

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

STEPHEN LEE JOHNSON,)	
)	
Plaintiff,)	
)	
vs.)	CIVIL ACTION
)	FILE NO. _____
SUSAN BOGGS,)	
TAMMY GRIENER,)	
PRISCILLA KILLINGSWORTH,)	
CHARLES O'NEILL, and)	
TAREY B. SCHELL,)	
in their individual and official)	
capacities, and)	
TERRELL MOODY, and)	
JAMES THOMAS,)	
in their official capacities,)	
)	
Defendants.)	

**PLAINTIFF'S BRIEF IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff Stephen Lee Johnson ("Johnson") files this brief in support of his application for a preliminary injunction preventing the defendants from enforcing the Order of Arrest entered against Johnson on September 21, 2004. Johnson possesses a fundamental right of free speech to criticize the government and government officials on his website. The Order of Arrest, predicated only on Johnson's critiques in his website, is an unconstitutional prior restraint, curtailing Johnson from exercising his rights to free speech and expression.

FACTUAL BACKGROUND

Johnson is being improperly threatened with arrest for expressing views critical of the government and its officials. Johnson heads a group called Advocates for Rights and Liberties of America ("ARLA"). ARLA's mission is to "reduce and

eliminate the child abuse caused by the very system instituted to protect them.” *See* Complaint at ¶ 13. ARLA campaigns for changes to the Georgia Department of Family and Children’s Services (“DFACS”), family and juvenile courts, and other state agencies charged with administering Georgia’s system for child and family welfare. *Id.* at ¶¶ 11, 13. One method Johnson employs to effectuate change in the juvenile and family system is to publicly call attention to what he believes are examples of the system’s failures. ARLA publishes its views on a website located at <http://www.angelfire.com/ga4/justice/>. *Id.* at ¶ 14. This website contains general critiques of the system as well as specific criticisms of individuals.

One such individual who Johnson has discussed is Susan Boggs (a defendant in this lawsuit). Ms. Boggs is the DFACS Supervisor for Pike County. Ms. Boggs was named DFACS Supervisor of the Year in 2004. Johnson, through his website, questioned both Ms. Boggs’s qualifications to supervise juvenile facilities and DFACS’ decision to honor her with a Supervisor of the Year award. Johnson cited a 1997 federal investigation that turned up abuses at Georgia juvenile facilities, including the facility for which Ms. Boggs was the director. Based on this report, the website asked rhetorically: “This person is the type [of] person to tell others how they should raise their children??” This website post prompted Ms. Boggs to send Johnson a letter threatening legal action. *See* Complaint at ¶ 24.¹

¹ The letter indicates that Ms. Boggs believes Johnson’s website to be slanderous and libelous. *See* Complaint at ¶ 23. (Mr. O’Neill sent a similar letter.) Whether or not Johnson’s speech constitutes libel and slander is of no moment in this application for preliminary injunction. While denying that any statement on the website is libelous and slanderous, the law will not countenance prior restraint even in cases of libel and slander. *See Singer Mfg. Co. v. Domestic Sewing Machine Co.*, 49 Ga. 70, 72 (Ga. 1873) (“[l]ibel and slander, however illegal and outrageous, will not be enjoined”); *Fernandez v. North Georgia Reg’l Med. Ctr., Inc.*, 400 S.E.2d 6, 7-8 (Ga. 1991) (citing *Singer*).

Another individual discussed on the ARLA website is Charles O'Neill (another defendant in this lawsuit), a Pike County Child Advocate. On the website, Johnson posted a news article from the local Pike County newspaper reporting on a trip Mr. O'Neill and his family made from Florida to Georgia in the wake of Hurricane Charley. The Pike County Journal-Reporter article noted that the O'Neill's car was badly damaged by the hurricane and that "the glass on all four doors was missing and the windshield was shattered." See Complaint at ¶ 19. Johnson questioned O'Neill's judgment for transporting his family back to Georgia in such a badly damaged vehicle. *Id.* at ¶ 20.

