

2010

**National First Amendment Moot Court
Competition**

Competition Hypothetical

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counsel, the Court finds that there are no genuine issues of material fact and that the Plaintiff is entitled to entry of summary judgment in his favor as a matter of law pursuant to Federal Rule of Civil Procedure 56(c). For reasons explained herein, Plaintiff's Motion for Summary Judgment is GRANTED. The Court finds that Defendants impermissibly engaged in viewpoint discrimination. Defendants' Motion for Summary Judgment is DENIED.

I. FACTUAL BACKGROUND

The facts of this case are not in dispute. The parties have stipulated to the following: Plaintiff Nicholas Roberts, an opponent of proposed national health care reform, brought a 42 U.S.C. § 1983 claim against the Defendants alleging a violation of the First Amendment as incorporated by the Fourteenth Amendment. As leader of the anti-health care reform group Citizens Against Socialism, Plaintiff Roberts alleges that the Town of Summerville, Missouri, Mayor Sarah Johnson, and Police Chief Mark Kadow, collectively Defendants, violated his First Amendment rights at a recent town hall meeting regarding health care reform. In particular, Plaintiff Roberts claims that a hastily enacted "protest policy," which created free speech zones surrounding the Town Hall Meeting, consisted of impermissible viewpoint and subject-matter (content) discrimination because it relegated him and his fellow anti-health care reform protesters to an undesirable locale where they were not as visible or heard as the pro-health care activists. In essence, Plaintiff contends that he and other members of his group were treated worse because of their unfavorable political viewpoints and speech.

Summerville, Missouri, is a town with a population of more than 60,000. Summerville's residents have been hit hard by the recent economic downturn. With job losses at an all-time high, Summerville's unemployment rate has risen to 12.6%. The high unemployment rate has left many without health insurance. As a result, recent polling of Summerville citizens

demonstrated that a large majority of registered voters support national health care reform. Summerville's town government is based upon the council-manager system, with eight council members who are elected to two-year terms on a non-partisan basis. Council elections occur in November and are staggered such that four Council members are up for reelection every year. The ninth and presiding member of the Council is the Mayor who is elected to a four-year term.

Council meetings occur every Tuesday evening at the Town Hall. The Summerville Town Hall is situated at the center of the Town Square, a roughly one acre tract of land surrounded by a roundabout with four connecting boulevards. The Town Hall's public meeting room maintains a seating capacity of 150 people. The roundabout is bordered by several stores and forms the heart of the town's business district. The roundabout also contains the town's police station and courthouse to the north. The front entrance to the town hall features a large staircase and opens to the south. A much smaller back entrance is located on the north side of the Town Hall, directly across from the police station and courthouse. There is a sidewalk which borders the outer edge of the Town Square and is accessible at crosswalks at each of the intersecting boulevards.

During the first Council meeting in November after Council elections, the Mayor typically provides opening remarks regarding her objectives for the upcoming year. The current Mayor of Summerville is Sarah Johnson, whose four-year term expires in April 2010. After reading several articles regarding traffic congestion, noise, and unruliness at Town Hall debates during the 2008 national presidential election, Councilwoman Rebecca Marsdale suggested that Mayor Johnson implement a free-speech policy for events at the local Town Hall. In response, during her opening remarks to the new Council in November of 2008, Mayor Johnson addressed the dire straits of the town economy, the tightening of the fiscal budget for the upcoming year,

and the possibility of implementing a “protest policy” surrounding the Town Hall. However, prior to March 2009, no such policy had been further discussed or adopted. Like most of her constituents, Mayor Johnson is a self-proclaimed proponent of health care reform.

On March 10, 2009, U.S. Senator Mark Smith of Missouri, an outspoken opponent of national health care reform, contacted Mayor Johnson about hosting a town hall meeting to discuss the reform issue. Senator Smith stated that he wished to explain to his constituents why he felt that the health care reform was ill-advised and to respond to their questions and concerns. Over the next few days, Senator Smith and Mayor Johnson discussed when to hold the Town Hall Meeting, and Mayor Johnson agreed to put the proposed Town Hall Meeting on the agenda of the next Council meeting.

Immediately upon learning of the proposed Town Hall Meeting, Mayor Johnson sent an email to city attorney Scott Kline, explaining that a protest policy needed to be executed immediately because of concerns about disagreements between supporters and opponents of the health care reform. The email stated as follows:

“Senator Smith wants to host a public discussion of health care reform ... we need to get a protest policy now! There are all these reports about brawls and arrests at other meetings. We can only seat so many people in the building, so we have to figure out a way to keep the rest under control. I don’t want any right-wing crazies causing trouble in our town. Nobody here cares what they have to say, anyway. If this thing happens, we need to be prepared and find a way to keep them away from the meeting and that building!”

In response, Kline drafted the following Protest Policy:

PROTEST POLICY – Summerville TOWN HALL

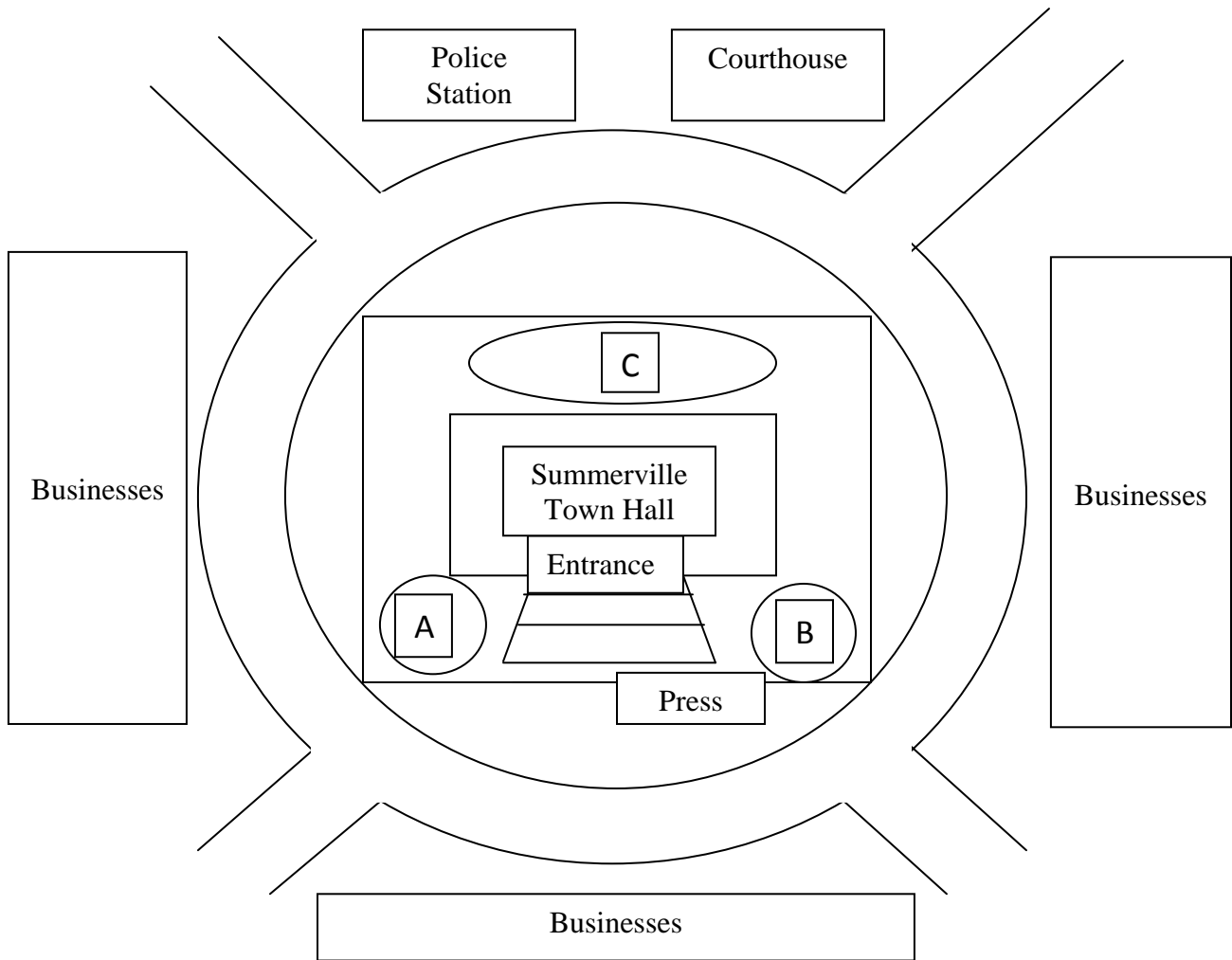
To maintain order and security at future meetings, such as the upcoming health-care debate forum, this Protest Policy is hereby enacted to regulate activities outside of the Town Hall Meeting to be held on March 30, 2009.

