

THE RUTHERFORD INSTITUTE

Post Office Box 7482
Charlottesville, Virginia 22906-7482

JOHN W. WHITEHEAD
Founder and President

TELEPHONE 434 / 978 - 3888
www.rutherford.org

March 13, 2026

City Council for South Padre Island
4601 Padre Blvd
South Padre Island, TX 78597
Via email

Re: Discriminatory Enforcement of Noise Ordinance 22-09

Dear Members of the City Council:

For more than 40 years, The Rutherford Institute¹ has championed the First Amendment rights of all Americans to not be silenced.

South Padre Island Code Enforcement unconstitutionally retaliated and discriminated against street-preachers last year during Spring Break. Those street-preachers plan to preach again during Spring Break this year. We are warning you that such discriminatory and retaliatory actions violate the First Amendment, the Fourteenth Amendment, and the Texas Religious Freedom Restoration Act (TRFRA), each of which can subject the City and its officers to legal liability. Therefore, we ask that you take steps to ensure that the First Amendment rights of street-preachers are respected and that your officers do not discriminatorily enforce the laws and ordinances against them.

Background

Last year on March 21, 2025 after 11:00 p.m., street-preachers stood on a sidewalk across from Louie's Backyard bar on Laguna Blvd and preached using a microphone and speaker so that they could be heard over the loud music blasting from a speaker outside the bar, which appeared intended to drown out the street preachers' normal volume of speech. Code Enforcement Officers, assisted by police, cited one street-preacher for having a bullhorn (which was not being used when they approached and encountered him as he was in the middle of conversing with others) and warned the other street-preachers to stop using the sound amplification equipment or be cited for violating the same provision of the Noise Ordinance, Section 12-2.3(1)(f). However, Louie's Backyard bar continued blasting music outside much

¹ The Rutherford Institute is a nonprofit civil liberties organization which seeks to protect individuals' constitutional rights and educate the public about threats to their freedoms.

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louder than the street-preachers' speaker, and yet the bar was not told by Code Enforcement officers to stop even though it was in violation of Noise Ordinance Section 12-2.3(1)(k) and (m).

Then, the next day on March 22, 2025, the same street-preachers were on the beach near Clayton's Beach Pier during the daytime and again preached using a microphone and speaker. Once again, Code Enforcement officers warned them to stop using the sound amplification equipment or be cited for violating the noise ordinance. However, many beachgoers right next to them were blasting music from a speaker much louder than the street-preachers' speaker, and yet they were not told by Code Enforcement officers to stop even though it was in violation of Noise Ordinance Section 12-2.3(1)(a).

The Noise Ordinance

South Padre Island Ordinance 22-09 ("Noise Ordinance") sets forth the City's prohibition on noise levels.² The Noise Ordinance provides no exceptions for bars (even if a City Council member is a general manager there, which raises even greater concerns of discriminatory enforcement) nor for beachgoers playing loud music outside.

However, there is an exemption for "the noise generated by any lawful activity that constitutes expression pursuant to the First Amendment of the United States Constitution" under Noise Ordinance Section 12-2.3(4)(17). The U.S. Supreme Court has long recognized that street-preaching is a form of expression protected by the First Amendment.³ In fact, the U.S. Supreme Court has explained, the Free Exercise Clause and the Free Speech Clause of the First Amendment "work in tandem":

"Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities. *That the First Amendment doubly protects religious speech is no accident.* It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent."⁴

Yet, the exemption under Noise Ordinance Section 12-2.3(4)(17) for "noise generated by any lawful activity that constitutes expression pursuant to the First Amendment" was not honored by Code Enforcement in these situations with the street-preachers.

² https://library.municode.com/tx/south_padre_island/ordinances/code_of_ordinances?nodeId=1187314; see also https://library.municode.com/tx/south_padre_island/codes/code_of_ordinances?nodeId=CH12OFMIPR_ARTIVNO_OR.

³ See, e.g., *Kunz v. New York*, 340 U.S. 290, 293 (1951); *Jamison v. Texas*, 318 U.S. 413, 414–16 (1943).

⁴ *Kennedy v. Bremerton School Dist.*, 142 S.Ct. 2407, 2421 (2022) (internal citations omitted) (emphasis added).

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First Amendment violation

Even if the street-preachers were in violation of Noise Ordinance Section 12-2.3(1)(f), citing or threatening to cite them—while allowing similar noise levels and violations by others, who are projecting music containing speech of a different content and viewpoint, to go unpunished—is blatant speech-retaliation in violation of the First Amendment.

The U.S. Supreme Court has made clear in *Nieves v. Bartlett* that even if there is probable cause of a violation of law, a First Amendment retaliation claim can still be sustained when law enforcement officers otherwise “typically exercise their discretion not to [issue such charges].”⁵ This is because such cases “pose ‘a risk that some police officers may exploit the arrest power as a means of suppressing speech.’”⁶ Therefore, a plaintiff may bring a First Amendment claim if he “presents objective evidence that he was arrested [or retaliated against] when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.”⁷ This evidentiary standard is not burdensome and does not require a plaintiff to show “very specific comparator evidence” or “virtually identical and identifiable comparators.”⁸

That is clearly what happened here when multiple Noise Ordinance violations were simultaneously occurring and yet Code Enforcement solely targeted the street-preachers to silence them while disregarding the even louder music blasting from the bar and beachgoers.