Like Ms. Boggs, Mr. O'Neill, through his attorney, sent a letter threatening legal action. *Id.* at ¶ 23. But unlike Ms. Boggs, Mr. O'Neill went to a magistrate judge in Pike County and obtained an order of arrest based solely on the allegation that "Johnson, Stephen Lee did post on a website made [sic] false and malicious statements against my family." *Id.* at ¶ 26.²

Since the Order of Arrest was issued on September 21, 2004, Johnson has been subject to arrest at any moment. Any changes made to his website raise the specter of arrest and confinement. Because the Order of Arrest is an impermissible violation of Johnson's constitutional rights, Johnson is suing for an injunction preventing the defendants from enforcing the Order of Arrest. Johnson seeks this preliminary

² The Order of Arrest was ostensibly predicated on Johnson's supposed violation of O.C.G.A. § 16-11-39 (a)(1) (2004) which makes it a crime to "act[] in a violent or tumultuous manner toward another person whereby such person is placed in reasonable fear of the safety of such person's life, limb, or health." See Application for Criminal Warrant (Ex. 1) (listing an "Offense" and "Offense Description"). While the Application tracks the language of O.C.G.A. § 16-11-39 (a)(1), the Order of Arrest is based only on an (unsigned) affidavit alleging Johnson made "false and malicious statements," which are not covered by the disorderly conduct statute.

injunction to immediately lift the threat of arrest and prosecution for engaging in protected expressive activities.

LEGAL BASIS FOR A PRELIMINARY INJUNCTION

Johnson moves for a preliminary injunction preventing enforcement of the Order of Arrest. 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 the plaintiff's injury outweighs any harm an injunction may cause the defendants; and (4) that granting the injunction would not be a disservice to the public interest. *See Teper v. Miller*, 82 F.3d 989, 992-93 n.3 (11th Cir. 1996). Johnson meets the four factors of this test with ease.

1. The Plaintiff Has A Substantial Likelihood of Success on the Merits

A. The First Amendment Protects Speech That is Critical Of Government Officials

Johnson's desire to effectuate change within the Georgia juvenile and family welfare system is at the heart of this dispute. In furtherance of his efforts, Johnson's website identifies weak areas in the system and the people he believes are responsible for them. Naturally, Johnson wants to make his case for change publicly, and he has the right to do so. The First Amendment, which applies to the States through the Fourteenth Amendment, prohibits laws and actions "abridging the freedom of speech, or of the press." *See Mills v. Alabama*, 384 U.S. 214, 218 (1966); U.S. Const. Art. I. A central tenet of freedom of speech is that speech can rarely be punished. *See Gulliford v. Pierce County*, 136 F.3d 1345, 1350 (9th Cir. 1998) (reversing jury verdict because jury instructions did not explain that words alone cannot form the basis for an arrest and stating "under the First Amendment an individual cannot be arrested for mere speech . . .").

Under First Amendment law, the right to criticize the government and government officials has been cited as one of the most prized freedoms granted in the Bill of Rights. “Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.” *Mills*, 384 U.S. at 218; *see also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991) (“There is no question that speech critical of the exercise of the State’s power lies at the very center of the First Amendment.”); *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (“[t]he publication of information relating to alleged governmental misconduct [is] speech which has traditionally been recognized as lying at the core of the First Amendment.”); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 767 (1985) (“Criticism and assessment of the performance of public officials and of government in general are not subject to penalties imposed by law.”) (White, J. concurring); *Gertz v. Welch*, 418 U.S. 323, 387 (1974) (“The central meaning of *New York Times*, and for me the First Amendment as it related to libel laws, is that seditious libel—criticism of government and public officials—falls beyond the police power of the state.”) (White, J., dissenting); *Trulock v. Freeh*, 275 F.3d 391, 404 (3rd Cir. 2001) (“The First Amendment guarantees an individual the right to speak freely, including the right to criticize the government and government officials.”) (citing *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964)).

There can be no question that Ms. Boggs and Mr. O’Neill are the types of government officials squarely contemplated by First Amendment law. It is only through the power of the state that they exercise the ability to intervene in family affairs and remove children from their parents’ custody. Yet governments are made up of individuals (including Ms. Boggs and Mr. O’Neill), and those individuals are

the ones who implement the State's policies. Johnson has strongly held beliefs that the current system does a disservice to the families it purports to help. His right to criticize the government - and necessarily the individuals who carry out government policy - is protected by the First Amendment. In short, Johnson cannot be punished for the contents of his website.