Three free speech zones will be created in the square surrounding the Town Hall. These free speech zones will be located 50 feet from the Town Hall. These zones will be available, on a first-come-first-serve basis, for organizations, groups, and persons who

apply for a permit at the Town Hall more than 5 business days prior to the March 30th Town Hall Meeting.

For those citizens unable to attend the Town Hall Meeting, permits will be available for additional protesting on the following day, March 31, 2009. The Council reserves the right to restore this policy for other similar events.

Attached to the proposed Protest Policy was the following map demonstrating the location of the free speech zones surrounding the Town Hall:



On the evening of March 17, 2009, the Mayor presented both the proposed Town Hall Meeting and the Protest Policy. The Council voted unanimously to host the Town Hall Meeting

on the health care debate. The Council additionally agreed that tickets to the Town Hall Meeting itself would be available to the first 150 persons to seek them at the Town Hall information center. Prior to voting on the proposed policy, Mayor Johnson addressed the council and stated:

“If we’re going to do this, we have to do it right! I don’t want our town ending up on national television looking like a circus. Our President needs to know that our town supports his plan. We don’t need to end up on YouTube or Twitter. We don’t need these crazy folks coming into our town and inciting the good people of Summerville!”

In response, Councilwoman Marsdale raised concerns regarding whether both sides would have equal opportunity to voice their concerns in light of the Mayor’s characterization of the policy. She also objected to what she deemed to be a “political charade.” Mayor Johnson assured her that the free speech zones would be available to any person or organization who applied for them in a timely manner.

The Council then voted 7-2 to enact the proposed protest policy. (hereinafter “Protest Policy”). Councilwoman Marsdale voted against the Protest Policy along with Councilman Jon Holland, who did not believe that the town should get involved in any regulation of what he termed “pure political speech.” Under the regulation, once a group or organization applies for a permit, the town government maintains no discretion in deciding whether or not to grant it. Protesters were given two days to apply for a permit to the sidewalk zones. Immediately following the conclusion of the Council meeting, city attorney Kline personally telephoned several pro-health care organizations and unions to inform them of both the Town Hall Meeting and the first-come-first-serve basis for occupying the free speech zones.

He also contacted Ray Lamonte, reporter at *The Summerville Gazette*, alerting him to the town hall meeting on health care reform. The next day the newspaper ran a front-page story about the meeting, the procedure for obtaining tickets and the likelihood of national media coverage after other incidents of disruption. By 10 A.M. that morning, the tickets to the Town

Hall Meeting had already been taken, mostly by local supporters of the health care reform. Additionally, both of the prime free speech zones (A and B) in the front of the Town Hall had been applied for and granted to two pro-health care organizations.

Around 2:15 PM later that same day, Plaintiff Roberts, a resident of the nearby town of Clearwater, learned about the Town Hall Meeting from a conservative radio show. An anti-health care activist, Plaintiff Roberts immediately drove 45 minutes to Summerville's Town Hall in order to get a ticket to the Town Hall Meeting. After being informed that all of the tickets were taken, Plaintiff Roberts applied for and received a permit to free speech zone C located behind the Town Hall. Plaintiff Roberts contacted the conservative radio station to voice his displeasure at the implementation of this policy and to draw more supporters for his planned protest at the Town Hall Meeting.

Plaintiff Roberts also began mobilizing members of Citizens Against Socialism ("CAS") to attend the Town Hall Meeting. A grassroots, self-proclaimed "watch dog" organization, CAS was founded by Plaintiff Roberts in December of 2008 after the 2008 U.S. Presidential Election. The group claims over 10,000 "members;" however, an individual is granted membership merely by entering his or her name and email address on CAS's website. CAS primarily involves itself with organizing groups to protest government programs that it believes unduly interferes with individual rights. CAS also distributes emails and other literature to its members. With regard to the health care reform, CAS members have protested at town hall meetings in Missouri, Iowa, Kansas, Nebraska, and Oklahoma.

On the day of the Town Hall Meeting, while the individuals with tickets were beginning to arrive at the Town Hall, one individual, later identified as Summerville resident Joey Dobbs, who had been protesting in Zone A, ducked under the rope that designated the area and skirted

past the policewoman who was stationed in front of Zone A. Mr. Dobbs accosted an older man who had a ticket to the meeting and was walking up the stairs of the Town Hall and, allegedly, offered to buy the older gentleman's ticket from him. Policemen, under some suspicion that Mr. Dobbs was intoxicated, removed him from the premises.

Plaintiff Roberts then arrived with his organized group of over 400 anti-health care protesters, nearly double the total of people in the front zones. Angry at being relegated to the back of the Town Hall and thus being less visible or heard by citizens and media alike, Plaintiff Roberts moved approximately 75 members of his group to an open sidewalk area directly across the street from the Town Hall square. When the Summerville Police ordered them to move to their designated zone, Plaintiff Roberts demanded why they had to leave when they weren't disturbing the other areas. Chief of Police Kadow allegedly told Roberts that "nobody in this town wants to hear from a bunch of nut jobs" and that he "better move immediately and clear the way for pedestrians." Under protest, Plaintiff Roberts and his group returned to the rear zone. Two members of Citizens Against Socialism again attempted to leave their designated zone and return to the front of the Town Hall in order to air their grievances in front of the media. Before being able to speak to the gathered press, they were physically stopped by Summerville Police and escorted back to the rear zone. Angered further by what they felt were unnecessary and biased restrictions on their desire to speak out against the health care reform, Plaintiff Roberts and his group became loud and belligerent. Although no arrests were made, the Summerville Police remained close by and monitored activities in Zone C much more intently than any activities in Zone A and B.

On April 1, Plaintiff Roberts filed a complaint in the United States District Court for the Western District of Missouri against the Town of Summerville, Mayor Johnson, in her official

capacity, and Mark Kadow, in his official capacity, alleging a violation of his First Amendment rights under 42 U.S.C. § 1983. In particular, Plaintiff Roberts alleges that the Protest Policy, on its face and as applied, represented impermissible content and viewpoint discrimination against anti-health care protesters and an impermissible prior restraint on speech. He alleged that the pre-enactment comments of Mayor Johnson and others evinced a clear hostility to his group's viewpoints and an improper motive behind the Protest Policy. Plaintiff Roberts also alleges that the regulation also consists of an impermissible content-based restriction on political speech regarding the health care debate.

II. ANALYSIS

The Court must decide whether the Town of Summerville's Protest Policy survives First Amendment scrutiny. It should be noted that the type of speech at issue here, speech on a proposed national health care reform, is political speech that falls within the core of First Amendment protection. *See e.g. Meyer v. Grant* 486 U.S. 414, 422, 425 (1988) (describing First Amendment protection for "core political speech" as "at its zenith" where there is "interactive communication concerning political change"); *see also Republican Party v. White*, 416 F.3d 738, 748-49 (8th Cir. 2005) (explaining that political speech is "at the core of the First Amendment" and "highly protected" and that "[p]rotection of political speech is the very stuff of the First Amendment") (hereinafter "*White II*").

The speech in this case took place on or near public streets – quintessential public fora; however, the court finds forum analysis to be of limited utility in this case. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). As a recent commentator explained: "ever since the first formal categorization of the three types of fora - the public forum, the middle forum, and the nonpublic forum - were described in *Perry Education Ass'n v. Perry Local*

Educators' Ass'n, courts and commentators alike have attacked forum analysis as an excessively semantic and complex judicial invention that supplants a sensible balancing approach with myriad irrelevant categorizations.” Note, *Strict Scrutiny in the Middle Forum*, 122 HARV. L. REV. 2140, 2143 (2009).

