

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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

Appellants,

vs.

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

Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF GEORGIA

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**BRIEF OF APPELLANTS**

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The Gay Guardian Newspaper v. Oohoopee Reg'l Library Sys., No. 02-16863JJ

**CERTIFICATE OF INTERESTED PERSONS**  
**AND CORPORATE DISCLOSURE STATEMENT**

Walter W. Ballew, III, Counsel for Gail Edenfield

Honorable Judge B. Avant Edenfield, United States District Judge

Gail Edenfield, Appellee

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The Gay Guardian Newspaper, Appellant

Dusty Gres, Appellee

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Trustees, Oohoopee Regional Library System, and Dusty Gres

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Oohoopee Regional Board of Library Trustees, Appellee

Oohoopee Regional Library System, Appellee

Gerald Weber, Counsel for Appellants

## **STATEMENT REGARDING ORAL ARGUMENT**

Appellants respectfully request oral argument in this case given the novelty, complexity and number of legal issues presented. The district court's analysis, which created an unprecedented fourth tier of public fora, so infected its holding that oral argument will assist this Court in realigning the analysis in this case back to established free speech jurisprudence. Oral argument should benefit the Court significantly.

## **CERTIFICATE OF COMPLIANCE WITH TYPE/STYLE LIMITS**

This brief is filed in Book Antiqua 13 point type, complies with FRAP 32 (a)(7)(A) and contains 6888 words.

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## STATEMENT OF JURISDICTION

\_\_\_\_\_Plaintiffs-Appellants appeal under 28 U.S.C. §1292(a)(1) from an order denying a preliminary injunction on all claims. Speer v. Miller, 15, F. 3d 1007 (11th Cir. 1994).

## STATEMENT OF ISSUES

- I. Whether the district court's "hybrid limited/nonpublic forum" designation is inconsistent with public forum jurisprudence of the U.S. Supreme Court and the Eleventh Circuit;
- II. Whether a government actor can close a public forum in order to silence the controversial content or viewpoint of a particular speaker;
- III. Whether a designated public forum loses its public forum status because it is located where many people may view it.

## STATEMENT OF CASE

\_\_\_\_\_Appellants are a free community-based Newspaper and its Editor and Chief whose ability to distribute their paper was denied when the display table at Appellees' library was removed for the undisputed reason of avoiding the controversial viewpoint or offensive content of the paper.

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## STATEMENT OF FACTS

\_\_\_\_\_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. R1-3-1. Recent article topics have included hate crimes and equality for gay/lesbian people. Id. The Newspaper sometimes 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. R5-2-2; R5-3-1 (copy of *Gay Guardian* issue).

As the lower court pointed out, "[n]one of the material facts are in dispute." R24-1-1. The Library created a "free publications" table that it placed in its lobby. Id.; R22-1-5 ("[T]he library permitted publications free to the public."); R20-2-2 (Gres Aff.) ("In early 2002, the library had an informal policy of permitting materials 'free to the public' on a table in the library's lobby."); R20-10-2 (Edenfield Aff.) ("Gay Guardian newspaper which had recently been placed on the library's lobby table

pursuant to the library's informal policy permitting placement of any 'free to the public' materials.") On February 22, 2002, the *Gay Guardian* Editor Ronald Mangum, who uses the professional pseudonym, Ronald Marcus, requested and gained permission to place approximately twenty copies of the Newspaper on the designated display table that held various free literature. R24-1-1; R22-1-5; R19-1-2.

On March 1, 2002, Mr. Mangum returned to the Library to replenish the Newspaper's supply. R5-2-6. A library staff person notified him that he could no longer display copies of the *Gay Guardian* in the Library. Id. The Director of the Library, Dusty Gres, informed Mr. Mangum that the Library had received too many complaints about the content and viewpoint of the *Gay Guardian*. Id. She stated that, due to the complaints, none of which were reduced to writing as required by library policy, the Library was nevertheless no longer allowing anyone to distribute literature on the table in the lobby. R24-1-2; R19-1-4; R5-6-1; R20-1-3 ("Because of the volume of oral complaints . . . they decided the library should remove the table . . .").

Mangum believed the copies of the *Gay Guardian* were illegally taken or destroyed. R5-2-2; R5-3-2 He contacted the Vidalia Police Department and City Police Officer Carlyle met them at the Library to address their concerns. R5-3-2. Gres

claimed the papers were removed because of “a religious issue, gays versus Christians.” Id.

On May 22, 2002, at the next Board of Trustees meeting of the Ohoopce Regional Library System, the Board discussed adopting a new display policy in response to “the controversy.” R5-5-7. Throughout the meeting, Gres and several Board members continually referred to the “controversy” as the reason for changing the current policy. Id. Nearly five months after the Library removed the display table in order to avoid the controversy generated by the *Gay Guardian*, the Board officially reaffirmed that decision and changed its policy to allow only Library and government publications. R24-1-2; R19-1-7,8; R24-1-1(“After it received oral objections to *The Gay Guardian* in its lobby, the Library restricted the table to government and library-generated materials.”).

