346 (9th Cir.1984), a case involving a challenge to a city's twenty day delay in granting a parade permit. The Court found the city's granting of such forum access discretion to the police "violated the first amendment in

two fundamental ways: it improperly restricts speech; and it improperly grants unlimited discretion to a censor." 743 F 2d at 1359. The Chief of Police was put in the position of deciding who could demonstrate in the public areas, and the Court ruled that such "[u]nfettered discretion to license speech cannot be left to administrative bodies...Such discretion grants officials the power to discriminate and raises the specter of selective enforcement on the basis of the content of speech." 743 F.2d at 1357 (internal cites omitted).

USING STATUTES AND ORDINANCES TO SHUT DOWN FREE SPEECH

The above law notwithstanding, some police officers across the nation wrongly believe that they can arbitrarily limit the free speech rights of U.S. citizens, issuing unconstitutional "just move along" orders at will. When such ill-informed officers are allowed to direct law enforcement operations, the result can be local policies or customs which set the stage for unconstitutional decision-making, and for the enforcement of reasonable laws (against criminal behavior) in unreasonable fashion. Where enforcement of "loitering," "disturbing the peace," "incommoding" or other such laws and licensing schemes is undertaken against First Amendment protected behavior, and pursuant to the unfettered discretion of government agents, the results are constitutionally violative acts on the part of the government.

When only the threat of arrest is used to close the forum to said protestors, the ensuing denial of forum access is actually the suppression of those ideas deemed unacceptable by the government. This is a very serious matter. *See Coates v. Cincinnati,* 402 U.S. 611, 616, 29 L.Ed.2d 214 (1971) ["it is unconstitutional when laws result in the] obvious invitation to discriminatory enforcement against those whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizen [or government officials]"). Simply put, any potential for subjective discriminatory enforcement of a statute, ordinance or policy regulating constitutionally protected rights raises the potential for the unconstitutional application of the law, and thus for civil rights litigation. The bottom line is that the application of criminal sanctions against peaceful free speech activities is particularly egregious and, under most conditions, patently unconstitutional.

Ordinances requiring permits be submitted prior to one speaking in public fora and completely forecloses all impromptu public speech have been repeatedly held unconstitutional. *See eg. Thornhill v. Alabama*, 310 U.S. 88 (1940) (Striking ordinance because "does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of speech or of the press.")

RESPONDING TO COMPLAINTS FROM ONLOOKERS

It is an unconstitutional abuse of authority to allow private citizens to direct law enforcement officers to deny First Amendment protected demonstrators access to traditional public fora. When the allegations put forth are based entirely on the expressions inherent in a speaker's exercise of his constitutionally protected free speech rights, and the government acts against the speaker or protestor based upon said allegations, the acts taken by the government are patently unconstitutional. Under such circumstances, law enforcement officers must uphold the Constitution they are sworn to protect, rather than the biased wishes of the allegedly aggrieved bystanders. It matters not that the officers also find the free speech and religious expression troublesome. If the speech and symbolism is protected under the First Amendment, it must be protected by the law enforcement officers. The United States Supreme Court has, time and again, ruled that if one does not like such expressions in the public square, the only constitutionally valid immediate solution is to simply look away. Such is the social price for a robust freedom of expression, as every community forced to play host to sexually oriented businesses and KKK marchers knows all too well.

Thorny issues of conflicting and conflict-causing messages may be the gravamen of many citizens' complaints. Many of your officers may be asked to silence a protestor, confiscate literature, or seize poster deemed disturbing or "hate speech." The better course is to call those citizens requesting action against peaceful demonstrators to a higher understanding of American jurisprudence and constitutional civics. I suggest your officers challenge such complainants join the Township in swearing off censorship and the heavy-handed silencing of unpopular messages. If such an enlightened perspective proves too difficult for the complainant, the advice of the U.S. Supreme Court is the next best solution: Those persons offended by the message can "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Cohen v. California,* 403 U.S. 15, 21, 29 L.Ed.2d 124 (1971).

IN CONCLUSION

Yesterday, officers of your department committed a grievous unconstitutional act by assaulting Mr. Marcavage, destroying his personal property and seizing his tape recorder. They also engaged in direct intimidation of Mr. Marcavage in an attempt to make him stop his speech. Accordingly, we hereby demand:

1. That the department immediately safeguard the data on the tape recorder and immediately return the recorder, tape and the signs to Mr. Marcavage;

2. That the department reimburse Mr. Marcavage $200 for damage to the signs;

3. That the department pay Mr. Marcavage $50 per day for rental of his tape recorder and $50 per day per sign for rental of his signs;

4. That the department pay Mr. Marcavage's attorneys fees of $1,000;

5. That the department compensate Mr. Marcavage in the amount of $1,000 for the assault by the officers; and,

6. That the Township guarantee that it will not threaten, harass or assault Mr. Marcavage for his constitutionally protected speech in the public fora of Springfield.

Should the case proceed to a federal action, amounts sought against Springfield for its violation of Mr. Marcavage's rights will be substantial. Moreover, should the tape in the recorder be altered, erased or destroyed, the presumption in federal court will be that the information contained was detrimental to the department.

Should we receive no response to this letter by December 31, 2003, a federal action will be swiftly filed.

Very truly yours,

Leonard G. Brown, III

cc: The Honorable Michael V. Puppio, Chairman, Public Safety Committee