



Stephen Meswarb, Interim Executive Director  
Mark Silverstein, Legal Director

**SENT VIA U.S. MAIL AND ELECTRONIC MAIL**

October 1, 2020

Mr. Gene Farish  
Town Attorney  
100 Silver Thread Lane  
PO Box 369  
South Fork, CO 81154  
gene@farishlaw.com

*Re: South Fork Solicitation Ban*

Dear Mr. Farish,

We write on behalf of Sol Mountain Farm (“the Farm”) regarding the Town of South Fork’s new policy banning solicitation of donations on all Town-owned property in South Fork. We urge you to rescind this policy immediately. There are several constitutional flaws with this new policy, which we address below.

**Background**

For the past seven years, the Farm has organized and maintained a Farmer’s Market<sup>1</sup> in the parking lot of the South Fork Visitor Center with the express approval of the Visitor Center Director, Mr. Mark Teders. The Friday Market runs every Friday from June through September. Each year, the Farm organizes vendors, takes out ads in local papers and radio stations, and ensures that the Friday Market goes off without a hitch. The Farm takes on an enormous amount of responsibility to ensure local vendors can sell products and maintain their livelihood while providing quality services to the residents of South Fork and beyond. The Farm is not only the organizer and administrator of the Market, it is also a vendor. The Farm sells local produce, arts and crafts, and other seasonal items at each Friday Market. The Friday Market is one of the Farm’s most successful ventures.

The 2020 Friday Market season kicked off shortly after protests began all over the country in response to police brutality against Black individuals. During one Friday Market on July 10, 2020, the Farm decided to solicit donations at its vendor booth on behalf of the Black

---

<sup>1</sup> Hereinafter “the Friday Market.”

Lives Matter movement, in addition to the NAACP Legal Defense and Education Fund. The Farm raised \$3 on July 10, 2020 in support of its cause.

Five days later, the Farm received an e-mail from Mr. Teders which simply stated he was attaching a letter “concerning Town of South Fork Policy changes.”<sup>2</sup> The attached letter, signed by Town Administrator Dan Hicks, stated that the South Fork Board of Trustees had “received formal complaints” from patrons of the Friday Market about solicitation of donations to a “political organization.” The letter further stated that the policy of Board of Trustees forbids “solicitation of donations for organizations or causes at any events held on Town owned premises.”<sup>3</sup>

After reading the letter, the Farm e-mailed Mr. Teders and asked where they could read what they assumed was a newly-adopted ordinance or where the new Policy was located in the municipal code. They also indicated an interest in reviewing, when they became available, the minutes from the meeting during which the Policy was discussed and ultimately passed. In an e-mailed reply, Mr. Teders said there was no ordinance or municipal code. “It is simply a policy by the Town Board,” he said. Mr. Teders closed his email with a threat: “If you “choose to argue this point we will simply remove you as the organizer of the Farmers Market and appoint it to someone else.”

After this e-mail correspondence with Mr. Teders, the Farm tried to follow up via e-mail with other members of the Town administration, including Mr. Hicks. When they did not receive a response for several weeks, the Farm called the Town administration and spoke with Mr. Hicks. During that phone call, the Farm learned that the Town Board had held a regularly scheduled meeting on July 14, 2020, and during the work session, it discussed a complaint it had received from a single patron of the Friday Market who was offended by the request to donate to Black Lives Matter and the NAACP Legal Defense and Education Fund. At this point, the Farm learned there were no minutes taken during the July 14, 2020 work session.

### Analysis

Solicitation of donations is constitutionally protected speech, and a broad policy banning all such solicitation on all town property violates the First Amendment.<sup>4</sup> The Supreme Court has concluded that charitable solicitations are unquestionably protected under the First Amendment.<sup>5</sup> Moreover, as the new Town Policy came on the heels of a complaint made against solicitation on behalf of a movement which is apparently controversial or unpopular in South Fork, but is currently commanding national and global attention, the speech at issue is certainly that of public importance. Solicitation for Black Lives Matter is afforded the same protection under the First Amendment as solicitation for the South Fork Table and Chair Fund.<sup>6</sup>

---

<sup>2</sup> July 15, 2020 e-mail from Mr. Mark Teders to Sol Mountain Farm.

<sup>3</sup> Hereinafter, “the Policy”; See July 15, 2020 Letter from Town Administrator.

<sup>4</sup> See *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 788 (1988); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (recognizing that “charitable appeals for funds, on the street or door to door, involve a variety of speech interests,” including advocacy of causes, that are protected by the First Amendment).

<sup>5</sup> *Schaumburg*, 444 U.S. at 632.

<sup>6</sup> See July 20, 2020 Facebook Post on South Fork Visitor Center Website (“You don’t have to buy a table or ten chairs, any amount of donation will be greatly appreciated.”).

