

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

THE GAY GUARDIAN NEWSPAPER,)
and RONALD MARCUS, as Editor)
and Chief of The Gay Guardian,)

Plaintiffs,)

vs.)

OHOOPÉE REGIONAL LIBRARY)
SYSTEM, OHOOPÉE REGIONAL)
BOARD OF LIBRARY TRUSTEES,)
GAIL EDENFIELD, individually and)
in her official capacity as Chairperson)
of the Ohoopée Regional Board of)
Trustees, and DUSTY GRES,)
individually and in his official capacity)
as Director of the Ohoopée Regional)
Library System,)

Defendants.)

Civil Action File
No.: _____

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs hereby move this Court for a preliminary injunction against the enforcement of Vidalia Public Library's practice, policy and actions in revoking the *Gay Guardian* newspaper's right to be placed on a public information table because of its allegedly controversial content. The practice, policy and actions of the Library in banning the Newspaper abridges Plaintiff's right to free speech, expression, petition,

equal protection and due process as guaranteed by the First, Fifth and Fourteenth Amendments of the United States Constitution and the Georgia Constitution.

FACTUAL BACKGROUND

The *Gay Guardian* is a free bi-monthly publication focusing on current issues of interest to the Southeast Georgia community in general and the gay/lesbian community in particular. Ex. 'A,' Ex. 'B.' Recent article topics have included hate crimes and equality for gay/lesbian people. Id. It advocates boycotts of companies who discriminate based on sexual orientation and advocates using the political process to achieve change. Id. The Newspaper is available throughout Georgia, as well as in parts of Florida and South Carolina. Aff, R. Mangum ¶3; Aff, B. Mellot ¶3.

On February 22, 2002, the *Gay Guardian* Editor Ronald Mangum, who uses the professional pseudonym Ronald Marcus, accompanied by Brian Mellot, Assistant Editor, delivered approximately twenty copies of the Newspaper to the Vidalia-Toombs County Library. Aff, Mangum ¶4; Aff, Mellot ¶4. Mr. Mangum requested and gained permission to place the papers on a designated display table, which held various free literature. Id.; Letter of Dusty Gres to William D. Torrance, March 11, 2002.

On March 1, 2002, Mr. Mangum and Mr. Mellot returned to the Library to replenish the Newspaper's supply. Id. at ¶ 6. In a taped in-person conversation, a library staff person notified them that they could no longer display copies of the *Gay Guardian* in the Library. Id. The Director of the Library, Dusty Gres, then informed Mr. Mangum and Mr. Mellot that the Library had received too many complaints about the content and viewpoint of the *Gay Guardian*. Id. She went on to state that, due to the complaints, the Library was no longer allowing anyone to distribute literature on the table in the lobby. Transcript of Audio Tape, p.1; Aff, D. Turner ¶5.

Mangum and Mellot believed the copies of the *Gay Guardian* were illegally taken or destroyed. Aff, Mangum ¶7, Aff, Mellot ¶7. They contacted the Vidalia Police Department and City Police Officer Carlyle met them at the Library to address their concerns. Id. at ¶ 8. Gres claimed the papers were removed because of "a religious issue, gays versus Christians." Id.

Mr. Mangum and Mr. Mellot went to Vidalia City Hall and spoke with the city manager about the incident. Aff, Mangum ¶10, Aff, Mellot ¶10. The manager informed them that he had received a complaint regarding the Newspaper being placed at the Library, which he had referred to the Library. Id.; Transcript of Audio Tape, p. 6.

In response to an open records request, Mr. Mangum received a copy of the Library's Materials Selection policy as well as the Meeting Room policy. The Materials Selection Policy states, "As Trustees of the Ohoopsee Regional Library System, we believe that what people read, view and access is deeply important; ideas can be dangerous, but the suppression of ideas is fatal to a democratic society." Ohoopsee Regional Library System: Materials Selection Policy, Adopted September 1980, Reaffirmed January 1992, Amended January 30, 2002.

On May 22, 2002, at the next Board of Trustees meeting of the Ohoopsee Regional Library System, the board discussed adopting a new display policy in response to "the controversy." Aff, L.Verity ¶ 5,6. Throughout the meeting, Gres and several board members continually referred to the "controversy" as the reason for changing the current policy. Id. The board tabled the issue, thus preventing the Newspaper from receiving relief for their First Amendment violation.