### **PROCEDURAL HISTORY**

In October of 2001, Newspaper and Editor filed suit in federal court against the individuals and entities who authorized and executed the barring of his paper. Simultaneously, he moved for a declaration that the defendant’s actions violated the First Amendment; a preliminary injunction restraining the Library from further censorship; nominal and compensatory relief; as well as attorney’s fees, costs and

expenses. The district court denied the request for a preliminary injunction.<sup>1</sup> The Newspaper and Editor moved the court for reconsideration and the court denied their motion.

### STANDARD OF REVIEW

The material facts are undisputed. Gay Guardian Newspaper v. Ochopee Regional Library System, No. 6:02cv00104, 2002 WL 31778780, at \*2 (S.D. Ga. Nov. 19, 2002) (“None of the material facts are in dispute.”). The denial of a preliminary injunction is reviewed *de novo* if district court has erred in its apprehension or application of the law. Cumulus Media, Inc. v. Clear Channel Communications, Inc., 304 F.3d 1167 (11th Cir. 2002).

### SUMMARY OF ARGUMENT

The district court erred by reinventing public forum doctrine to include a fourth tier of analysis in order to create a new fourth type of forum, the “hybrid

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<sup>1</sup> Plaintiffs have plainly demonstrated the remaining requirements for a preliminary injunction. “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 Ass’n of Gen. Contractors of America v. City of Jacksonville, 896 F.2d 1283, 1285 (11th Cir. 1990)). Moreover, the equities tip decisively in Plaintiffs’ favor. Preliminary relief is essential to safeguard Plaintiffs’ constitutional rights during the pendency of these proceedings. Finally, a preliminary injunction serves the public interest.

limited/nonpublic” forum, which tolerates both content-based and viewpoint restrictions on speech.

Courts must narrowly focus on the access actually sought by the speaker to determine the relevant forum. Contrary to precedent, however; the district court erroneously focused on the library as a whole, instead of the display table at issue, in order to relegate the speech restriction to “rational basis” review. The district court also erred by relying on the presumed location of the table within the library in order to convert the display table into a “hybrid limited/nonpublic forum” with even less protection -- a “good public policy reason” allows speech restrictions, “even . . . view-point based discriminating censorship.” Gay Guardian Newspaper v. Ochoopee Regional Library System, No. 6:02cv00104, 2002 WL 31778780 (S.D. Ga. Nov. 19, 2002) at \*5, \*9,\*2. Under proper analysis, the free publications table, open to all, was a designated public forum subject to strict scrutiny.

It is a bedrock principal of the First Amendment that the government may not silence speech in order to avoid controversy. Texas v. Johnson, 491 U.S. 397, 414 (1989). Under strictscrutiny, it is also well-established that the government may not close a public forum in order to silence a viewpoint or escape a controversy. Cornelius, 473 U.S. at 811-813 (“the avoidance of controversy is not a valid ground for restricting speech in a public forum”); Hopper v. City of Pasco, 241 F.3d 1067,

1078-83 (9<sup>th</sup> Cir. 2001); Putnam Pit, Inc. v. City of Cookeville, Tenn., 221 F.3d 834, 845-46 (6<sup>th</sup> Cir. 2000). No other court, save the lower court here, has permitted the closing of a designated public forum for the explicit rationale of avoiding controversial or offensive speech.

The district court's tangled "hybrid" public forum creation infected the entire analysis and led to a holding wholly at odds with precedent: that the government may silence speech "even assuming that viewpoint-discriminating censorship drives part or all of that decision." Gay Guardian, 2002 WL 31778780 Gay Guardian Newspaper v. Ochopee Regional Library System, No. 6:02cv00104, 2002 WL 31778780, at \*2 (S.D. Ga. Nov. 19, 2002).

## **ARGUMENT AND CITATIONS OF AUTHORITY**

### **I. THE DISTRICT COURT ERRED IN CREATING A NEW AND UNPRECEDENTED PUBLIC FORUM WITH REDUCED FIRST AMENDMENT PROTECTION.**

The district court altered existing first amendment law by creating a brand new category of government property, the "hybrid limited/nonpublic forum" with severely diminished constitutional protections. The court erred by creating this fourth "hybrid" forum because it conflicts with established principles of constitutional jurisprudence, where there are only three<sup>2</sup> types of government

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<sup>2</sup> A "limited public forum" is not a fourth category of property, but rather a subset of a "designated public forum." See, e.g., Chabad-Lubovitch of Georgia v. Miller, 5

property for First Amendment purposes. United States v. Kokinda, 497 U.S. 720, 725-26 (1990) (“[T]he Court announced a tripartite framework for determining how First Amendment interests are to be analyzed with respect to Government property.”); Daniel v. City of Tampa, 38 F.3d 546, 549 (11th Cir. 1994) (“For purposes of First Amendment analysis, the Supreme Court has identified three types of government-owned property.”).