Instead the analytical prism the court must employ to decide this case is the content-discrimination principle. While the content discrimination model in First Amendment jurisprudence has come under some criticism, *see* Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 Cal. L. Rev. 297, 362 (1997), Justice Sandra Day O’Connor explained its importance: “On a practical level, it has in application generally led to seemingly sensible results. And, perhaps most importantly, no better alternative has yet come to light.” *City of Ladue v. Gilleo*, 512 U.S. 43, 50 (1994) (O’Connor, J., concurring). Under this doctrine the court must determine whether the Protest Policy is content-based or content-neutral.

A. Content Neutral, Content-Based, and Viewpoint Discrimination

Content-based restrictions on speech are presumptively unconstitutional and must survive strict scrutiny. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). As the name suggests, a content-based restriction is one “enacted for the purpose of restraining speech on the basis of its content.” *City of Renton v. Playtime Theatres*, 475 U.S. 41, 47 (1986). Such regulations are presumptively invalid. *Id.* For the government to enforce a content-based restriction in a traditional public forum, it bears the burden of proving that the regulation passes strict scrutiny – that is, the State “must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” *Perry Educ.*, 460 U.S. at 45.

The Supreme Court has further differentiated “restrictions of expression based on *subject matter* [i.e. content-based restrictions] and restrictions based on *viewpoint* [i.e. viewpoint

discriminatory restrictions].” *R.A.V.*, 505 U.S. at 340 (Stevens, J., concurring). “When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination.” *Rosenberger v. Rector & Univ. of Virginia*, 515 U.S. 819, 828-29 (1995).

A content neutral restriction is one that can be justified without reference to the content of the regulated expression. *City of Renton*, 475 U.S. at 47 (distinguishing that the regulation at issue was “not aimed at the content” of the regulated speech “but rather at the *secondary effects*” of the regulated speech). A State is permitted to impose reasonable content neutral time, place and manner restrictions so long the restrictions are (1) narrowly tailored to serve a significant government interest and (2) leave open alternative means of communication. *Perry Educ.*, 460 U.S. at 45.

“The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The Supreme Court has referred to this as a “governmental purpose” inquiry. Elena Kagan has explained that “the application of First Amendment law is best understood and most readily explained as a kind of motive-hunting.” Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996).

B. The Parties’ Claims

Here, Plaintiff Roberts claims that Summerville’s Protest Policy discriminates against speech on its face because it restricts speech on the subject matter of the proposed health care

reform. Plaintiff Roberts concedes that the text of ordinance itself refers to “regulat[ion] of activities outside of the Town Hall Meeting.” Protest Policy (emphasis added). Defendants contend that “activities” refers to all manners and subject matters of speech that may occur outside of the Town Hall Meeting, whether related to the health care reform date or not. However, Plaintiff Roberts correctly emphasizes that the reason for the enactment of the Protest Policy, namely to “maintain order and security” at meetings such as “the upcoming health-care debate forum” demonstrates that the Protest Policy was clearly enacted to regulate political speech regarding the health-care debate. *See Ward*, 491 U.S. at 791 (stating that in making the determination between content neutral and content-based restrictions, the “government’s purpose is the controlling consideration”); *see also Frye v. Kansas City Missouri Police Dep’t*, 375 F.3d 785, 790 (8th Cir. 2004) (“The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”) (quoting *Hill v. Colorado*, 530 U.S. 703, 716 (2000)).

In response, Defendants invoke the secondary effects doctrine and argue that, even if the Protest Policy only restricts speech regarding the proposed health care reform, the regulation remains content-neutral because it is aimed at the harmful secondary effects of such speech. *See City of Renton*, 475 U.S. at 47 (holding that, although a zoning ordinance “treats theaters that specialize in adult films differently from other kinds of theaters,” it remains content neutral because it was “aimed not at the content of the films shown at ‘adult motion pictures theatres,’ but rather at the secondary effects of such theaters in the surrounding community”). Defendants contend that the Protest Policy and creation of free speech zones do not prohibit free speech on the health care reform, but merely regulate where it may occur. *See Ward*, 491 U.S. at 791.

("[R]easonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'") (quoting *Clark v. Comm'y for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

In other words, Defendants claim that the Protest Policy was enacted, not to restrict this political speech based upon its subject matter of the health care reform, but rather to combat the adverse, secondary effects of public disorder, noise, and traffic congestion. *See Nat'l Amusements v. Town of Dedham*, 846 F.Supp. 1023, 1024, 1028 (D. Mass. 1994) (finding that an ordinance restricting theatrical entertainment from occurring during the hours of 12 midnight and 6:00am to be content neutral because it was aimed at such secondary effects as traffic congestion, noise, and security). Defendants point to the Town Council's prior consideration of these secondary effects and desire to create a general protest policy as evidence that these secondary effects were considered prior to enactment of the Protest Policy. *See T & D Video, Inc. v. City of Revere*, 423 Mass. 577, 581 (Mass. 1996) ("Evidence concerning the governmental interest underlying a time, place and manner (content-neutral) ordinance is relevant only when it consists of information that the city council considered in making its determination to enact the ordinance.... Mere conclusions asserted after an ordinance's enactment regarding the secondary effects ... are insufficient to show that the ordinance was designed to serve a substantial governmental interest."); *see also City of Renton*, 475 U.S. at 59 (Brennan, J., dissenting) (noting the "suspiciously coincidental timing" of an amendment explaining that a zoning ordinance was enacted to combat the secondary effects of adult businesses and the lack of evidence that such secondary effects were considered prior to enactment of the zoning ordinance). They claim that

such considerations were constantly “in the back of their minds” and thus remained part of the enactment of the Protest Policy.

However, this Court finds that the Protest Policy as applied to Plaintiff Roberts constitutes impermissible viewpoint discrimination because it was created and employed to restrict the free expression of anti-health care reform activists while favoring those who support the proposed health care reform. Although this Court remains doubtful that Defendants’ secondary effects argument is valid in light of the fact that there is no evidence such considerations were made immediately prior to the enactment of this particular regulation, such arguments need not be considered. *See Del Gallo v. Parent*, 557 F.3d 58, 75-76 (1st Cir. 2009) (“A regulation is viewpoint neutral and reasonable is nonetheless unconstitutional if it is enforced in a manner that ‘prefer[s] the message of one speaker over another.’”) (citing *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 325 (2002)); *see also Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 812 (1985) (noting that an inconsistent application of a facially neutral law may evidence “a bias against the viewpoint advanced by the excluded speakers”). Thus, even if Defendants establish that the Protest Policy is facially neutral as a way to address harmful secondary effects, the Protest Policy would still be unconstitutional if it was, in fact, applied in a viewpoint discriminatory manner.

C. The Protest Policy is Unconstitutional Viewpoint Discrimination as Applied to Plaintiff Roberts

In *Ambassador Books & Video, Inc. v. City of Little Rock, Arkansas*, the 8th Circuit held that a land-use zoning ordinance limiting where adult businesses could operate constituted a content neutral restriction because it was aimed at the secondary effects of such businesses on the surrounding communities. 20 F.3d 858, 864 (8th Cir. 1994). When the city attorney sought a memorandum from his staff concerning how to deal with these adult businesses, he included a

handwritten statement stating that he “wanted to shut these places down!” *Id.* at 863. Relying on Supreme Court precedent, the 8th Circuit found that this was merely “the personal objective of the city attorney who was not a member of the body that adopted the ordinance” and therefore remained insufficient to establish the “clearest proof” of an unconstitutional motive. *Id.* (citing *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (stating that the unconstitutionality of a statute because “a punitive purpose in fact lay behind the statute” requires “the clearest proof”). Unlike the alleged illicit motive in *Ambassador Books*, this Court finds that the improper motive of Defendants to stifle the free expression of anti-health care reform activists has been established by clear proof.