Fourteenth Amendment violation

The First and Fourteenth Amendments prohibit restrictions on speech which fail to provide members of the public fair notice of prohibited conduct. The U.S. Supreme Court has explained that a vague regulation can violate the due process required under the Fourteenth Amendment for either of two reasons: when it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”⁹ Therefore, where a regulation’s “scope...is capable of reaching expression sheltered by the First Amendment, the [due process] doctrine [of vagueness] demands a greater degree of specificity than in other contexts.”¹⁰

Not only are many of the standards so vague as to fail to provide fair notice of what is prohibited, but it is so standardless that it authorizes or encourages seriously discriminatory enforcement, as occurred in these situations.

⁵ *Nieves v. Bartlett*, 139 S.Ct. 1715, 1727, 587 U.S. 391, 407 (2019); *accord Gonzalez v. Trevino*, 144 S.Ct. 1663, 1667, 602 U.S. 653, 657–58 (2024) (per curiam).

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Gonzalez*, 144 S.Ct. at 1667.

⁹ *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

¹⁰ *Smith v. Goguen*, 415 U.S. 566, 572-573 (1974).

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Additionally, the U.S. Supreme Court has explained that “government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause [of the First Amendment], whenever they treat *any* comparable secular activity more favorably than religious exercise.”¹¹ Strict scrutiny cannot be satisfied by the government when its provisions or enforcement are underinclusive so as to leave the exact same harm (here, loud noise levels) occurring from other sources.

Texas Religious Freedom Restoration Act violation

These unconstitutional retaliatory citations and threats of citation also violate the Texas Religious Freedom Restoration Act (TRFRA).¹² TRFRA “applies to any ordinance, rule, order, decision, practice, or other exercise of governmental authority,”¹³ and states that “a government agency may not substantially burden a person's free exercise of religion” unless doing so “is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that interest.”¹⁴

TRFRA thus creates “a four-part test: (1) whether the government’s regulations burden the plaintiff’s free exercise of religion; (2) whether the burden is substantial; (3) whether the regulations further a compelling governmental interest; and (4) whether the regulations are the least restrictive means of furthering that interest.”¹⁵

Applying TRFRA in this case:

(1) The street-preachers feel called by their sincere religious beliefs and convictions to proclaim warnings against sin and the way of salvation, but the City is threatening to punish them for this by selectively enforcing the Noise Ordinance, which chills the street-preachers’ speech and burdens the free exercise of their religion. Notably, courts do not inquire into the adequacy or centrality of this feeling of obligation to preach unless there is a clear non-religious motive, which is not present here.¹⁶

(2) The burden of this threatened citation is “real vs. merely perceived, and significant vs. trivial,” since enforcement was threatened more than once on separate days, and the street-preachers intend to return to South Padre Island to keep preaching.¹⁷

¹¹ *Tandon v. Newsom*, 141 S.Ct. 1294, 1296 (2021) (per curiam) (emphasis in original); see also *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 537–538 (1993); *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 884 (1990).

¹² Tex. Civ. Prac. and Rem. Code § 110.

¹³ Tex. Civ. Prac. and Rem. Code § 110.002(a).

¹⁴ Tex. Civ. Prac. and Rem. Code § 110.003.

¹⁵ *Merced v. Kasson*, 577 F.3d 578, 588 (5th Cir. 2009) (citing *Barr v. City of Sinton*, 295 S.W.3d 287, 299 (Tex. 2009)).

¹⁶ *Merced*, 577 F.3d at 588; *Barr*, 295 S.W.3d at 300.

¹⁷ *Merced*, 577 F.3d at 588; *Barr*, 295 S.W.3d at 301.

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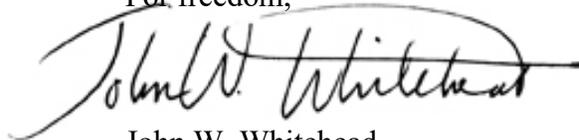
(3) The Noise Ordinance Section 12-2.1 states that the purpose “is to prevent noise disturbance...to protect the general health, safety, and well-being of the city’s inhabitants and visitors and to also safeguard the quality of life and the peaceful enjoyment for the city’s inhabitants and visitors and to preserve the tranquility of the community.”

(4) But even if the Noise Ordinance’s purpose serves a compelling interest, as applied discriminatorily against street-preachers only, the application of the Noise Ordinance is not the least restrictive means of furthering that purpose since it is not enforced at the exact same time and place against the bar or beachgoers blasting even louder noise. The U.S. Supreme Court has disapproved of “selective enforcement” by governments with “broad discretionary...power”¹⁸ of a law which is “fair on its face, and impartial in appearance” if that law “is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances.”¹⁹

Conclusion

Therefore, we hope that you will ensure that the Noise Ordinance and other laws are not applied or enforced in a discriminatory manner to suppress and retaliate against unpopular or disfavored speech in violation of the First and Fourteenth Amendments as well as TRFRA.

For freedom,



John W. Whitehead
President



William Winters
Senior Staff Attorney

The Rutherford Institute

CC: SPI City Manager
SPI Environmental Health Services Dept.

¹⁸ *Cox v. Louisiana*, 379 U.S. 536, 557–58 (1965).

¹⁹ *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886).