After the Library continued the censorship policy unabated for another 2 months, this lawsuit ensued.

ARGUMENT

A preliminary injunction is appropriate when the movant establishes: (1) a substantial likelihood of success on the merits; (2) a threat of irreparable injury; (3) that Plaintiffs'

injury outweighs any harm an injunction may cause Defendants; and (4) that granting the injunction would not disserve the public interest. See Teper v. Miller, 82 F.3d 989, 992-93 n.3 (11th Cir. 1996). Plaintiffs satisfy each of these requirements.

I. PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO PREVAIL

Preliminary relief is warranted here because Plaintiffs ("Newspaper") are likely to prevail on the merits. Freedom of speech, amongst our most precious constitutional protections, may not be abridged by the government based on viewpoint or on content without a compelling state interest. The actions of the Defendants ("Library") in revoking the Newspaper right to place its paper in a public information area based solely on the controversy created by the Newspaper's content and/or viewpoint are clearly unconstitutional.¹

A. The Library Unlawfully Discriminated Against the Plaintiff Based on the Content of the Newspaper.

¹ At the outset, Plaintiff claims that the actions of the Library constitute unlawful prior restraint of speech -- well-established as noxious to the First Amendment. See e.g. Near v. Minnesota, 283 U.S. 697, 713 (1931); N.Y. Times v. U.S. 403 U.S. 713, 714 (1971). Georgia's Constitution provides even broader protection against prior restraint of speech. Ga. Const. art. 1, §1; See e.g. K. Gordon Murray Productions v. Floyd, 217 Ga. 784, 792 (1962) ("no interference [of speech], no matter for how short a time nor the smallness of degree, can be tolerated")

The government creates designated public fora where it allows public areas to be used as "places for expressive activity." Perry, 460 U.S. 45-49 (1983); International Soc'y for Krishna Cosciousness v., 505 U.S. 672, 687 (1992) ("designated public forum...property that the State has opened for expressive activity by part or all of the public"); Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802 (1985) ("public forum may be created by government designation of a place or channel of communication for use by the public").

The Constitution forbids a state to enforce exclusions from a designated public forum, even where it was not required to create such a forum in the first place. Widmar v. Vincent, 454 U.S. 263 (1981) (state could not close university meeting facilities to religious groups); City of Madison Joint School District v. Wisconsin Public Employment Relations Comm'n, 429 U.S. 167 (1976) (teacher could not be prohibited from speaking at school board meeting); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) (controversial play could not be prohibited from appearing at municipal theater without proper protection against prior restraint).

Speech regulations in a designated public forum must pass strict scrutiny analysis: the regulation must be content-

neutral; serve a compelling state interest; and be narrowly drawn. Capitol Square Review and Advisory Bd. vs. Pinette, 515 U.S. 753 (1995); Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 394 (1993); Perry Educ. Assoc. v. Perry Local Educators' Assoc., 460 U.S. 37, 45-46 (1983); U.S. v. Kokinda, 497 U.S. 720 (1990); Searcey v. Harris, 888 F.2d 1314, 1318-19 (11th Cir. 1989); Union City Bd of Zoning Appeals v. Justice Outdoor Displays, Inc., 266 Ga. 393 (1996).

A policy or practice which allows the public to use a forum for expressive purposes creates a presumption that the government intended to create a public forum. Cornelius 473 U.S. at 802. The nature of the property and its compatibility with expressive activity is also relevant to this determination. Id. Thus, in Capitol Square the Court held that the state's actions granting permits to variety of individuals and groups wishing to display messages in part of a statehouse plaza created a public forum. 515 U.S. 753; see also Lamb's Chapel 508 U.S. at 394 (1993) (government created a designated public forum by allowing variety of groups to use school facilities for meetings and public presentations); Rosenberger 515 U.S. at 828-829 (1995) (university's policy of funding variety of student

organizations created a designated public forum).