As the 8th Circuit implied in *Ambassador Books*, the expression of an improper motive by a “member of the body that adopted the ordinance” tends to establish the unconstitutionality of a regulation. *Id.* Here, in her email to city attorney Kline, Mayor Johnson specifically stated that she wished to “find a way to keep [anti-health care reform protesters] away from the meeting.” It is undisputed that Mayor Johnson is a member of the Town Council that adopted the Protest Policy. It is additionally undisputed that Mayor Johnson remained the catalyst behind the drafting and enactment of the Protest Policy. Just prior to voting on the Protest Policy, Mayor Johnson addressed the Town Council and stated that the “President needs to know that [Summerville] supports his plan” and that “we don’t need these crazy folks coming into our town and inciting the good people of Summerville!” With these words, Mayor Johnson, as mastermind behind the entire Protest Policy, egregiously demonstrated that she sought to silence those who would oppose the proposed health care reform. The fact that Mayor Johnson was up for reelection and that most of her constituents supported the health-care reform emphasizes the illicit nature of her motivations.

Defendants, however, argue that under *United States v. O'Brien*, such proof remains irrelevant. 391 U.S. 367, 383-84 (1968) (“It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.”); *see also Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552 (8th Cir. 1996) (“Furthermore, an isolated statement by an individual legislator is not a sufficient basis from which to infer the intent of that entire legislative body: in the absence of a showing that a more significant segment of the Minnesota legislature shared [the Senator’s] views, we are not inclined to conclude that his statements accurately reflect the legislative purpose.”).

However, Plaintiff Roberts emphasizes that the defendants committed viewpoint discrimination in applying its Protest Policy. While evidence of Mayor Johnson’s improper motive would likely be insufficient to establish clear proof that the Town Council maintained that same improper motive for purposes of a facial challenge, such evidence can certainly be used to help establish viewpoint discrimination when the regulation was applied to Plaintiff Roberts.

Additional evidence of the illicit motive in the application of the Protest Policy to Plaintiff Roberts and his fellow anti-health care activists establishes the “clear proof” required to render this regulation unconstitutional. First, Councilwoman Marsdale expressed concern that the Protest Policy would be enacted and enforced so as to restrict speech by anti-health care reform activists. She objected to what she termed a “political charade.” Thus, at least one member of the Town Council recognized that the motivating factor behind the Policy consisted of an impermissible motive.

Second, despite assurances that everyone would have an equal opportunity to apply for the permits, city attorney Kline immediately telephoned several pro-health care reform organizations to inform them of both the Town Hall Meeting and the new Protest Policy. That Kline failed to inform anti-health care organizations emphasizes the unfairness and bias in application of the Protest Policy. Additionally, it should be emphasized that this is the very attorney who drafted the Protest Policy at Mayor Johnson's behest in order to "keep [anti-health care reform protesters] away from the meeting." Although Kline was not a member of the Town Council that enacted the Protest Policy, it can be concluded from this circumstantial evidence that he was once again acting on behalf of Mayor Johnson, the head of that Council.

Third, although Plaintiff Roberts arrived the very next afternoon to apply for a permit, two of these pro-health care organizations who were contacted by Kline had already applied for and received the prime free speech zones (A and B). Plaintiff Roberts was forced to take the undesirable Zone C, located at the back of the building, away from both the press and those members of the public attending the Town Hall Meeting. From this location, Plaintiff Roberts and the Citizens Against Socialism protesters were largely ignored by all except the police, who remained close by and watched them intently. Such an undesirable location and intimidating police presence evidences that the primary motivating factor behind the Protest Policy was to silence anti-health care reform protesters. Even though Plaintiff Roberts was allowed to engage in free expression of his anti-health care reform beliefs, this Court finds that the location and police presence were so restrictive of his ability to communicate with others as to strongly indicate viewpoint discrimination.

Finally, when Plaintiff Roberts and his group attempted to move to a closer, open location, Police Chief Kadow informed Roberts that "nobody in this town wants to hear from a

bunch of nut jobs.” Again, although Chief Kadow was not a part of the enactment of the Protest Policy, he was in charge of ensuring that his police force *applied* the application. Such a statement of disagreement with the viewpoint of Plaintiff Roberts by the one charged with enforcement of the Protest Policy, demonstrates that the regulation, as applied to Plaintiff Roberts, constituted impermissible viewpoint discrimination. Defendants contend that these facts are not evidence of viewpoint discrimination because Chief Kadow also stated a legitimate purpose behind asking them to return to Zone C, namely “to clear the way for pedestrians.” However, just because Chief Kadow may have had a more proper reason for asking Plaintiff-Roberts to return to the isolation of Zone C, his improper comments can still be considered to evidence viewpoint discrimination. In combination, all of these individual pieces of evidence demonstrate by the “clearest proof” that the application of the Protest Policy to Plaintiff Roberts amounted to unconstitutional viewpoint discrimination.

III. CONCLUSION AND ORDER

This Court finds that the Protest Policy at issue was applied to Plaintiff Roberts in an unconstitutional viewpoint discriminatory manner. Defendants can point to no secondary effects that would justify restricting the free expression of only anti-health care protesters such as Plaintiff Roberts. From the drafting, enactment, and enforcement of the Protest Policy, Mayor Johnson and the Town of Summerville clearly established that their main objective was to keep opponents of the health care reform out of sight and out of mind. Such discrimination based upon viewpoint remains an anathema to the protections of the First Amendment and cannot be tolerated. Because the Court decides this matter on viewpoint discrimination grounds, the Court does not address the prior restraint issue raised by Plaintiff Roberts.

This Court grants Plaintiff's Motion for Summary Judgment and denies Defendants' Motion for Summary Judgment.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

NICHOLAS ROBERTS)	
)	
Plaintiff-Appellee,)	
)	
v.)	Case No.: VU 3:83-4733
)	
TOWN OF SUMMERSVILLE, MISSOURI,)	
MAYOR SARAH JOHNSON, and POLICE)	
CHIEF MARK KADOW)	
Defendants-Appellants.)	

MEMORANDUM OPINION AND ORDER

July 20, 2009, Argued

August 3, 2009, Decided

BEFORE: BATEMAN, Chief Judge, GREENE, MILTON, Circuit Judges.

BATEMAN, C.J. delivered the Opinion of the Court, in which GREENE, J. joined.

MILTON, J, filed a dissenting opinion.

BATEMAN, Chief Judge.

This case is before the Court on appeal from the United States District Court for the Western District of Missouri. On April 1, 2009, Nicholas Roberts, the leader of an anti-health care reform group, known as Citizens Against Socialism, brought suit under 42 U.S.C. § 1983 against the Town of Summerville, Missouri, Mayor of Summerville, Sarah Johnson, and Police Chief Mark Kadow, alleging the following: the Summerville Town Council’s hastily enacted Protest Policy, which created designated free speech zones surrounding the Town Hall in the

lead up to a Town Hall Meeting, was unconstitutional because it discriminated against Plaintiff on the basis of the content and viewpoint of his speech as an anti-health care reform activist and because it relegated him and his fellow anti-health care reform protesters to an undesirable locale where they were not as visible to be seen or heard as the pro-health care activists.

The District Court found that the actions of the Defendant in implementing its Protest Policy constituted impermissible viewpoint discrimination. On appeal, Mayor Johnson and the Town of Summerville seek reversal of the District Court's order stating they violated the First Amendment and a grant of summary judgment in favor of Appellants. We reverse for the following reasons.

I. BACKGROUND

The uncontested facts of this case as summarized by the District Court are adopted herein by reference. On June 18, 2009, the District Court found that the Summerville Protest Policy as applied constituted impermissible viewpoint discrimination. The District Court granted summary judgment to the Plaintiff-Appellee. On June 22, 2009, the Town of Summerville and Mayor Sarah Johnson appealed to this Court. Oral argument was heard by this Court on July 20, 2009.

II. STANDARD OF REVIEW

We review the District Court's grant of summary judgment *de novo*, applying the same standard as the District Court. *Frye v. Kansas City Mo. Police Dep't*, 375 F.3d 785, 789 (8th Cir. 2004). Summary judgment is appropriate when the record establishes "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

III. LEGAL ANALYSIS

The District Court correctly recognized that the speech at issue in this case is classic political speech: two opposing sides, in a public forum, vehemently debating the efficacy of a proposed government policy. Protecting speech and debate on public issues has been of “central importance” to the courts of this country, and the First Amendment of the U.S. Constitution reflects this “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Boos v. Barry*, 485 U.S. 312, 318 (1988) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). Furthermore, sidewalks, public parks, and, here, the Summerville Town Square, are considered “quintessential,” “traditional public fora,” places that “by long tradition . . . have been devoted to assembly and debate.” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 US 37, 45 (1983).

