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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

GARY WAYNE WRIGHT, II	)	
	)	
	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL CASE NO. 4:22-cv-00615-SGC**
	)	
MARSHALL COUNTY, ALABAMA, et.al	)	
	)	
	)	
	)	
Defendants.	)	

DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Defendants Marshall County and Marshall County Sheriff Phil Sims, in his official capacity, hereby respectfully file this Brief in Support of their Motion for Summary Judgment pursuant to Fed. R. Civ. Pro. 56, as follows:

STATEMENT OF MATERIAL UNDISPUTED FACTS

1. On December 9, 2020, the Marshall County Commission passed a Resolution regulating "picketing," which is defined in the Resolution as "the peaceful patrolling activity or demonstration by any individuals, groups, or organizations, often including chanting; the use of signs, banners, or flags to convey a message; or handing

out flyers, pamphlets, brochures, or leaflets." (Exhibit A, 2020 Picketing Resolution, Doc. 55-1, pg. 2)

2. Pursuant to this Resolution, picketing is forbidden inside the two Marshall County courthouses located in Albertville and Guntersville, Alabama. (Doc. 55-1, pg. 2) On July 26, 2023, the Commission expanded this ban to forbid picketing "at, near, or proximately around the Marshall County Animal Control Shelter, the County Commission District Offices, the Marshall County Sheriff's Office, the Marshall County Jail, the Marshall County District Attorney Annex, the Marshall County Probate Office Annexes, and any other property owned, operated, and/or maintained by the County Commission which is not open to the general public." (Exhibit B, 2023 Picketing Resolution, Doc. 55-2, pg. 2).

3. Picketing is permitted "in and around the exterior portions or courtyards of the Guntersville and Albertville County Courthouses, provided such activities are in compliance with the provisions of [the] Resolutions and do not interfere with the daily operations of government." (Doc. 55-1, pg. 2)

4. Persons wishing to picket on the outside of the courthouses must first obtain a permit from the Marshall County Chairman or his designee. Registration for a permit may be done on the same day. While forms are provided, use of the form is not mandatory as long as all required information is provided in writing, including: a group

name, if applicable, the number of persons expected to participate, a point of contact, and the desired time, day, and duration of Picketing. (Doc. 55-1, pg. 2)

5. "The Marshall County Commission Chairman, or his designee, without regard to the viewpoint of the proposed Picketing, shall issue a permit upon the submission of a Registration" so long as no other permit has been issued for the same time, day, and location, and as long as the minimum requirements of the Resolution are met. (Doc. 55-1, pg. 3-4)

6. Permits are generally to be issued on a first-come, first-served basis, except that the Chairman "is permitted to exercise objective, nonbiased adjustments in the event one individual, group, or organization has not had an equal opportunity to engage in Picketing due to conflicts. Said individual, group, or organization who has not had an equal opportunity to engage in Picketing may be given priority for a given date and time over the first registrant to Register to engage in Picketing on the same time, day, and location." (Doc. 55-1, pg. 4)

7. The Chairman "shall not issue Permits that exceed a duration of three (3) consecutive days or six (6) nonconsecutive days," nor shall permits be issued more than six (6) months in advance. All picketing must take place between the hours of 6:00 a.m. and 8:00 p.m., Central Time. (Doc. 55-1, pg. 4)

8. "Issuance decisions shall be made as soon as reasonable possible, but no later than seventy-two (72) hours from the time the initial Permit application is

submitted. Should an issuance decision not be made within seventy-two hours (72) the requested permit will be deemed granted." (Doc. 55-1, pg. 4.)

9. Picketing must take place at least twenty-one (21) feet from the exteriors of the courthouses, and cannot block entrances or exits or otherwise obstruct, delay, or interfere with the free movements of any other person or seek to coerce or physically disturb any other person. Signs, etc., cannot be affixed to the buildings, signs, barriers, fences, or monuments, and courthouse property cannot be chalked, painted, etc. Standing on or damaging any of the monuments is not allowed. (Doc. 55-1, pg. 4-5)

10. Law enforcement officers are authorized to enforce the Resolution through warnings and may eventually remove offending individuals and/or groups from the grounds, up to and including dispersing a crowd if a group "becomes violent, threatening, menacing, or unruly." (Doc. 55-1, pg. 5)