Each type of public forum has an accompanying, and well-settled, First Amendment analysis. Id. (“There are three categories of fora, each with its own First Amendment analysis.”) United States v. Gilbert, 130 F.3d 1458, 1461 (11th Cir. 1997); see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983); Kokinda, 497 U.S. 720, 725-26 (1990); New York Magazine v. Metro. Transp. Auth., 136 F.3d 123 (2d Cir. 1998) (citing Perry Educ., 460 U.S. at 45-46 (“The Supreme Court has created three categories of government property, and announced standards for reviewing government restriction of speech according to those categories.”) ).

The Court categorizes property that has been traditionally open to expression as “traditional” public fora. Perry Educ. Ass'n, 460 U.S. at 44. “Government

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F.3d 1383 n.13 (11th Cir. 1993) (en banc); M.N.C. of Hinesville, Inc. v. U.S. Dept. of Defense, 791 F.2d 1466, 1472 n.2 (11th Cir. 1986); see also Krumeir v. Bureau of Police, 958 F.2d 1242 (3rd Cir. 1992).

limitations on expressive activity in traditional public fora . . . are subject to strict scrutiny; they must be narrowly tailored to serve a compelling state interest.” Daniel, 38 F.3d at 549 (11th Cir. 1994) (citing Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. 788, 800 (1985)).

The second category of fora, generally referred to as “designated” public fora<sup>3</sup>, is created “when the Government has intentionally designated a place or means of communication as a public forum,” either through policy or practice. Cornelius, 473 U.S. at 800; Perry Educ. Ass'n, 460 U.S. at 46; see also Widmar v. Vincent, 454 U.S. at 267-8 (finding policy of allowing groups to use school facilities created designated public forum). Though created in a different way, designated public fora are likewise subject to strict scrutiny. Kokinda, 497 U.S. at 727 (“Regulation of speech

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<sup>3</sup> Although the source of some confusion, a “limited” public forum is a sub-category of designated public fora created when the government designates a forum “for certain groups of speakers or for discussion of certain subjects.” Crowder v. Housing Auth., 990 F.2d 586, 591 (11th Cir. 1993); Perry Educ. Ass'n, 460 U.S. at 46, n.7. Although government may restrict access in a limited public forum under rational basis, regulations which affect speech *within* the category for which the forum was opened are still accorded strict scrutiny. International Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1992) (“[T]he designated public forum, whether of a limited or unlimited character. . . subject to the same limitations as that governing a traditional public forum.”). Although the district court refers to “limited” public fora as synonymous with designated public fora, this Court has noted the confusion this characterization creates. Chabad, 5 F.3d 1383 n.13 (11th Cir. 1993) (en banc); see also M.N.C. of Hinesville, Inc. v. U.S. Dept. of Defense, 791 F.2d 1466, 1472 n.2 (11th Cir. 1986) (“We eschew this [limited public forum] terminology because it is misleading.”).

on property that the Government has expressly dedicated to speech activity is also examined under strict scrutiny.”); see also Cornelius, 473 U.S. at 800 (“[W]hen the Government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest.”); Gilbert, 103 F.3d at 1461 (citing Perry Educ. Ass'n, 460 U.S. 37).

The third and final category of fora, non-public, envelops the remainder of government property. The government may limit speech in a non-public forum if the limitation is reasonable, and not based on the speaker's view point. Perry, 460 U.S. at 46; Cornelius, 473 U.S. at 806 - 809; Gilbert, 130 F.3d at 146.

The district court now introduces a fourth public forum, a “hybrid limited/nonpublic” forum. Yet, as applied to this case and as explained infra, this new forum provides less protection for expression than any of the three established fora.

**A. The District Court’s New-Fangled “Hybrid” Public Forum Affords Less Constitutional Protection than a Nonpublic Forum.**

The district court admits it created new law with its “hybrid” public forum “construct.” Op. on Recon. at 4. (“[H]ybrid-forum’ . . . constitutes new law.”) This

novel fourth public forum exists nowhere in case law.<sup>4</sup> Aside from a few cases regarding *nonpublic* forum analysis, the court points to only one law review article to support this new-fangled forum and analysis.<sup>5</sup> Gay Guardian Newspaper v. Ochoopee Regional Library System, No. 6:02cv00104, 2002 WL 31778780, at \*8 (S.D. Ga. Nov. 19, 2002). *No* other court has cited this article as authority.<sup>6</sup> Further, *no* other court has hybridized, or otherwise combined, public fora in order to “construct” a new category.