However, the District Court did not place enough emphasis on the fact that the right to engage in speech, even in a public forum, is not absolute. The government may impose reasonable time, place and manner restrictions on speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Such restrictions are constitutional if: (i) they are justified without regard to the content of the speech; (ii) they are narrowly-tailored to serve a significant governmental interest; and (iii) there are ample alternative channels for communication of the desired message. *Id.*

The Summerville Town Council’s Protest Policy, the regulation at issue, did not exclude speakers or groups of speakers from participating in the debate surrounding proposed health care reform on March 30, 2009, when U.S. Senator Mark Smith appeared at the Summerville Town Hall to discuss his position on reform. If the Protest Policy had prohibited individuals from speaking outside of the Town Hall on this occasion, the test for determining whether or not that

regulation was constitutional would have been of the more exacting strict scrutiny variety. *See, e.g., Bronx Household of Faith v. Bd. of Educ.*, 492 F.3d 89, 97 (2d Cir. 2007). Instead, the Summerville Protest Policy merely created multiple free speech zones in the public park area of the Town Square surrounding the Town Hall building itself.

The district court also ignored the fact that zoning speech, on its own, is not automatically a “restriction” on speech but rather merely a regulation of places where speech can occur. *Hill v. Colorado*, 503 U.S. 703, 719 (2000). However, here, the Plaintiff-Appellee’s ability to engage in some expressive conduct was inhibited due to the location of the third free speech zone (“Zone C”) to which Plaintiff-Appellee was assigned when he applied for his permit. The record indicates that Zone C was located on the back side of the Town Hall and out of sight of the media and those entering the Town Hall building in the front entrance.

Thus, we must determine the constitutionality of the Protest Policy in conjunction with the three-part test, established by the Supreme Court in *Ward v. Rock Against Racism*. In doing so, we find that the Protest Policy enacted by the Council passes judicial scrutiny, because it was content-neutral, narrowly-tailored to serve a significant government interest, and left open ample alternative channels for communication.

A. Content-Neutrality

“Content-neutral regulations do not pose the same inherent dangers to free expression that content-based regulations do, and thus are subject to a less rigorous analysis, which affords the Government latitude in designing a regulatory solution.” *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 213 (U.S. 1997). The principal inquiry in determining content-neutrality is whether “the government has adopted a regulation of speech because of disagreement with the message it conveys.” *Ward*, 491 U.S. at 791. If it has, then that regulation is content-based and is subject to

strict scrutiny. In making this determination, however, the “government’s purpose is the controlling consideration,” and, as long as the regulation can be justified without reference to the content of the speech, that regulation is content-neutral. *Id.*

This inquiry is one that benefits from the application of the Supreme Court’s “secondary effects” doctrine. The secondary effects doctrine originally developed in relation to city zoning regulations that aimed to regulate the location of adult businesses. *See* David L. Hudson, Jr., *The Secondary Effects Doctrine: “The Evisceration of First Amendment Freedoms,”* 37 WASHBURN L.J. 55, 61 (1997). The Supreme Court held that as long as an ordinance was aimed not specifically at the content of speech at adult businesses such as, for instance, the films shown at adult theaters, but rather at the harmful “secondary effects” that the screening of adult films had in the surrounding community, i.e., the impacts on public health, safety, and welfare, then such a restriction would be considered content-neutral. *See, e.g., City of Erie v. Pap’s A.M.,* 529 U.S. 277, 297 (2000). The Supreme Court has since implicitly recognized the secondary effects rationale for restrictions of speech outside of the adult business context. *R. A. V. v. St. Paul,* 505 U.S. 377, 390 (1992); *see also Boos,* 485 U.S. at 320 (1988) (“So long as the justifications for regulation have nothing to do with content,” then a regulation can be properly considered content-neutral.).

The secondary effects doctrine comes into play in regards to regulations of the time, place, and manner of speech when the governmental purpose in enacting the regulation is to combat negative secondary effects of the speech at issue, and, thus, is justified without regard to the content of the speech. *See, e.g., Holmberg v. City of Ramsey,* 12 F.3d 140, 143 (8th Cir. 1993). In this case, the primary justification for the Protest Policy was not the combating of secondary effects of the speech, but rather combating, what we might call the “primary” effects

of the speech, that is, the public disorder and threat to public safety that results from protesting proposed health care reform. These effects are akin to the effects of “undue intrusion [of loud noise] into residential areas and other areas of the park” in *Ward*, which led the government to attest that one of its purposes in enacting the regulation was to control noise levels; the Court found this purpose to be content-neutral. 491 U.S. at 792. However, another equally important government justification in this case, preventing traffic congestion and noise, would fall under the category of “secondary effects.”

In *Ward v. Rock Against Racism*, the Supreme Court considered a New York City Parks Department ordinance, a “Use Guideline” for an amphitheatre in Central Park, that required those performing at the amphitheatre to use a sound amplification system provided by the city. *Id.* at 787-88. The Guidelines were enacted, and, in fact, the City undertook to develop the comprehensive guidelines only after several years of concerts hosted by the group, Rock Against Racism, and subsequent noise complaints after each one of these concerts by neighbors in the area. *Id.* at 785-86. The numerous noise complaints after each of these concerts occurred for several years running, and, when the city realized it could not legally deny a permit to the group for use of the amphitheatre, it undertook the drafting of the use guideline. *Id.* at 785. Despite the circumstances surrounding the drafting of these guidelines, the Court held that the government’s purpose and principal justification for the restriction were stated in the guidelines themselves: a desire to “control noise levels at bandshell [i.e. amphitheatre] events” and the city’s desire to ensure the “quality of sound.” *Id.* at 792. Thus, the guidelines were held to be content-neutral.

We find *Ward* controlling and the Protest Policy content-neutral. The purpose of the Council in enacting the Protest Policy was to prevent civic disorder outside of the Town Hall and protect public welfare and safety. Another justification for the Council’s Protest Policy was to

help control traffic congestion and noise outside of the Town Hall on nights when a speaker would be appearing at the Town Hall, what can be properly considered a “secondary effect” of the speech. This justification, likewise, had nothing to do with the content of the speech.

The District Court’s conclusion that the Protest Policy, as applied, constituted viewpoint discrimination against the Plaintiff-Appellee is incorrect, and, we reverse its ruling. Establishing an “illicit motive” behind a facially neutral regulation requires the “clearest proof,” *Ambassador Books & Video, Inc. v. City of Little Rock*, 20 F.3d 858, 863 (8th Cir. 1994) (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)), and the District Court’s findings regarding the application of the Protest Policy do not reach this high evidentiary standard. There is simply not enough evidence in the record that Mayor Johnson or the Town of Summerville applied the Protest Policy in a way that discriminated based on the viewpoint of the speaker.

1. Text of the Statute

Although the Supreme Court has not clarified the exact evidentiary standard required for the government to prove its justification for enacting a speech restriction, previous cases are instructive. In *Ward*, the Court recognized the legitimacy of looking at the statute itself for the governmental purpose: the statute provided explicitly that its purpose was “[t]o provide the best sound for all events . . . [and] [t]o insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone of Sheep Meadow,” and the Court considered these justifications when determining whether the statute was content-neutral. *Id.* at 788, 792. When one examines the text of the Protest Policy, the reasoning for the Protest Policy is readily discernible on its face:

To maintain order and security at future meetings, such as the upcoming health-care debate forum, this Protest Policy is hereby enacted to regulate activities outside of the Town Hall Meeting to be held on March 30, 2009.

Summerville's justification for the Protest Policy was to "maintain order and security" in its public fora, in particular, in the public areas, sidewalks and the Town Square park space. This court has taken judicial notice of the violence, near-riots, and legitimate threats to public safety that have occurred at other town-hall fora in the midst of this national debate on health care reform. A desire to prevent violence and disorder in public areas and to protect the public in the midst of this disorder is a justification for a regulation of speech that "ha[s] nothing to do with content." *Boos*, 485 U.S. at 320.