Courts have held that libraries are compatible with expressive activity and that allowing the public to post public information and create public displays is sufficient to create a public forum. Giebel v. Sylvester, 244 F.3d 1182 (9th Cir. 2001) (bulletin board in state university held public forum); Hopper v. City of Pasco, 241 F. 3d. 1067 (9th Cir. 2001) (program of displaying public artwork in city hall held designated public forum); Concerned Women for America, Inc. v. Lafayette County, 883 F. 2d 32 (5th Cir. 1989) (library meeting rooms held designated public forum); Searcy v. Crim, 643 F. Supp. 313 (N.D. Ga. 1986) (school bulletin boards, which allowed certain career literature, held limited public forum); Pfeifer v. City of West Allis, 91 F. Supp. 2d 1253 (E.D. Wis. 2000) (library meeting rooms held public forums); PFLAG/Anchorage et. al. v. Municipality of Anchorage, Case No. A01-073 CV, (D.C. Al., July 9 2001) (library walls held designated public forum where library allowed community organizations to create and display exhibits).

Here, a public forum was created where the Library allowed citizens to freely place material, on an ongoing and indifferent basis, on a designated table for patron use. Thus, the Library must reveal a compelling interest to restrict the Newspaper's right to participate in the public forum it created.

The Library's announced reason for restricting Plaintiff's speech was based on "the controversy" and "complaints" about the content and viewpoint of the Newspaper. This content-based and viewpoint rationale cannot survive strict scrutiny. The fact that speech is offensive to some is simply not a compelling state interest. Hill v. Colorado, 530 U. S. 703, 716 (2000) ("[t]he right to free speech...may not be curtailed simply because the speaker's message may be offensive to his audience"); McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 347(1995) ("the advocacy of a politically controversial viewpoint - is the essence of First Amendment expression"); Terminiello v. Chicago, 337 U.S. 1, 4(1949) ("speech may indeed serve its highest purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger").

Further, "[c]ontent-based regulations are *presumptively* invalid." R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (emphasis added); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("above 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").

Nor may the government retaliate against an individual on a basis that infringes his constitutional right to free speech:

[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech. Perry v. Sinderman, 408 U.S. 593, 596-598 (1972)

This principal precludes government retaliation for engaging in expressive activities. Brett v. Jefferson County, Ga., 123 F.3d 1429, 1432 (11th Cir. 1997); Umbehr v. McClure, 44 F.3d 876, 883 (10th Cir. 1995).

Thus, although the Newspaper may have had no inherent "right" to distribution in the Library, and the Library is not required to keep the forum open, the Library's action in revoking its presence based on Newspaper's content or viewpoint was unconstitutional.

B. The Library Engaged in Unlawful Viewpoint Discrimination.

Viewpoint neutrality is a hallmark of free speech jurisprudence; government action which restricts speech based on the viewpoint of the speaker is unconstitutional. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Cornelius, 473 U.S. at 800; Capitol Square, 515 U.S. at 753; U.S. v. Kokinda, 497 U.S. 720 (1990); M.N.C. Hinesville, Inc. v. Department of Defense, 791 F. 2d 1466 (11th Cir. 1986).

In R.A.V., where a white man burned a cross on a black

family's lawn, the Supreme Court held that the compelling state interest in protecting minorities from intimidation did not allow the government to discriminate based on the views of individual speakers. R.A.V., 505 U.S. 391 ("The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects").²

Where a court determines that a forum retains its nonpublic character, viewpoint discrimination remains unconstitutional. Judicial inquiry must ensure that the speech restriction is not "impermissibly motivated by a desire to suppress a particular point of view." Cornelius 473 U.S. at 812-813; Perry, 460 U.S. at 46 (a regulation must not be "an effort to suppress expression merely because public officials oppose the speaker's view"); Rosenberger 515 U.S. at 829 ("the government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the

²Even in nontraditional public fora, such as military bases, the government may not regulate speech based on the viewpoint of the speaker. Greer v. Spock, 424 U.S. 828, 848 n.3 (1976) (Powell, J., concurring) ("base authorities cannot select among candidates"); Brown v. Palmer, 915 F.2d 1435, 1444 (10th Cir. 1990) (military base "must still regulate in a reasonable, viewpoint neutral manner"), aff'd, 944 F.2d 732 (10th Cir. 1991) (en banc); Persons For Free Speech at SAC v. United States Air Force, 675 F.2d 1010, 1022 (8th Cir.) (en banc) (government barred from exercising ideological favoritism).

rationale for the restriction"); International Soc'y for Krishna Consciousness, 505 U.S. 672, 687 (1992) (nonpublic forum status "does not mean that the government can restrict speech in whatever way it likes").

