

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION**

MICHELLE SOLOMON,)
GRADY ROSE, ALLISON SPENCER,)
SAVANAH KITE,)

Plaintiffs,)

vs.)

Case Number:

THE MAYOR and)
ALDERMAN OF THE CITY OF)
SAVANNAH,)

Defendant.)

**MEMORANDUM IN SUPPORT OF PLAINTIFFS’ MOTION FOR TEMPORARY
RESTRAINING ORDER**

Come Now, the Plaintiffs by and through their undersigned counsel and file this their Memorandum in Support of Plaintiffs’ Motion for Temporary Restraining Order against the Defendant, and shows this Honorable Court the following:

SUMMARY

Plaintiffs urgently seek emergency relief that will allow them to exercise a basic First Amendment right tomorrow on Saturday, March 17, 2018, during the annual Savannah St. Patrick’s Day Parade: the right to “public-issue picketing,” which is “an exercise . . . of basic constitutional rights in their most pristine and classic form, [and] has always rested on the highest rung of the hierarchy of First Amendment values.” *Carey v. Brown*, 447 U.S. 455, 466-67 (1980) (citations and quotations omitted). Specifically, Plaintiffs ask for nothing more than the right to display hand-held poster signs (no larger than a poster board) containing messages they would like

to convey to the participants of this year's parade, namely Vice President Mike Pence. But on March 14, the City of Savannah suddenly imposed an absolute ban on all hand-held poster signs near the Vice President's parade route, even though, oddly, they are permitting parade goers to display hand-held flags, with the City spokesperson all but encouraging parade goers to bring "American flags." This apparent forced patriotism is anathema to the First Amendment.

Although the government might be justified in banning the display of signs or flags mounted on a pole or stick, which may raise security concerns, there is no justification in banning hand-held poster signs. Indeed, the policy specifically bans only "Flags on sticks," while banning *all* "Posters Signs" regardless of whether they are mounted on a stick. The permissive policy on hand-held flags undermines any purported security justification for banning hand-held poster signs.

As discussed below, Plaintiffs are likely to succeed in demonstrating that banning hand-held poster signs while allowing hand-held flags at the St. Patrick's Day Parade violates the First Amendment for two independent reasons. First, banning hand-held poster boards while allowing hand-held national flags unconstitutionally discriminates on the basis of content. Second, banning hand-held poster boards of any size is not narrowly tailored to serve a compelling state interest and is an unreasonable time, place, or manner restriction, principally because the permissive policy on hand-held flags undermines any security justification for banning hand-held poster signs. Plaintiffs will also be irreparably harmed in the absence of an injunction, the threatened injury to Plaintiffs outweighs whatever damage the proposed injunction may cause Defendant, and an injunction is in the public interest. Accordingly, this Court should grant Plaintiffs' motion for a temporary restraining order allowing them to display hand-held poster signs at tomorrow's parade.

FACTUAL BACKGROUND

The facts of this case are straightforward. The Savannah St. Patrick's Day Parade is a time-honored tradition dating back to 1824. As described on the official Savannah St. Patrick's Day website, "Today, bands, families, societies, soldiers, public servants, and commercial floats wind through the streets of Historic Downtown Savannah every March 17th, making [the Savannah] St. Patrick's Day Parade one of the largest and most recognized in the world[.]" This year, Vice President Mike Pence will be featured in the parade.

On March 14, 2018, the City of Savannah suddenly announced a new policy restricting the activities of parade goers situated on public sidewalks and streets within a one block distance of the parade route (so-called "Enhanced Security Zone"), which is currently posted online¹ and attached as Exhibit A to the Complaint. The policy contained a list of items that would be banned, including explosives, firearms, knives, and other items that may pose a security threat to the Vice President.

The policy, however, also imposed an absolute ban "Posters Signs." While it also banned "Flags on sticks," it did not limit its ban on poster signs only to those that are mounted on a pole or stick. There was also no size restriction noted.

When asked at a press conference about the "Flags on sticks" restriction, the City of Savannah spokesperson explained, "The issue is making sure we are do not have any sticks that could possibly be used as a security threat. So we do not want any sticks, but flags, American flags, Irish flags, things like that are allowed as long as they are not on a stick or on a post. And also, no

¹ <https://www.savannahga.gov/2537/Security-Enhancements-for-VP-Visit>

signs are allowed.”² The spokesperson also reminded the public that they were allowed to bring blankets.