Furthermore, the Ninth Circuit has adopted the view that in determining whether or not a restraint on speech is content neutral, the courts will "not make a searching inquiry of hidden motive," but, rather, look only at the "literal command of the restraint." *Menotti v. City of Seattle*, 409 F.3d 1113, 1128 (9th Cir. 2005) (adopting Justice Kennedy's approach in *City of Los Angeles v. Alameda Books, Inc.*: "[W]hether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based." 535 U.S. 425, 448 (2002) (Kennedy, J., concurring)). The literal command of the restraint is apparent: the Summerville Town Council was attempting to maintain order and security by creating free speech zones outside of the Town Hall. If we explicitly adopted the Ninth Circuit's test, which we do not at this time because we feel a more comprehensive examination of the circumstances is appropriate, then the inquiry would end here.

The Protest Policy itself also does not discriminate based on viewpoint. This court has taken judicial notice of the fact that both anti-health care reform protestors and pro-health care reform supporters have contributed to violence and disorder at town hall fora in other locales across Missouri and the rest of the country, and, thus, an interest in preventing disorder does not

discriminate based on one group’s viewpoint over another. The district court glossed over the indelible fact that the language of the statute itself treats all speakers equally:

These zones will be available, on a first-come-first-serve basis, for organizations, groups, and persons who apply for a permit at the Town Hall more than 5 business days prior to the March 30th Town Hall Meeting.

The fact that Plaintiff-Appellee’s organization was late in applying for a permit, and, thus, obtained a permit for the less desirable location does not, in and of itself, transform the statute into a viewpoint-based restriction.

2. Legislative History

We have had the opportunity to address arguments by plaintiffs in previous cases that the government’s predominant interest in passing a piece of restrictive legislation was merely a “pretext” for the government’s real purpose of directly suppressing free expression. *Holmberg*, 12 F.3d at 143; *Ambassador Books*, 20 F.3d at 863. We have emphasized that “[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.” *Ambassador Books*, 20 F.3d at 863 (quoting *United States v. O’Brien*, 391 U.S. 367, 383 (1968)). And, furthermore, that only the “clearest proof could suffice to establish the unconstitutionality of a statute” on the ground that a punitive purpose lay behind the passing of the statute. *Id.* (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)).

In *Ambassador Books*, a government official, a city attorney, had instructed a member of his staff to prepare a memo detailing how he might “shut these places down[]” in reference to adult businesses in his community. *Id.* at 863. We held that this statement was the personal objective of the city attorney, who was not a member of the body that adopted the ordinance and that this statement, along with other evidence, fell “far short” of what would suffice to justify

“disregarding the plain and clear statement of the ordinance’s purpose.” *Id.* Here, of course, the Mayor was a member of the body that adopted the ordinance; however, she was only one member of a nine-member council and did not have the ability to enact the regulation on her own. The District Court’s alarmist assertion that the Mayor was a “mastermind” behind the enactment of the policy is, quite frankly, not supported by the evidence.

Furthermore, in *United States v. O’Brien*, the Supreme Court explicitly rejected the view that a facially content neutral regulation may be struck down “on the basis of an alleged illicit legislative motive,” even if, as the Plaintiff-Appellee asserts is the case here in regards to Mayor Johnson’s statement to the City Council, the illicit motive may be evident from a legislator’s speech at the time of enactment: “What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.” 391 U.S. 367, 383-84 (1960). Thus, one email and one speech do not come close to carrying the burden of “clearest proof,” particularly where both the email and the speech can reasonably be interpreted as promoting a legitimate government interest in preventing civil disorder and violence.

Likewise, the examination of evidence outside of the statute itself actually provides further support for the government’s position. One of the “secondary effects” proffered by the government as a justification for the regulation can be found in the “legislative history” of this Protest Policy. In December of 2008, Councilwoman Rebecca Marsdale brought up the need for a general protest policy and Mayor Johnson noted the problems of congestion, traffic, and unruliness experienced by other towns during the national presidential election in 2008. The control of traffic and congestion have been recognized as valid harmful secondary effects that justify establishing a restriction on speech. *Nat’l Amusements, Inc. v. Town of Dedham*, 846 F.

Supp. 1023, 1029 (D. Mass. 1994). Thus, as early as December of 2008, the Council was actively discussing the need for a protest policy to combat the problems associated with large-scale protesting; this proof offered by the Council weighs against the finding of a pretextual purpose.

3. Enforcement

In *Ward*, the plaintiff, Rock Against Racism, had argued that the restriction was invalid on its face because it gave “unbridled discretion” to city officials charged with enforcing it. 391 U.S. at 793. The plaintiff’s argument was unsuccessful. However, in our circumstances, town officials do not have unbridled discretion; in fact, they have just the opposite:

These zones will be available, on a first-come-first-serve basis, for organizations, groups, and persons who apply for a permit at the Town Hall more than 5 business days prior to the March 30th Town Hall Meeting.

That is, government officials have no discretion; anyone who applies receives a permit.

The District Court cited as evidence for its decision that the statute, as applied, constituted viewpoint discrimination a number of facts surrounding the actual health-care town hall event: phone calls by Scott Kline, the city attorney, informing pro-health care reform groups of the Policy immediately after the Policy was passed; statements by Police Chief Kadow to one of the anti-health care reform protestors at the protest itself; and, in general, an “intimidating police presence” surrounding Zone C during the protest. First, it was clear from the events surrounding the actual speech that the policy was enforced content and viewpoint neutrally: when an unruly pro-health care reform protestor left free speech zone A and approached a ticketed individual, he was promptly removed from the premises. There was, quite simply, a police presence at all three free speech zones, not just Zone C. Furthermore, statements by the police chief to an anti-health care reform protestor are not evidence of discriminatory

“implementation” of a city policy. As was the case with the city attorney in *Ambassador Books*, what Police Chief Kadow said was his “personal objective;” his job—his “implementation”—of the policy was merely to properly police the free speech zones. What he said at the time was irrelevant. Finally, city attorney Scott Kline, as well, was not “implementing” the policy by calling the newspaper or pro-health care reform groups after the passing of the Protest Policy; he too was merely acting to achieve his own personal objective. All of this evidence considered together does not provide clear proof of a viewpoint-discriminatory application of the Protest Policy.

B. Narrowly Tailored To Serve A Significant Government Interest

1. Significant Government Interest

We have previously recognized that protecting the safety of citizens is an indisputably significant government interest. *Frye*, 375 F.3d at 791. Furthermore, preserving order and public safety in the form of ensuring the free flow of traffic on streets and sidewalks has been recognized by the Supreme Court as a significant government interest. *See Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 376 (1997) (noting public safety as an interest in justifying an injunction “if only because of the dangerous situation created by the interaction between cars and protesters and because of the fights that threatened to (and sometimes did) develop”). In *Ward*, the Court even recognized as “substantial” the government’s interest in “ensuring the sufficiency of sound amplification” at events at the amphitheatre, because inadequate amplification would affect the ability of some audiences to hear and enjoy the music. 491 U.S. at 796-97. Thus, the interest of the Summerville Town Council in preventing disorder in its Town Square and maintaining the free flow of traffic and avoiding congestion on streets and sidewalks all qualify as significant government interests.

In secondary effects cases, the government body has the evidentiary burden of proving the harmful secondary effects that the government has an interest in combating. *Holmberg*, 12 F.3d at 143. It is not enough merely to give “lip service” to a legitimate government interest. *Id.* However, a city may compile a record of other cities’ experiences with the problem at hand and such evidence will be sufficient to carry their burden. *Id.* In this situation, such a record is not necessary; this court has taken judicial notice of the problem of disorder, traffic, and congestion at various town hall fora throughout the country. Finally, we have recognized that a police officer is entitled to decide, on the spot, that a situation represents a danger to the public, *Frye*, 375 F.3d at 791; thus, it is apparent that a danger that is public knowledge and well-documented in the media, as are the disruptions that occur at national political conventions, World Trade Organization protests and abortion clinic disputes, as well as health care forum town hall debates, would certainly carry the burden of a significant government interest.

2. Narrowly Tailored

The regulation of speech must be “narrowly tailored to serve the government’s legitimate, content-neutral interests;” however, “it need not be the least restrictive or least intrusive means of doing so. *Ward*, 491 U.S. at 798. Furthermore, a judge does not have to agree with the decision-maker “concerning the most appropriate method of promoting” the interests or even the degree to which those interests should be promoted. *Id.* at 800. However, of course, applying this standard does not mean that a regulation may burden substantially more speech than is necessary to further the government’s legitimate interests. Thus, the government “may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.” *Id.* at 799.