Here, the Library based its decision to remove the Newspaper on "complaints" and a fear of "controversy" based on the gay-positive viewpoint of the Newspaper. This evidence, viewed in the light most favorable to the Plaintiffs, reveals impermissible and unconstitutional viewpoint-based discrimination.

C. Closing an Entire Public Forum in Order to Silence a Particular Speaker Does Not Evade the First Amendment.

The fact that the Library chose to 'close the forum' in order to suppress speech does not preclude injunctive relief for the First Amendment violation. Perry, 460 U.S. at 45-46 (1983). Even if the government was not required to open a forum in the first place, and is not required to keep it open indefinitely, it cannot close the forum to silence a controversial or disfavored viewpoint. Id; Sefick v. Gardner 164 F.3d 370 (7th Cir. 1998); Act-Up, 755 F. Supp. 1281 (M.D. Pa. 1991).

Confronted with the maneuver to silence speech by closing a designated forum, federal appellate courts have heeded the constitutional mandate to address the First Amendment violation.

In Sefick v. Gardner, for example, the Seventh Circuit considered an artist's challenge to the government's refusal to let him display artwork in a federal courthouse by closing a designated forum. 164 F.3d at 372. The court held that the government's decision to change their policy and exclude all exhibits of any kind did not invalidate the claim for injunctive relief. Citing Perry, the court went on to explain the common-sense reasoning:

First, a court could order Sefick's sculpture displayed as a remedy for a violation of his first amendment rights ... Second, the current no-display policy...could be changed again, so this voluntary cessation of the challenged conduct does not eliminate the controversy. Sefick 164 F.3d at 372.

See also Barnard v. Chamberlain, 897 F.2d 1059, 1062 & n.3 (10th Cir. 1990) (plaintiff's first amendment challenge to refusal to print his letters to the editor in state bar newsletter was not rendered moot by defendant's closing of forum by adopting new guidelines on publication of letters to the editor); DiLoreto v. Downey Unified School District Board of Education, 196 F.3d 958, 963 n.1 (9th Cir. 1999) (where court considered government decision not to accept advertisement on a school fence based on content even though the school closed forum to all ads on fence).

In Act-Up, the government effectively silenced a group of

demonstrators by closing the Gallery of the Pennsylvania House of Representatives to all members of the public. 755 F. Supp. 1281. The court held the action violated the group's first amendment rights and announced that closing an entire public forum to silence one group, as happened here, "cuts against the grain of the notions of a free and open society embodied in the first amendment." Act-Up, 755 F. Supp. at 1290.

Thus, the Library's subterfuge in closing their designated open forum in response to "the controversy" and "complaints" about the Newspaper's content does not create a barrier to relief for this Plaintiff's First Amendment violation.

II. PLAINTIFFS HAVE DEMONSTRATED IRREPARABLE HARM

An injunction is further warranted because Plaintiffs have demonstrated irreparable harm flowing from the violation of their First Amendment rights. "The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable harm." Elrod v. Burns, 427 U.S. 347, 373 (1976).

"Because chilled speech cannot be compensated by monetary damages, an ongoing violation of the First Amendment constitutes irreparable injury." Northeastern Fla. Chapter of Asso'n of Gen. Contractors of America v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990)).

III. THE BALANCE OF HARDSHIPS WEIGHS IN PLAINTIFFS' FAVOR

The equities tip decisively in Plaintiffs' favor. Preliminary relief is essential to safeguard Plaintiffs' constitutional rights during the pendency of these proceedings.

IV. GRANTING PRELIMINARY RELIEF SERVES THE PUBLIC INTEREST

Finally, a preliminary injunction serves the public interest. The First Amendment is a fundamental component of American democracy, and its very essence is the principle that government may not avoid controversy by silencing speakers. Regardless of the merits of any individual's view of minority rights, targeting their speech for censorship is not an approach that serves the public interest or satisfies the mandates of the Constitution. Georgia citizens need to rest assured that the Georgia judiciary will not condone the government's attempt to silence controversial speech or trample upon the rights of a minority group of citizens.

V. CONCLUSION

For the foregoing reasons, a preliminary injunction should be entered against further enforcement of the Sign Ordinance.

This the ____ day of 2002.