11. In response to an Interrogatory asking Plaintiff if he had ever registered for a protest permit (Doc. 50, pg. 5), Plaintiff stated as follows: "No, the Plaintiff's activities are constitutionally protected and no permit is required." (Exhibit C, Plaintiff's Answers to Consolidated Discovery Requests, Doc. 55-3, pg. 5)

12. The 2020 Resolution was enacted in the wake of the violent counterprotest by Sons of the Confederacy against Black Lives Matter protestors. This incident made it clear that the space and resource limitations could not ensure the safety of multiple groups holding opposing views seeking to protest at the same time. The increase in

reports from around the nation of violence occurring in such protests/counter-protests also factored into the determination that such occurrences were likely to increase. (Exhibit D, Defendants' Responses to Interrogatories, Doc. 55-4, pg. 2)

13. The 2023 Resolution was passed to ensure the continued provision of services at locations that are not public forums, and to make it clear after the break-in at the Animal Shelter that certain County properties are not generally open to the public for all purposes. Allowing protests at such non-public for a would interfere with their ability to carry out their mission and, particularly as to the Jail, would also result in forcing people to bear witness to the protest. For example, animals at the Animal Shelter are often already uneasy. Loud noises, crowds, and tensions only exacerbate this issue, even if the protest is being done on their behalf (since the animals obviously cannot understand what is happening). Protests may interfere with people's ability to visit the shelter, and may cause animals to act in undesirable, even if understandable, ways, causing harm to themselves and others. (Ex. D, Doc. 55-4, pg. 3)

14. Exhibit E, Doc. 55-5, consists of photographs of the Albertville Courthouse (which were submitted by Plaintiff). The courthouse is relatively small. It occupies the front half of a block; there is a narrow sidewalk in front of it that is distinct from the other city sidewalks, with additional sidewalks going into the entrances of the building. (Doc. 55-5, pgs. 2-3) There is a small fenced off area with flags, a monument

to veterans of World War I, World War II, the Korean War, and the Vietnam war and a monument to confederate soldiers. (Doc. 55-5, pg. 3)

15. Exhibit F, Doc. 55-6, is an aerial photograph of the slightly larger Guntersville court complex, which occupies the entire block. The main (west) entrance faces 431 South. There is parking on the north side of building. (Doc. 55-6, pg. 3) Exhibit G is a video taken by Plaintiff walking from the front of the building past the monument area up to the courthouse. Exhibit H is taken from the back, up to the front doors through the open lawn space.

16. Exhibit F also shows the Marshall County Sheriff's Office and Building Maintenance Department. (Doc. 55-6, pg. 2) As easily seen from this aerial view, there is no place to picket around the immediate exterior of these buildings that would not interfere with operations, i.e., a lawn; however, there are public streets and sidewalks nearby.

17. The first permit was requested and issued on December 9, 2020. (Exhibit I, Protest Permits, Doc. 55-9, pg. 2) Multiple other permits have been issued since, some of which are attached herein. (Doc. 55-9, pgs. 3-11). Pursuant to the Resolution, up to six non-consecutive dates have been permitted in a single permit to one group. (Doc. 55-9, pg. 5)

18. Exhibit J, Doc. 55-10 are pictures submitted by Plaintiff of a protest that apparently occurred on March 13, 201 (Permit at Doc. 55-9, pg. 5). Exhibit K, Doc. 55-11, is video footage from the same protest.

19. No violations were reported in 2023, nor (at least to the best of Defendants' knowledge) was law enforcement called to respond to any protest in the last year. (Doc. 55-4, pg. 4)

STANDARD OF REVIEW

Summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is appropriate when the pleadings, affidavits, and depositions demonstrate that there is no genuine issue as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The party moving for summary judgment meets its initial burden by "showing – that is, pointing out" that the non-movant lacks evidence to support the essential elements of his claim. *Id.* at 325. After the movant has met this initial burden, the non-movant must present "substantial evidence" on each essential element of his claim. *Id.* "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." *Id.* at 327.