It is undeniable that the Town of Summerville's interest in maintaining security and order in its public spaces is served by creating free speech zones, available by permit to groups on a first come, first served basis. Separating the opposing sides of a political issue, or any public issue, allows both sides to express themselves freely without the potential for disorder and violence that could threaten the health and safety of the public. Confining individuals to different zones also allows those who have tickets to attend the speech or even the speakers themselves unobstructed access to the main door of the building. *See Hill*, 530 U.S. at 715.

The city's secondary effects rationale — preventing traffic and congestion — is also well-served by the Protest Policy adopted by the Summerville Town Council. Confining individuals to three separate free speech zones allows the sidewalks and public space around the Town Hall to remain clear and uncongested for foot traffic. Furthermore, without these zones, there would be a significant risk that a crowd would spill out into the street, the roundabout that circles the Town Square, causing serious danger both to the individual protestors and to any drivers who were circling the Town Square at that time. Although it would, of course, be preferable to have all three speech zones within comparable distance of the front of the Town Hall, so that the group in Zone C would not feel inhibited in their means of expression, unfortunately, the design of the Town Square does not allow for this possibility. There is simply not enough available space at the front of the Town Hall for three separate free speech zones or even two larger free speech zones to accommodate more people, and the Town Square roundabout, furthermore, is bordered on the east and west by private businesses. Thus, Zone C has been placed in the best available space, and the regulation, although it is not required to be so, is, in fact, the least restrictive means available. The burden on speech in Zone C does certainly serve to advance these goals of the Council.

C. Alternative Means of Communication

Finally, the last requirement, whether the guideline leaves open alternative means of communication, is an important one. Many years ago, the Supreme Court recognized that “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 151-52 (1939). We have previously held in cases of anti-picketing regulations that when “plaintiffs wish to express an opinion about an individual to that individual and others, and they wish to direct their message at that individual” allowing them to do so in another location, even if it is only around the next block does not give the speaker “the opportunity to direct their intended message at their intended recipients.” *Kirkeby v. Furness*, 92 F.3d 655, 662 (8th Cir. 1996). However, *Kirkeby* and the more recent case of *Phelps-Roper v. Nixon*, 545 F.3d 685, 694 (8th Cir. 2008), which upheld an injunction against the enforcement of a Missouri law that would prevent picketing at military funerals, are distinguishable.

In both of these previous cases, the regulations at issue forbade picketing in certain locations, at the residences of individuals who provide abortion services and at the cemetery, respectively, while the alternative means of communication were outside of the desired locales. Here, however, the Summerville Protest Policy allows demonstration and expressive activity at the Town Square; Zone C is just located on the opposite side of the Town Hall building. Unlike the previous two cases, where the intended recipient of the expression was stationary, for instance, in *Phelps-Roper*, a funeral party moving to and from a funeral plot, 545 F.3d at 688, the intended recipients of Plaintiff-Appellee’s expression, either the media or the speakers themselves, are certainly not tied to a particular location at the Town Hall or in the vicinity of the Town Hall. The media is able to move about the Town Square and report on any of the three

protest zones. Although the front entrance to the Town Hall is indeed the most widely used, there are other entrances to the building for speakers or ticket-holders, including a back entrance in close proximity to Zone C.

The facts of this case are more in line with *Ward*, because, although the Plaintiff-Appellee argues that Zone C is, in itself, a restriction on speech, Plaintiff-Appellee is still able to freely speak within this zone. As previously mentioned, the zoning of speech is not a regulation of speech, but merely “a regulation of the places where some speech may occur.” *Hill*, 530 U.S. at 719. Like in *Ward*, the restriction on Plaintiff-Appellee’s speech still permits expressive activity and has “no effect on the quantity or content of that expression” beyond placing it in a location that is not as convenient for attracting the media’s attention. *See Ward*, 491 U.S. at 802. Furthermore, the Protest Policy explicitly provides for those who were unable to obtain permits on the day of the speech to do so the following day.

In sum, the Summerville Town Council’s Protest Policy is consistent with the dictates of the First Amendment to the U.S. Constitution: the regulation is content-neutral, has been narrowly tailored to serve a significant government interest, and there are ample alternative channels of communication available. Therefore, for the foregoing reasons we reverse the judgment of the district court.

MILTON, J., dissenting:

I respectfully dissent from the majority's ruling reversing the district court decision. I agree with the majority opinion in so far as it holds that the Protest Policy was not viewpoint discriminatory as applied to Plaintiff-Appellee simply because he was late in applying for a permit and was unsatisfied with the location of his designated free speech zone. I would also point out that Plaintiff-Appellee has failed to establish any link between city attorney Kline's phone calls to the pro-health care organizations and Mayor Johnson. Without such a connection and the lack of evidence as to whether those organizations applied for permits because of those calls or because of the front-page newspaper article the following morning, I would not find this to be evidence of viewpoint discrimination. Additionally, I would note that the enforcement of the Protest Policy by Chief Kadow and his police force was not viewpoint discriminatory because they were merely applying the regulation as it had been enacted and as the permits had been granted. *See McGuire v. Reilly*, 386 F.3d 45, 64 (1st Cir. 2004) (“[I]n order to [establish as applied viewpoint discrimination], Plaintiff-Appellee would need to show "a pattern of unlawful favoritism.”) (quoting *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 325 (2002)) (internal quotation marks omitted). I conclude that Plaintiff-Appellee has indeed failed to establish such a pattern of favoritism.

Where I dissent from the majority is in its consideration of the secondary effects doctrine and the holding that the Protest Policy is facially content neutral. I agree with the District Court that the Protest Policy was clearly intended to regulate political speech regarding the health care debate. I fail to see, however, that Defendants-Appellants have sufficiently established that the regulation was aimed primarily at the secondary effects of noise and traffic congestion. It appears that the policy was enacted to silence at least some participants in a vibrant public

debate. “Listeners’ reaction to speech” is not a valid secondary effect. *Boos v. Barry*, 485 U.S. 312, 321 (1988). As such, I would find that the Protest Policy is a content-based restriction on free speech regarding the health care reform that fails strict scrutiny.

A. The Protest Policy is a content-based restriction.

The text of the Protest Policy itself establishes that it is intended to “maintain order and security” by regulating “activities” outside of the Town Hall during meetings such as “the upcoming health-care debate forum.” Defendants-Appellants contend and the majority agrees that the Protest Policy remains content neutral because it was aimed, not at the subject matter of the speech, but rather at such secondary effects as public disorder, noise, and traffic congestion. The majority emphasizes that the Town Council had already considered the secondary effects of noise and traffic congestion prior to the Protest Policy’s enactment and that such concerns were “in the back of [the Council members’] minds.” However, I do not believe the government can rely on the secondary effects doctrine in this instance as a post-hoc justification for its hastily-enacted policy. With no evidence that noise or traffic congestion were considered during the enactment of this *particular* regulation and with the text of the regulation mentioning only maintenance of public order and security, I cannot agree that the government has sufficiently established that the Protest Policy was aimed at these secondary effects.

It is true that the Supreme Court in *City of Los Angeles v. Alameda Books, Inc.* held that a city could rely on a study conducted six years prior to enactment of a zoning ordinance for adult businesses because the city “reasonably believed [it] to be relevant to the secondary effects.” 535 U.S. 425, 442 (2002) (internal quotations omitted). However, that case is distinguishable from the present one. *Alameda Books* involved the zoning of adult businesses – the genesis and

perhaps proper containment of the secondary effects doctrine in First Amendment jurisprudence – rather than pure political speech as is at issue in the present case.

In *Alameda Books*, the regulation at issue was an amendment that had been passed six years after the study, whereas the city had already passed an original zoning ordinance within one year of the study and *in response to* the study. *Id.* at 430. Additionally, the study specifically dealt with the secondary effect of adult businesses on the higher crime rates surrounding them. *Id.* Here, we merely have the discussion of several incidents of traffic and noise at similar meetings with no indication that they establish a definitive link between town hall meetings and such secondary effects. There is no statistical evidence establishing that the creation of free speech zones would, in fact, alleviate these alleged secondary effects. Furthermore, the Council failed to even discuss the issue of a protest policy again until Summerville became the host for a Town Hall Meeting on the public health care debate. The suspect timing behind the enactment of this regulation weighs against a finding of content-neutrality.