In other words, hand-held flags are permitted under the policy, while hand-held poster signs are not. As a result of this policy, Plaintiffs will not be able to bring any hand-held poster signs (no bigger than the size of a regular poster board) displaying messages critical of the government.

ARGUMENT

A temporary restraining order or preliminary injunction is warranted if the movant demonstrates: (1) a substantial likelihood of success on the merits; (2) irreparable harm in the absence of an injunction; (3) that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) that an injunction would not disserve the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Odebrecht Const., Inc. v. Sec’y, Florida Dep’t of Transp.*, 715 F.3d 1268, 1273-74 (11th Cir. 2013). As discussed below, consideration of each of these four factors supports Plaintiffs’ request for preliminary relief.

I. Plaintiffs Are Substantially Likely to Succeed on the Merits of Their First Amendment Claim

Plaintiffs are substantially likely to succeed on the merits of their First Amendment claim. This case concerns Plaintiffs’ ability to picket with small, hand-held signs on public sidewalks and streets, the kind of activity deserving of the strongest First Amendment protection. As the Supreme Court has explained, “public-issue picketing” is “an exercise . . . of basic constitutional rights in their most pristine and classic form, [and] has always rested on the highest rung of the hierarchy

² The video of this press conference was posted at: <http://bit.ly/2IsngCr>. The quote was expressed on or around the 13:30 minute mark of the video.

of First Amendment values.” *Carey v. Brown*, 447 U.S. at 466-67. What is more, public sidewalks and streets “occupy a ‘special position in terms of First Amendment protection’ because of their historic role as sites for discussion and debate.” *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (citation omitted). These are known as traditional public fora. *See Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1224 (11th Cir. 2017). “Consistent with the traditionally open character of public streets and sidewalks, we have held that the government’s ability to restrict speech in such locations is ‘very limited.’” *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014) (citation omitted).

To assess the constitutionality of a speech restriction in a traditional public forum, the Court may initially determine whether the speech restriction is content neutral. “A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015) (citation omitted). If a law is not content-based, then the restriction must satisfy intermediate scrutiny, which in the First Amendment context means it must be “narrowly tailored to serve a significant governmental interest” and a “reasonable restriction[] on the time, place, or manner of protected speech.” *McCullen*, 134 S. Ct. at 2529.

As discussed below, the absolute ban on hand-held poster signs, which exempts hand-held national flags, violates the Constitution for two independent reasons. First, it is content-based and fails strict scrutiny. Second, it is not narrowly tailored to serve a significant governmental interest and is otherwise unreasonable.

A. The absolute ban on hand-held poster signs is content-based because it exempts hand-held national flags

First, Savannah’s absolute ban on hand-held poster signs is an impermissible content-based restriction because it expressly allows hand-held national flags. A policy that favors “flags” clearly

signals a preference for the display of the most common and widely-available flag—the American flag. This preference that was overtly adopted by the City of Savannah at its press conference, when the spokesperson cited the “American flag” as an example of something people could bring to greet the Vice President. An expressed motivation to discriminate against speech based on content can also render a restriction unconstitutional. *See Reed*, 135 S. Ct. at 2228-29 (courts can look to “governmental motive” to determine whether restriction is content-based). “The vice of content-based legislation . . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.” *Id.* at 2229 (citation and quotation omitted). Forced patriotism is anathema to the First Amendment. *Cf. W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”).

In addition, the policy evinces a clear content-based preference for stock messages that have been embraced by established, official organizations or large groups with the resources to create numerous flags and to distribute them widely. With only three days’ notice of this “flags only” policy, it is difficult to imagine any individual going through the ludicrous and time-consuming exercise of hand-weaving an individual, unique message on a cloth flag in three short days. Thus, for example, in *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1265-66 (11th Cir. 2005), the Eleventh Circuit held that sign exemptions that favor “official signs” or signs “erected by, or on behalf of, or pursuant to the authorization of a governmental body,” “are content based.” The sudden announcement of this flags-only policy effectively accomplishes the same thing.