The district court’s newly-created category of public property appears to exist somewhere between a diminished “limited” public forum and a nonpublic forum. Moreover, it does not even provide the *minimal* constitutional protections found in a nonpublic forum. According to this new “hybrid limited/nonpublic

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<sup>4</sup> A westlaw search in all federal cases produced no results consistent with the district court’s analysis.

<sup>5</sup> L.G. Jacobs, The Public Sensibilities Forum, 95 Nw. U. L. Rev. 1357 (2001), which discusses “public sensibilities” fora, such as bus advertising and vanity license plate programs, and argues for limited access to these nonpublic fora.

<sup>6</sup> A westlaw search for citations revealed that only the lower court opinion has ever cited this law review article.

forum” analysis:

- content-based speech regulations are no longer presumptively unconstitutional;<sup>7</sup>
- viewpoint based regulations are allowed;<sup>8</sup>
- the government need not provide a compelling state interest;<sup>9</sup> and
- speech regulations need not be narrowly tailored.<sup>10</sup>

Although public forum doctrine requires courts to analyze speech restrictions either under a compelling interest standard or a viewpoint-neutral reasonableness standard, the novel “hybrid limited/nonpublic” forum created by the district court

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<sup>7</sup> Gay Guardian, 2002 WL 31778780, at \*6 (regulation allowed premised on “avoiding loud, garish, prurient materials”); id. at 3 (“library conceded that it acted as it did after some members of the local community objected to placement of *The Gay Guardian*”); id. at \*3 (ultimately answering in the affirmative “the driving question: whether material to which some within a community might object can...be..removed outright”).

<sup>8</sup> The court answers in the *affirmative* 1) “whether librarians can...avoid disruption...even assuming view-point based discriminating censorship drives all or part of that decision” and 2) whether “the elimination of unwanted (gay publication) speech – the essence of viewpoint discrimination” is allowed. Gay Guardian, 2002 WL 31778780., at \*2, \*8, \*12.

<sup>9</sup> Gay Guardian, 2002 WL 31778780, at \*6 (where the court allows speech regulations premised on “sense of decorum,” “managing the presentation of their front lobbies,” “rational basis,” and “good public policy reasons”).

<sup>10</sup> Gay Guardian, 2002 WL 31778780, at \*6.

upholds content-based *and* viewpoint-based discrimination. The reasoning and result in the lower court can not stand because it radically alters established First Amendment principles and reverses decades of constitutional jurisprudence.

## **II. The District Court Erred in Defining the Relevant Forum and According it a Reduced Level of Scrutiny.**

The district court erred by 1) focusing on the *entire* public library in defining the relevant forum and 2) concluding that “limited or designated” public fora have reduced constitutional protection. Gay Guardian, 2002 WL 31778780, at \*4 (“Libraries are Limited Public Forums”); *id.* at \*4 (“limited or designated public forum” receive “increasingly less” scrutiny). These errors, which contradict proper public forum analysis, led to a clearly erroneous result.

As discussed supra, a limited public forum is a subset of designated public fora in which the government limits *access* to certain topics or speakers. The parties agree that public libraries *as a whole* are generally considered limited public fora.<sup>11</sup> Thus, libraries may make content selection (i.e. restrict access) on a reasonable basis.

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<sup>11</sup> Libraries are generally considered limited public fora because they are “open to the public only for specified purposes: reading, studying, using the Library materials” and “not for the exercise of all First Amendment activities.” Krumeir v. Bureau of Police, 958 F.2d 1242, 1260 (3rd Cir. 1992); see also Armstrong v. Dist. of Columbia Public Library, 154 F. Supp. 2d 67 (D.D.C. 2001) (where court analyzed access restriction based on appearance under strict scrutiny because public library was a limited public forum for acquiring information).

Mainstream Loudoun v. Board of Trustees of Loudoun County Library, 24 F. Supp. 2d 552, 563 (E.D.Va. 1998) (library a designated forum “for the limited purposes of the expressive activities they provide”). However, the district court’s focus on the entire library, rather than the free information table open to all and at issue here, is misplaced.

The Supreme Court has repeatedly held that courts must narrowly focus on the access sought by the speaker to determine the relevant forum. Cornelius, 473 U.S. at 802. In Cornelius, the Court defined the relevant forum as the fundraising campaign that an organization sought access to – not the government buildings which housed federal workers. Id. As the Court explained:

[w]hen speakers seek general access to public property, the forum encompasses that property. In cases in which limited access is sought, our cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property. Id. at 802.

In American Library Ass'n, Inc. v. United States, 201 F. Supp. 2d 401 (E.D.Pa. 2002), the court heeded this mandate when analyzing the First Amendment protection afforded speech on library property through library-provided internet terminals:

In this case, the patron plaintiffs are not asserting a First Amendment right to compel public libraries to acquire certain books or magazines for their print collections. Thus, the relevant forum for analysis is not the library's entire collection, which includes both print and electronic media, such as the Internet, but rather the specific forum.” Id. at 455.