B. A Threatened Arrest is An Impermissible Prior Restraint Under the First Amendment

"The doctrine of prior restraint, reduced to its simplest form, is that no prior restraint may prevent exercise of free speech, although criminal or civil action may result from that speech." *ACLU v. City of Pittsburgh*, 586 F. Supp. 417, 421 (W.D. Pa. 1984). Closely tied to the right not to be punished for engaging in free speech is the right not to have one's speech prospectively silenced through prior restraints. Johnson is subject to arrest at any moment if he chooses to continue speaking. The Order of Arrest restrains his ability to speak freely about the Georgia child and family welfare system in general and about Ms. Boggs and Mr. O'Neill in particular. The Order to Arrest signals to Johnson that if he says the wrong thing or intensifies his critique of Boggs and O'Neill, he will be prosecuted. The Order of Arrest, therefore, is an attempt to prevent Johnson from engaging in free speech.

In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), the Supreme Court reviewed the constitutionality of the "Rhode Island Commission to Encourage Morality in Youth." *Id.* at 59. The Commission's purpose was "to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, or manifestly tending to the corruption of the youth." *Id.* The Commission's practice was to notify distributors that certain material had been reviewed by the Commission and had been declared

by a majority of its members to be objectionable for sale, distribution or display to youth under 18 years of age. *Id.* at 61. The typical notice provided by the Commission reminded the recipient that, in the absence of compliance, it was the Commission's duty to recommend prosecution of purveyors of obscenity to the Attorney General. *Id.* at 62.

The Supreme Court recognized that Rhode Island's informal threats of legal sanctions amounted to a prior restraint. The Court noted that "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around . . ." *Id.* at 68. In finding the informal notification system unconstitutional, the Supreme Court noted that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Id.* at 70. This maxim that prior restraints are disfavored under the First Amendment is firmly imbedded in the First Amendment jurisprudence. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931). Moreover, other courts have reached the same conclusion as the Supreme Court in *Bantam Books* – that threats of arrest and prosecution are prior restraints. See *Penthouse Int'l v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980); *ACLU v. City of Pittsburgh*, 586 F. Supp. 417 (W.D. Pa. 1984).

Johnson finds himself in a situation analogous to those receiving notices in *Bantam Books*. The Order of Arrest is a formal threat to prosecute Johnson if he continues criticize the administrators of Georgia's child and family welfare system. Johnson's speech has not been adjudicated to be criminal, nor could it be. Yet he is

being threatened with prosecution if he continues to exercise his First Amendment rights. A device that “compels or restrains belief and association is inimical to the process which undergirds our system of government and is ‘at war with the deeper traditions of democracy embodied in the First Amendment.’” *Elrod v. Burns*, 427 U.S. 347, 357 (1976)(quoting *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 576 (7th Cir. 1972)). The Order of Arrest in this case is a prior restraint warranting injunctive relief. See *Bantam Books*, 372 U.S. at 638 n.8.

C. A Threatened Arrest is An Impermissible Prior Restraint Under Georgia Constitution.

The Georgia Constitution even more clearly bars **all** prior restraint of claimed defamatory speech. The Georgia Supreme Court has, since 1873, flatly and unequivocally held that “equity will not enjoin [even unprotected speech such as] libel and slander.” *Pittman v. Cohn Communities, Inc.*, 240 Ga. 106, 109 (1977) (citing *Singer Mfg. Co. v. Domestic Sewing Machine Co.*, 49 Ga. 70, 72 (1873)); see also *Cohen v. Advanced Med. Group of Ga.*, 496 S.E.2d 710, 711 (Ga. 1998). The Georgia Constitution's free speech protections are even stronger than those of the United States Constitution in the area of prior restraint in that “all interference” with speech before it occurs is “absolutely interdicted.” *K. Gordon Murray Productions v. Floyd*, 217 Ga. 784, 792 (1962). The Georgia Constitution of 1983 provides:

Freedom of Speech and Press Guaranteed. No law shall be passed to curtail or restrain the freedom of speech or of the press. Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that liberty.