Finally, I would find that these supposed secondary effects here, as opposed to the carefully considered and studied effects in *Alameda Books*, are mere pretextual or contrived justifications for a regulation that is clearly content-based. The lack of evidence that the Council considered these articles prior to enactment of this particular regulation demonstrates that the Council did not “reasonably believe [the articles] to be relevant to the secondary effects.” Without evidence to suggest that the Protest Policy actually addressed the secondary effects at issue and was enacted in response to such sound evidence, I cannot find that the secondary effects doctrine is properly invoked in this case.

Additionally, I would find that such allegedly secondary concerns as public disorder consist of “emotive impact of the speech,” which is not to be considered when determining secondary effects. *Boos*, 485 U.S. at 321 (“Listeners' reactions to speech are not the type of “secondary effects” we referred to in *Renton* ... [because] [t]his justification focuses only on the content of the speech and the direct impact that speech has on its listeners.”). Thus, just because listeners may disagree with the content of the speech and react emotionally to it, such behavior does not provide justification for rendering a content-based restriction facially neutral. In light of these considerations, I would find the secondary effects rationale advanced by Defendants-Appellants insufficient and hold that the Protest Policy constitutes a content-based restriction on speech.

B. The Protest Policy is not narrowly tailored to serve a compelling governmental interest.

In the 8th Circuit, strict scrutiny is described as an “end-and-means test that asks whether the state’s purported interest is important enough to justify the restriction it has placed on the speech in question in pursuit of that interest.” *White II*, 416 F.3d at 750. Under this approach, the focus remains on the “tightness of the fit” between the state interest (the end) and the regulation (the means). *Id.* (“The inquiry of whether the interest (the end) is ‘important enough’ – that is, sufficiently compelling to abridge core constitutional rights – is informed by an examination of the regulation (the means) purportedly addressing that end.”).

For a restriction on speech to be narrowly tailored, it must meet several exacting criteria. First, the regulation must “actually advance the state’s interest (is necessary).” *Id.* at 752. It must be not be overinclusive by “sweep[ing] too broadly.” *Id.* It must not be underinclusive by “leav[ing] significant influences bearing on the interest unregulated.” *Id.*; *see also Republican Party v. White*, 536 U.S. 765, 780 (2002) (“[A] law cannot be regarded as protecting an interest

of the highest order, and thus as justifying a restriction upon . . . speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.”) (hereinafter “*White I*”); *City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994) (“Exemptions from an otherwise legitimate regulation of a medium of speech . . . may diminish the credibility of the government’s rationale for restricting speech in the first place.”). Finally, the restriction must be the least-restrictive means of regulation. *White*, 416 F.3d at 752. That is, the regulation must be such that it “could be replaced by no other regulation that could advance the interest as well with less infringement of speech.” *Id.*

With the burden on the State to prove that the regulation meets such demanding criteria, it becomes evident that a restriction rarely passes strict scrutiny. *Id.* at 749 (“[I]t is the rare case in which a law survives strict scrutiny.”) (citing *Burson v. Freeman*, 504 U.S. 191, 211 (1992)). Though *Burson* was such a case, I would find that the Protest Policy fails this exacting standard in at least two respects.

First, with regard to traffic congestion and noise, I cannot believe that such concerns are compelling enough to justify a content-based restriction on free speech. *See Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1262 (11th Cir. 2005) (“[T]he City’s asserted interest in aesthetics and traffic safety was ‘not a compelling state interest of the sort required to justify content based regulation of noncommercial speech.’”) (quoting *Dimmitt v. City of Clearwater*, 985 F.2d 1565, 1569-70 (11th Cir. 1993)). These justifications cannot be compelling because they concern mere inconveniences and annoyances. *See Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (“[F]reedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”).

Second, assuming that the maintenance of public order is a compelling governmental interest, the Defendants-Appellants have not sufficiently established that the Protest Policy is necessary to any compelling governmental interest or that it is the least speech-restrictive way to advance their purported interests. For all of the foregoing reasons, the ruling of the district court granting summary judgment to Plaintiff-Appellee should be affirmed.

SUPREME COURT OF THE UNITED STATES

NICHOLAS ROBERTS, Petitioner,

v.

**TOWN OF SUMMERVILLE, MISSOURI,
MAYOR SARAH JOHNSON, AND POLICE CHIEF
MARK KADOW, Respondents.**

No. VU-SUP 2009

September 25, 2009

Case Below:

___ F.3d ___ (8th Cir. 2009)

___ F. Supp. 3d ___ (W.D. Miss. 2009)

Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit
GRANTED.

The issue before the Court is:

Whether the enactment and enforcement of a protest policy placing individuals into free speech zones constitutes impermissible viewpoint and subject-matter discrimination or serves as a permissible content-neutral regulation designed to address adverse effects associated with protests.

Arguments will be heard on an expedited basis. The Petitioner Nicholas Roberts shall present argument first.

LIST OF RELEVANT SOURCES

CASES

Ambassador Books & Video, Inc. v. City of Little Rock, Arkansas, 20 F.3d 858 (8th Cir. 1994)
Boos v. Barry, 485 U.S. 312 (1988)
Bronx Household of Faith v. Bd. of Educ., 492 F.3d 89 (2d Cir. 2007)
Burson v. Freeman, 504 U.S. 191 (1992)
City of Erie v. Pap's A.M., 529 U.S. 277 (2000)
City of Ladue v. Gilleo, 512 U.S. 43 (1994)
City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002)
City of Renton v. Playtime Theatres, 475 U.S. 41 (1986)
Clark v. Comm'y for Creative Non-Violence, 468 U.S. 288 (1984)
Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788 (1985)
Del Gallo v. Parent, 557 F.3d 58 (1st Cir. 2009)
Dimmitt v. City of Clearwater, 985 F.2d 1565 (11th Cir. 1993)
Flemming v. Nestor, 363 U.S. 603 (1960)
Frye v. Kansas City Missouri Police Dep't, 375 F.3d 785 (8th Cir. 2004)
Hill v. Colorado, 530 U.S. 703 (2000)
Holmberg v. City of Ramsey, 12 F.3d 140 (8th Cir. 1993).
Kirkeby v. Furness, 92 F.3d 655 (8th Cir. 1996)
Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994)
McGuire v. Reilly, 386 F.3d 45 (1st Cir. 2004)
Menotti v. City of Seattle, 409 F.3d 1113 (9th Cir. 2005)
Nat'l Amusements v. Town of Dedham, 846 F.Supp. 1023 (D. Mass. 1994)
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)
Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983)
Phelps-Roper v. Nixon, 545 F.3d 685 (8th Cir. Mo. 2008)
R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).
Republican Party v. White, 536 U.S. 765 (2002)
Republican Party v. White, 416 F.3d 738 (8th Cir. 2005)
Rosenstiel v. Rodriguez, 101 F.3d 1544 (8th Cir. 1996)
Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357 (1997)
Schneider v. State (Town of Irvington), 308 U.S. 147 (1939)
Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005)
T & D Video, Inc. v. City of Revere, 423 Mass. 577 (Mass. 1996)
Terminiello v. Chicago, 337 U.S. 1 (1949)
Thomas v. Chi. Park Dist., 534 U.S. 316 (2002)
United States v. O'Brien, 391 U.S. 367 (1968)
Wallace v. Jaffree, 472 U.S. 38 (1985)
Ward v. Rock Against Racism, 491 U.S. 781 (1989)
Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)

OTHER SOURCES

42 U.S.C. § 1983

Federal Rule of Civil Procedure 56(c)

Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297 (1997)

Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347 (2006)

David L. Hudson, Jr., *The Secondary Effects Doctrine: "The Evisceration of First Amendment Freedoms,"* 37 WASHBURN L.J. 55 (1997)

Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996)

Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987)

Jed Rubinfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001)

John Fee, *Speech Discrimination*, 85 B.U.L. REV. 1103 (2005)

Note, *Strict Scrutiny in the Middle Forum*, 122 HARV. L. REV. 2140 (2009)