In both principle and application, the Supreme Court consistently reiterates the narrow focus approach to determining the relevant forum. See e.g. Perry Educ. Ass'n, 460 U.S. at 44 (Court focused on the school's internal mail system rather than school property); Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974) (defining forum as advertising spaces on buses, not buses or transit system). Lower courts also regularly follow this rule of law. See e.g., Searcy v. Crim, 815 F.2d 1389, 1392 (11th Cir. 1987) (where organization sought access to school bulletin boards, court determined that relevant forum was bulletin boards not school); Air Line Pilots Ass'n, Intern. v. Department of Aviation, 45 F.3d 1144, 1151-52 (7th Cir. 1995)(where airline pilots' association sought to display a diorama in airport display case, court determined that the display cases, rather than the airport itself, constituted the relevant forum); Texas v. Knights of the Ku Klux Klan, 58 F.3d 1075, 1078 (5th Cir. 1995) (where the Ku Klux Klan sought to participate in an Adopt-A-Highway Program, the court defined the relevant forum as the program rather than the State's highways).

The Newspaper does not seek access to the entire public library, only to the display table that the Library set up to facilitate expression. The district court's inappropriately broad focus allowed it to rely on librarians' "content selection/removal decisions"- decisions relating to access limitations placed on

libraries as limited public forum – to reduce the level of scrutiny afforded the display table to “rational basis.” Gay Guardian, 2002 WL 31778780, at \*6. This focus was erroneous.

The proper focus in determining the fora analysis was the display table itself. The district court’s focus on the entire library to base its public forum analysis is fatally flawed, led to diminished constitutional protection and led to an erroneous result.

**C. The Library Created a Designated Public Forum Entitled to Strict Scrutiny.**

As discussed, a designated public forum is created when the Government intentionally opens a nonpublic forum for expression. Cornelius, 473 U.S. at 800; Widmar, 454 U.S. at 267. Courts consider the nature of the property only to determine whether the government intended to create a public forum. Cornelius, 473 U.S. at 802; International Soc. for Krishna Consciousness, 505 U.S. at 680. Here, it is undisputed that the Library intended to create a public forum on its display table. Gay Guardian, 2002 WL 31778780, at \*6 (“Here it is undisputed that the Library specially created and absorbed the cost of the temporary, ‘lobby-table forum.’”). It is also undisputed that the Library allowed citizens to indiscriminately place community information on its display table. Id. at \*2 (The Library “permitted *The*

*Gay Guardian* . . . to be distributed with other free publications on a front lobby table”). The Library clearly created a designated public forum for community material.

Regulation of speech in a designated public forum is “examined under strict scrutiny.” Kokinda, 497 U.S. at 727; see also Daniel, 38 F.3d at 549 (“Government limitations on expressive activity in . . . designated public fora are subject to strict scrutiny; they must be narrowly tailored to serve a compelling state interest.”). Yet, as a result of the district court’s erroneous “hybrid forum” analysis, the district court never even considered whether the governmental interest was compelling or whether the speech restriction was narrowly tailored.

The district court only reviewed this case under a “rational basis” or “good public policy reasons” level of protection by focusing on the entire library, a “limited” public forum. Gay Guardian, 2002 WL 31778780, at \*6. This Court should see through the smokescreen created by the district court’s hazy analysis and refocus the analysis on the relevant forum, the display table, and relevant analysis, strict scrutiny.

**D. The District Court Erred by Relying on the Location of the Forum in Creating “Hybrid” Forum and Further Reducing Constitutional Protection.**

Beyond the district court’s error in creating an elusive and unprecedented “hybrid” public forum, it compounded its flawed analytical framework by focusing on the location of the government-created forum in order to transform the free literature table at issue into a “hybrid” forum with “nonpublic” attributes. Gay Guardian, 2002 WL 31778780, at \*5-\*8. The court’s new hybridized forum rests on the table’s location, *a fact which the court inserted into the record*,<sup>12</sup> finding that “a public building’s front lobby is typically considered a *nonpublic* forum” allowing greater censorship because “the library’s lobby is the first thing the community sees.” Gay Guardian, 2002 WL 31778780, at \*6 (emphasis added).