On its face, the Policy applies on all town-owned property in South Fork, without distinction. The prohibition includes traditional public fora such as the streets and sidewalks – where an individual’s right to freedom of expression is at its strongest and the government’s power to regulate speech is at its lowest.<sup>7</sup>

Moreover, the Policy is a content-based prohibition, which is presumptively unconstitutional in a public forum.<sup>8</sup> It is content-based because its enforcement or its application turns on the content of an individual’s expression. To determine whether someone has violated the Policy, it is necessary to examine the content of their speech. It is permissible to say “I support Black Lives Matter” but forbidden to request a contribution. So, even within the universe of solicitation, the Policy is content-based. It is permissible to solicit direction to the Farmer’s Market, and it is permissible to solicit signatures on a petition, but prohibited to solicit a donation. Such a content-based prohibition is constitutional only in the extremely rare case where it is “narrowly drawn to accomplish a compelling governmental interest.”<sup>9</sup>

The Town will be unable to provide even a *legitimate* government interest, much less a *compelling* one to carry on with this speech-restrictive Policy. The desire to protect people from the discomfort caused by unpopular speech (or solicitation for unpopular causes or organizations) does not justify suppressing speech.<sup>10</sup> Even if the new Policy only applied to the Friday Market, and even if the Market were regarded as a limited public forum, where the government has more power to regulate expression, the regulation still violates the First Amendment. In a limited public forum, a regulation of expression must be both reasonable and viewpoint neutral.<sup>11</sup> The Policy is neither.

In grocery stores and retail shops, customers at the cash registers are commonly asked if they would like to make a donation to a particular charity. There is nothing about a request for donations that is incompatible with the nature or purpose of the Friday Market. The Policy simply does not pass the test of reasonableness.

Moreover, the Policy is not viewpoint-neutral. Courts have consistently held that viewpoint-based restrictions on speech are “more blatant” and “egregious” forms of content-based discrimination.<sup>12</sup>

On a recent phone call with the owners of the Farm, Mr. Hicks told one of our clients, Mr. O’Rourke, that there may be exemptions to the Policy, such as donations sought by the Town itself. Mr. Hicks also told Mr. O’Rourke that the Town would retain a considerable amount of discretion in determining whether certain speech would be permissible. Thus, our clients have been left with the definite understanding that persons will be free to solicit donations for causes or charities of which the Town approves. By forbidding disapproved causes while allowing solicitations for

---

<sup>7</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

<sup>8</sup> *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional. . .”).

<sup>9</sup> *United States v. Grace*, 461 U.S. 171, 177 (1983); *see also Boos v. Barry*, 485 U.S. 312, 321 (1988); *Perry Educ. Ass’n*, 460 U.S. at 45.

<sup>10</sup> *See Coates v. Cincinnati*, 402 U.S. 611, 615 (1971); *Terminiello v. Chicago* 337 U.S. 1, 4 (1949).

<sup>11</sup> *Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 679 n.11 (2010).

<sup>12</sup> *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *see also Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276, 1289 (D. Colo. 2015).

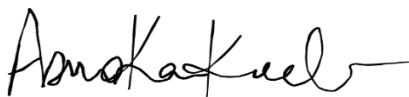
approved charities, the Town's Policy is clearly viewpoint-based, in violation even of the lenient First Amendment standards that govern limited public fora.

Finally, Mr. Teders threatened to carry out an alarmingly egregious violation of the First Amendment when he warned the Farm, in writing, that if they "choose to argue this point," he would "simply remove [the Farm] as the organizer of the Farmers Market and appoint it to someone else." A government actor violates the First Amendment when he unjustifiably retaliates against persons for exercising their First Amendment rights. The government official is liable when: "(1) a person is engaged in constitutionally protected activity; (2) the government's actions caused the person to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) the government's adverse action was substantially motivated by the individual's constitutionally protected speech or conduct."<sup>13</sup>

With this letter, Sol Mountain Farm has clearly chosen to "argue this point." Mr. Teders' threat, if he carries it out, will meet all three prongs of the test for illegal retaliation. Seeking legal assistance to question and challenge a government policy is certainly activity that is protected by the Constitution. Expelling the Farm from the Friday Market is an injury that would chill a person of ordinary firmness. Mr. Teders' email itself is undeniable proof that the threatened retaliation is motivated by the Farm's questions about the Policy and its decision to question that Policy. The Town of South Fork, and Mr. Teders himself, will surely be liable to compensate Sol Mountain Farm for its losses if this indefensible threat is carried out.

We therefore request that the Town of South Fork immediately rescind the Policy that prohibits Sol Mountain Farm from soliciting donations anywhere on Town property. We also request your written assurance that it will not carry out Mr. Teders' threat to remove the Farm from its role as organizers and vendors of the Friday Market. **Please respond to this letter by October 15, 2020.**

Sincerely,



Asma Kadri Keeler  
Staff Attorney\*  
ACLU of Colorado  
Akeeler@aclu-co.org  
\*Licensed in Virginia and Wisconsin



Mark Silverstein  
Legal Director,  
ACLU of Colorado  
msilverstein@aclu-co.org

---

<sup>13</sup> *Shero v. City of Grove*, 510 F.3d 1196, 1203 (10th Cir. 2007) (quoting *PeTA v. Rasmussen*, 298 F.3d 1198, 1204 (10th Cir. 2002) (internal citations and quotations omitted).