Ga. Const. 1983, Art. I, Sec. I, Par. V.³ “[T]he State constitutional guarantee of

³ This provision “traces its lineage to the first Constitution of our State, in 1777, antedating the First Amendment by fourteen years.” *Martin Luther King, Jr. Center for Social Change, Inc v. Am. Heritage Prod.*, 250 Ga. 135, 150 (1982) (Weltner, J., concurring).

freedom of speech is absolute in what it protects." *Hirsh v. City of Atlanta*, 261 Ga. 22, 27 (1991).

Under the Georgia Constitution, the prior restraint of defamatory or allegedly defamatory speech is absolutely prohibited. See, e.g. *Georgia Gazette Publ'g Co. v. Ramsey*, 248 Ga. 528, 530 (1981); *Singer*, 49 Ga. at 72-73; *Fernandez v. North Ga. Reg'l Medical Ctr., Inc.*, 260 Ga. 765, 766 (1991); *Brannon v. American Micro Distrib.*, 255 Ga. 691, 692 (1986); *Pittman v. Cohn Communications*, 240 Ga. 106, 110 (1977). K. Gordon Murray explained Georgia's constitutional prohibition on prior restraints as follows:

This means that no interference, no matter for how short a time nor the smallness of degree, can be tolerated [not even] for one second in any conceivable manner.... [I]ntrusion even for the shortest time and in the most superficial manner would be an invasion of constitutionally protected liberty.

217 Ga. at 793 ("The far reaching effect of this decision does not escape our notice or concern.... [Nevertheless,] we have no alternative to saying, this sayeth the Constitution, and we cheerfully obey."); see also *Georgia Gazette Publ. Co.*, 248 Ga. at 530.

Therefore, under the Georgia Constitution, as well as the First Amendment, an injunction against the Order of Arrest is plainly warranted.

2. Restraints on Speech Cause Irreparable Injury

The "irreparable injury" requirement is a simple matter in cases of prior restraint. "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); *Northeastern Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990); *ACLU v. Reno*, 929 F. Supp. 824, 851 (D. Pa. 1996) ("Subjecting speaker to criminal penalties for speech that is

constitutionally protected in itself raises the specter of irreparable harm.”). As demonstrated above, the Order of Arrest in this case is preventing Johnson from fully enjoying his First Amendment rights. The Order is preventing Johnson from freely engaging in speech, and is preventing him from working to advance his cause.

3. The Balance of Hardships Weighs in the Plaintiff’s Favor

In assessing a request for preliminary injunctive relief, courts must weigh the relative hardships faced by each party. *See Hughes Network Sys. v. Interdigital Communications Corp.*, 17 F.3d 691, 693-94 (4th Cir. 1994) (balance of hardship is an important component in assessing whether to grant preliminary injunctive relief). In so doing, courts generally balance the injury faced by the person applying for an injunction against the injury that would be sustained by the defendant if relief were granted. *See Yakus v. United States*, 321 U.S. 414, 440 (1943) (court balances convenience of parties and possible injuries as they may be affected by granting or withholding injunction). In this case, the equities decisively tip in Johnson’s favor. The defendants are threatening criminal prosecution and are abusing criminal procedures to silence Johnson. On the other hand, Johnson is merely trying to exercise his free speech rights. In such a situation, “the seriousness of the injury caused by allegedly unconstitutional restraints on fundamental rights weighs in favor of a preliminary injunction.” *One World One Family Now v. City of Key West*, 852 F. Supp. 1005, 1013 (S.D. Fla. 1994); *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board*, 578 F.2d 1122, 1126 (5th Cir. 1978) (determining that the relative injuries tip in favor of plaintiff in First Amendment case, and noting that “in our constitutional scheme of things [restrictions on First Amendment rights] are viewed very gravely indeed.”)

4. Granting the Preliminary Injunction Will Serve the Public Interest

Finally, a preliminary injunction serves the public interest by fostering open debate about the weaknesses in Georgia's child and family welfare system. "No long string of citations is necessary to find that the public interest weighs in favor of having access to a free flow of constitutionally protected speech." *Reno*, 929 F. Supp. at 851 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994)); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

CONCLUSION

For the foregoing reasons, a preliminary injunction should be entered to prevent the enforcement of the unconstitutional Order of Arrest that is straining Johnson from engaging in constitutionally protected speech.

DATED: This the ___ day of April, 2005.

Respectfully submitted,

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