Although the district court relies heavily on this fact – devoting it nearly four pages – the placement of the table is irrelevant. Even if the library lobby began as a nonpublic forum – as the lobbies *remained* in the court’s cited cases – the Library’s

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<sup>12</sup> Although the defendants do not contend that the table’s location contributed to their decision to silence speech, the court nonetheless relied heavily on the table’s presumed location in an entryway to find that “library’s lobby is the first thing the community sees.” Gay Guardian, 2002 WL 31778780, at \*5-\*8 . Not only is this finding irrelevant to the First Amendment inquiry, discussed infra, there is no indication in the record as to the lobby table’s exact location. There is no evidence in the record that this table was the first thing people saw when entering; nor where the lobby was located; nor whether it was separate from the main building, used as an entryway, part of a large front room, etc.

allowing all comers to the free publications table converted the display table into a designated public forum entitled to strict scrutiny. As this Court warned, “[b]efore it establishes a public forum, the state should take many factors into account, including the difficulty of maintaining a public forum and educating the public about its attributes.” Chabad, 5 F.3d at 1393.

The district court patently misapplied the law by eliminating constitutional protections of speech in a government-created forum based *only* on its presumed location in an entryway. As an en banc panel of this Court determined, the onus is squarely on the government in dealing with complications arising from its decision on whether to create, and where to place, a designated public forum:

The state would be well advised to refrain from dedicating a public forum in a location that it believes the public inextricably associates with state authority such that the public would be unable to distinguish private speech in that location from state-sanctioned speech. Once the state decides to designate a public forum, however, the monkey is on the state’s back. Chabad, 5 F.3d at 1393-1394.

Here, the Library does not dispute that it intended to create a public forum for expression by designating a table for community information.<sup>13</sup> Gay Guardian, 2002

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<sup>13</sup> The lower court erroneously relied on the nature of the property (a public library) and the location of the table (front lobby), both relevant only to determine whether the government intended to create a designated forum – a fact not in dispute – to define the *type* of forum created and the *level* of constitutional scrutiny it should receive.

WL 31778780, at \*2,\*6. According to settled First Amendment principles, the relevant forum was the display table which the Library *admittedly* set up without speech or speaker limitations and the appropriate analysis was strict scrutiny. Yet, instead of analyzing whether the Library enforced a content-neutral regulation that was necessary to serve a compelling state interest and narrowly tailored to serve that interest, the district court replaced existing first amendment public forum analysis with its own.

**II. THE LIBRARY VIOLATED THE FIRST AMENDMENT BY CLOSING THE FREE PUBLICATIONS TABLE PUBLIC FORUM TO SILENCE THE CONTROVERSIAL CONTENT AND/OR VIEWPOINT OF *THE GAY GUARDIAN*.**

Both sides agree that the Library took action because of “the controversy” and “complaints” regarding the *Gay Guardian’s* content and viewpoint. R20-1-4 (“Because of the volume of oral complaints,” defendants “decided that the library should remove the table and all remaining ‘free to the public’ materials from the lobby.”).<sup>14</sup> Moreover, “[t]he Library does not challenge plaintiff’s contention that, had it kept its library table open and excluded only the *Gay Guardian*, it would violate the First Amendment.” Gay Guardian, 2002 WL 31778780, at \*8.

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<sup>14</sup> Defendants point out that one woman personally “complained” about the paper, and that the “library received a number of other oral complaints about the presence of the *Gay Guardian* in the library’s lobby” but that no complainer even bothered to follow the Library’s written complaint process. R20-1-3.

Yet the district court's unprecedented "hybrid forum" analysis led it to conclude that the Library could "escape judicial second-guessing" - "even assuming that viewpoint discriminating censorship dr[ove] part or all of that decision" - by closing the forum to *all* speakers in order to exclude the *Gay Guardian's* controversial content or viewpoint. *Id.* at \*2, \*8, 12. Neither defendants' fast-and-loose play, nor the district court's new and erroneous "hybrid" forum, should allow the Library to "escape" the basic prohibition against viewpoint and content discrimination.

"[The] bedrock principle underlying the First Amendment is . . . that the government may not prohibit expression of an idea simply because society finds the idea offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove 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."). It is this foundational principle of free speech jurisprudence that defendants seek to side-step. Yet, content based restrictions on speech are "presumptively unconstitutional," and viewpoint discrimination is an even more "egregious form of content discrimination." R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 827-29 (1995) ("Government must abstain from regulating

speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”).

While the *Gay Guardian* holds no inherent “right” to distribution in the library, and the Library is not required to keep the forum open, the Library’s barring all publication in order to bar the viewpoint of the *Gay Guardian* is unconstitutional – “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; see also Initiative and Referendum Institute v. U.S. Postal Service, 116 F. Supp. 2d 65, 73 (D.C. 2000) (“The government may close a public forum that it has created by designation, though, so long as the reasons for closure are not content-based.”) (citing Mosley, 408 U.S. at 96).