As a content-based restriction, the policy cannot survive strict scrutiny. Though the government has a compelling interest in security, the ban is not “narrowly drawn” to achieve that interest, because it is utterly unclear how hand-held poster boards pose a security threat. Although courts have upheld bans on signs carried by a stick or a pole because they may be used as a weapon, *see generally, e.g., A.N.S.W.E.R. Coalition v. Jewell*, 153 F. Supp. 3d 395 (D.D.C. 2016), an explanation also given by the Savannah spokesperson, such threats are not at issue with hand-held signs. And even if hand-held signs did pose some security threat Plaintiffs have not considered, it is not clear how hand-held *flags* of the exact same size do not pose that same threat. *See, e.g., Solantic LLC*, 410 F.3d at 1267 (government’s interests “clearly are not served by the distinction between government and other types of flags; therefore, the regulation is not ‘narrowly drawn’ to achieve its asserted end.” (quoting *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1570 (11th Cir. 1993))). The ban is therefore an unconstitutional content-based restriction.

B. The absolute ban on hand-held poster signs, even if content-neutral, also fails intermediate scrutiny

Second, Savannah’s absolute ban on hand-held poster signs, even if content-neutral, fails because it is not “narrowly tailored to serve a significant governmental interest,” nor is it a “reasonable restriction[] on the time, place, or manner of protected speech.” *McCullen v. Coakley*, 134 S. Ct. at 2529. “The tailoring requirement does not simply guard against an impermissible desire to censor. The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. . . . [B]y demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily sacrificing speech for efficiency.” *Id.* at 2534 (citation and quotation omitted).

For largely the reasons expressed above, the ban fails intermediate scrutiny. Here, the “significant governmental interest” at issue is security, but it is utterly unclear what the security justification is for preventing people from holding poster boards next to a parade. As noted above, Plaintiffs do not challenge any restriction on the display of poster signs on sticks or poles (just as they do not challenge the existing ban on “Flags on sticks”), which could be a security threat, but simply want to display their home-spun messages on poster signs with their hands. *See Glasson v. City of Louisville*, 518 F.2d 899, 905 (6th Cir. 1975) (unconstitutional for police officer to rip up poster being displayed on the route of a presidential motorcade), *overruled on other grounds*, 805 F.3d 228.

It is furthermore unclear what security threat posed by hand-held poster signs is not also posed by hand-held flags of the *exact same size*, and held in the *exact same way*. In other words, whatever security justification Defendant might possibly imagine is served by banning hand-held poster boards is likely to be undermined by their allowance of hand-held flags. As the Savannah spokesperson also confirmed, people may even bring blankets onto the parade grounds, which are presumably even larger than poster boards. It is furthermore unclear “that alternative measures that burden substantially less speech would fail to achieve the government’s interests,” *McCullen*, 134 S. Ct. at 2540, though again, it is not clear how the ban on hand-held posters serves the government’s interests to being with. As the policy states, everyone attending the parade already undergo rigorous security measures and must pass through magnetometer check points.

For the above reasons, Plaintiffs are likely to succeed on the merits.

II. The Remaining Factors Weigh in Favor of a Temporary Restraining Order

The remaining factors this Court must consider also weigh in favor of granting a temporary restraining order. It is well-established that the suppression of speech constitutes irreparable injury. *See Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1229 (11th Cir. 2017). As for weighing the balance of hardships, as discussed above, it not at all clear how the City of Savannah will suffer if it allows hand-held poster signs onto the parade grounds, especially since it is already allowing hand-held flags (and blankets) onto the parade grounds. And of course, the potential for offending other people with speech critical of the Vice President is legally irrelevant, as the government cannot allow a “heckler’s veto” which “would empower an audience to cut off the expression of a speaker with whom it disagreed.” *Glasson*, 518 F.2d at 906. Finally, an injunction allowing Plaintiffs to display messages on hand-held poster signs does not disserve the public interest. *See Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276 (11th Cir. 2001) (“[T]he public interest is always served in promoting First Amendment values.”).

CONCLUSION

The City of Savannah should honor the Vice President’s visit by encouraging free expression under the First Amendment, not suppressing it. Imposing an absolute ban on all hand-held poster signs does not meaningfully serve any security interest, especially when the policy allows people to display hand-held American flags of the same size and in the same way. Plaintiffs respectfully urge this Court to grant its motion for a temporary restraining order enjoining Defendant from enforcing the ban on hand-held poster signs in tomorrow’s Savannah St. Patrick’s Day Parade.

Respectfully submitted, this 16th day of March, 2018.

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*Application for admission into S.D.Ga.
and/or pro hac vice pending*

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