**A. In a Public Forum, Speech May Not Be Restricted  
Simply Because it is Controversial.**

In order to regulate speech in a public forum, the government must demonstrate a compelling government interest.<sup>15</sup> The fact that speech in a public

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<sup>15</sup> “The state cannot constitutionally penalize private speakers by restricting either their right to speak or the content of their speech simply because the state exhibited dubious wisdom in creating . . . its public forum.” Chabad-Lubavitch of Georgia v. Miller, 5 F.3d 1383, 1394 (11<sup>th</sup> Cir. 1993) (en banc) (noting that “closing the forum altogether” to avoid a violation of another constitutional right, the establishment clause, may satisfy compelling interest standard).

forum is offensive to some, i.e. “controversial,” is simply not a compelling interest that allows the government to censor. Consolidated Edison Co. v. Public Service Comm’n, 447 U.S. 530, 537-538 (1980) (striking down ban on mailings concerning “controversial issues of public policy” because to “allow the government the choice of permissible subjects for public debate would be to allow the government control over the search for political truth”).

“The right to free speech . . . may not be curtailed simply because the speaker's message may be offensive to his audience.” Hill v. Colorado, 530 U.S. 703, 716 (2000). “[T]he advocacy of a politically *controversial viewpoint* - is the essence of First Amendment expression.” McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 347(1995) (emphasis added); see also Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (“[Speech] may indeed best serve its highest purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”). “[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it . . . government must remain neutral in the marketplace of ideas.” F.C.C. v. Pacifica Found., 438 U.S. 726, 745-746 (1978). The district court’s new-fangled “hybrid limited / non-public forum” that it acknowledged did not previously “exist in the case law” drove the lower court to conclude that *an interest less than compelling* could justify the closing of the public forum:

[S]ome importation of the non-public forum case rationale is warranted here ... [and] good public policy reasons exist for allowing a government body to close a hybrid forum such as this in a speech-suppressive manner. Gay Guardian, 2002 WL 31778780, at \*7,\*9.

Absent this Circuit's acceptance of the diminished government interest standard of the new hybrid forum created by the district court - a forum never considered by any other court and grounded only in a single law review article cited discovered by the lower court<sup>16</sup> - the Library has failed to demonstrate a compelling interest in limiting free speech in this public forum. Barring the *Gay*

*Guardian*, and others, to avoid controversy does not satisfy the compelling interest standard. See Cornelius 473 U.S. at 811 ("the avoidance of controversy is not a valid ground for restricting speech in a public forum"); Planned Parenthood of Southern Nevada, Inc. v. Clark Cnty. Sch. Dist., 941 F.2d 817, 831 (9th Cir. 1991) ("As the Supreme Court has made clear, 'avoidance of controversy is not a valid ground for restricting speech in a public forum'"); see also Hopper v. City of Pasco, 241 F.3d 1067, 1078-83 (9th Cir. 2001) (city's "controversy" justification not "compelling interest" where it had excluded accepted art and closed down limited public forum for art because certain works were "controversial art"); Putnam Pit, Inc. v. City of

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<sup>16</sup> Gay Guardian, 2002 WL 31778780, at \*8 (citing L. G. Jacobs, The Public Sensibilities Forum, 95 N.w. U. L. Rev. 1357 (2001)). This article's new hybrid "public sensibilities forum" has not been cited or accepted by any other state or federal court. See supra at p.10-11 & n.5.

Cookeville, Tenn., 221 F.3d 834, 845-46 (6th Cir. 2000) (even where non-public forum city web-site, plaintiff could not be excluded because of “controversial views he espouses”).

Moreover, the “avoidance of controversy” interest is particularly unconvincing here. First, even a cursory review of the *Gay Guardian* reveals that its content is mainly political and clearly not obscene. Second, the Library is a public library and not a school facility. See Knights of KKK v. East Baton Rouge Parish Sch. Bd., 578 F.2d 1122 (5<sup>th</sup> Cir. 1978) (granting preliminary injunction to KKK group excluded from use of school facilities). Third, the “controversy” here was deminimis -- no person even bothered to file a formal complaint about the publication and no one ever threatened any litigation concerning the continued display of the *Gay Guardian*. Fourth, the patrons of the Library could not credibly be considered, as the district court claimed them to be, a “captive audience.” Gay Guardian, 2002 WL 31778780, at \*6; see Cohen v. California, 403 U.S. 15, 21 (1971) (rejecting state’s captive audience argument for punishing man who wore “fuck the draft” jacket in courthouse corridor where children present).

The failure here to enunciate a compelling interest is fatal to any attempt, even the most slick, to exclude the *Gay Guardian* because of its controversial content or viewpoint.

**B. Closing an Entire Public Forum in Order to Bar a Particular Speaker Does Not “Escape” the First Amendment.**

The district court erred in holding that “even assuming viewpoint-discriminating censorship,” that government can “escape judicial second guessing” by closing a public forum entirely. Gay Guardian, 2002 WL 31778780, at \*8. 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. Act-Up v. Walp, 755 F. Supp. 1281 (M.D. Pa. 1991); Hopper v. City of Pasco, 241 F.3d 1067 (9th Cir. 2001); Sefick v. Gardner 164 F.3d 370 (7th Cir. 1998). First, the closing of a forum – whether public or non-public -- does not moot the First Amendment issue. In Sefick, 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 non-public forum. 164 F.3d at 372. Judge Easterbrook found that the closing of the forum neither rendered the claims moot or undercut the potential First Amendment violation:

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. Id.

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 non-public forum as result of previous lawsuit settlement); DiLoreto v. Downey Unified School District Board of Education, 196 F.3d 958, 963 n.1 (9th Cir. 1999)(claim that school refused advertisement on a school fence, a non-public forum, not mooted by closure of forum for commercial ads).

Second, every court that has reviewed the *closing of a public forum to silence controversial speech* has found such closing of the forum unconstitutional. In Hopper, "potentially controversial or political" art was excluded from a "designated public forum" and the defendant ultimately "terminated the arts program altogether." 241 F.2d at 1073. The Ninth Circuit found that the exclusion of "controversial art" was not supported by a "compelling state interest," was "content-based" and that a "ban on 'controversial art' may all too easily lend itself to viewpoint discrimination. . . ." Id. at 1078-80.

Similarly, in Act-Up, the government effectively silenced a group of demonstrators by closing the visitors Gallery of the Pennsylvania House of Representatives to all members of the public. 755 F. Supp. 1281. After finding that the Gallery was a “limited public forum,” the court concluded:

Here, the government admits that the closing of the gallery, though closed to everyone, was aimed at preventing ACT-UP members access . . . . As a content-based restriction, the closing must be necessary to protect a compelling interest. . . . The closing of the gallery of the house chamber, which has consistently been open to all who would care to sit and listen, in order to deny access to a particular group is not only in all probability unconstitutional, but also cuts against the grain of the notions of a free and open society embodied in the first amendment.”Id. at 1289-90.

See also Putnam Pit, Inc. v. City of Cookeville, Tenn., 221 F.3d 834, 845-46 (6th Cir. 2000) (plaintiff could not be excluded from non-public forum city web-site because of “controversial views he espouses”); Rhames v. Biddeford, 204 F. Supp. 2d 45, 51 (D. Maine 2002)(“Certainly if [government] were to shut down the public access channel . . . so as to stifle the particular speech of this plaintiff, that shutdown would be speaker and viewpoint censorship and would violate the First Amendment under any analysis.”).

What if a Mayor closed down a public park because there were controversial protests against his administration? Under the district court’s analysis -- “even assuming view point-discriminating censorship,” the Mayor could “escape judicial

second guessing” because his closing of the forum affected his vocal opponents and his silent supporters alike -- the Mayor’s action failed to have “the *effect* (in contrast to intent) of singling out an ‘unwanted’ speaker.” Gay Guardian, 2002 WL 31778780, at \*2,\*8,\*9,\*12. The district court’s reasoning sanctions the Mayor’s admitted censorship of opponents, but the First Amendment cannot stomach this outcome.

The Library’s closing their designated open forum in response to “the controversy” and “complaints” about the *Gay Guardian*’s content does not avoid a First Amendment violation. Instead, it is a candid admission of unconstitutional content and viewpoint discrimination that censors even more broadly than its target.

**C. Closing a Public Forum to Eliminate Controversial Speech Was Not a Narrowly Tailored Solution.**

Finally, the district court failed to address the existence of alternatives that would have imposed far less burden on free expression than the blanket closing of the public forum. The district court placed great emphasis on a fact never emphasized by the parties -- the placement of the free publication table in the “front lobby.” The district court believed that this placement decision impacted both the weight and character of government interests and the very standards for constitutional analysis:

A library might want to treat its front lobby different from others for the simple reason that most patrons enter through the lobby and thus are a captive audience. . . . So even when a library decides to facilitate free expression in its front lobby (thus making it a limited public forum), it nevertheless does so within an area that also arguably remains a non-public forum to the extent that it serves to greet a captive-audience public and facilitate the quiet atmosphere that the library would like to present. It is in this sense that the Library's lobby may be considered a hybrid -- a cross between a limited and nonpublic forum. Gay Guardian, 2002 WL 31778780, at \*6.

The district court's analysis, even if correct, begs for the consideration of a simple alternative that addresses concerns about the placement of the table and preserves free speech -- move the free materials table to a less prominent area or the periodicals section of the Library. See R30-1-2 ("Defendants have nowhere suggested that they have considered, or would consider, the less restrictive alternative of making paper copies of the *Gay Guardian* available in the periodicals section or on reserve.") Such less intrusive alternatives render the far broader closure of the public forum unconstitutional.

## CONCLUSION

For the reasons set forth above, this Court should reverse the district court's decision denying Appellant a preliminary injunction.

This the \_\_\_\_\_ day of February, 2003.

Respectfully submitted,

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