The importance of summary judgment was reinforced in *Scott v. Harris*, 550 U.S. 372 (2007). The *Scott* Court "emphasized" that the rule stating that the facts must be viewed in the light most favorable to the non-moving party applies "only if there is a

'genuine' dispute as to those facts." 550 U.S. at 380. "Some metaphysical doubt" is not enough to prevent summary judgment. *Id.* "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.*

ARGUMENT

The First Amendment of the United States Constitution does not categorically forbid the government from regulating the activities protected by the Amendment. *See, e.g.*, *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 803–04 (1984) ("'But to say the ordinance presents a First Amendment issue is not necessarily to say that it constitutes a First Amendment violation.'" *Metromedia, Inc. v. San Diego*, 453 U.S., at 561, 101 S.Ct., at 2920, 69 L.Ed.2d 800 (Burger, C.J., dissenting)). "It is by now clear that the First Amendment does not guarantee access to property just because it is owned by the government." *Bloedorn v. Grube*, 631 F.3d 1218, 1230 (11th Cir. 2011).

It is first important to note that Plaintiff's claims are a facial challenge to the constitutionality *vel non* of the Resolutions because he has not been denied a permit or otherwise had the Resolutions applied to him. To the contrary, Plaintiff has steadfastly refused to engage in the permitting process as a matter of principle, apparently even refraining from knowingly participating in protests that were permitted. "There are two

quite different ways in which a statute or ordinance may be considered invalid 'on its face'—either because it is unconstitutional in every conceivable application, or because it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally 'overbroad.'" *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796 (1984). The justification for allowing the invalidation of a regulation on First Amendment grounds even when it could theoretically be constitutionally applied in some cases is that "the statute's very existence will inhibit free expression." *Id.* at 799. Thus, a statute may be invalidated as overbroad "in cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker, and in cases where the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected." *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 129-130 (1992) (internal citations omitted).

Permitting a facial challenge to an overly broad statute is an "extraordinary doctrine," and the United States Supreme Court has questioned the wisdom of allowing it in cases where the regulation vests only limited authority, not unbridled discretion, in a government official to make the decision to permit or deny expressive activity. *Ward v. Rock Against Racism*, 491 U.S. 781, 973-94 (1989); *see also Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. at 798 ("In the development of the overbreadth doctrine the Court has been sensitive to the risk that the doctrine itself

might sweep so broadly that the exception to ordinary standing requirements would swallow the general rule.") Further, at some point, the purely hypothetical chilling effect "— at best a prediction – cannot, with confidence, justify invalidating a statute on its face…To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 799-800 (quotations and citation omitted).

The first hurdle for any regulation of activity protected under the First Amendment to clear is whether it impermissibly discriminates against groups or individuals because of the content of the speech. *See Hill v. Colorado*, 530 U.S. 703, 721-725 (2000). A regulation is content-based "if it suppresses, disadvantages, or imposes differential burdens upon speech because of its content, i.e., if it draws facial distinctions defining regulated speech by particular subject matter." *United States v. Pugh*, 90 F.4th 1318, 1331-32 (2024) (cleaned up; quotations and citations omitted). A regulation may also be found not to be content neutral if it vests unbridled discretion in a decisionmaker that would allow impermissible viewpoint-based censorship, either through standardless denial or through inaction. *See Bloedorn*, 631 F.3d at 1236. Both the 2020 and 2023 Resolutions are explicitly content neutral, forbidding or permitting picketing without regard to the expressed messages. The 2020 Resolution sets out the only factors that may be validly considered in issuing permits, and provides that a permit

may be granted by default if it is not denied within 72 hours. These Resolutions are accordingly content-neutral.

"The extent to which the government can control access to its property depends on the nature of the relevant forum." *U.S. v. Gilbert*, 130 F.3d 1458, 1461 (11th Cir. 1997). Courts now recognize four categories of public fora: traditional public fora; designated public fora; limited public fora; and non-public fora. *See Id.*; *Bloedorn v. Grube*, 631 F.3d 1218, 1230-32 (11th Cir. 2011). This Brief first discusses those areas that Defendants consider as non-public fora, in which picketing is prohibited entirely, and then the restrictions on picketing on the exterior of the courthouses.

I. THE PROHIBITION ON PICKETING IN NON-PUBLIC FORA IS CONSTITUTIONAL.

Plaintiff concedes that the interior of government offices are generally nonpublic, and has presented no evidence that any of the additional locations listed in the 2023 Resolution are or have ever been anything other than nonpublic fora. (Doc. 55-3, pgs. 7-8). The immediately adjacent exteriors that exist only to facilitate access to such nonpublic forum are also themselves nonpublic. *See U.S. v. Belsky*, 799 F.2d 1485, 1489 (11th Cir. 1986). Access to a nonpublic forum "can be restricted as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 800 (1985) (internal quotations omitted). The content-neutral prohibition on picketing in nonpublic fora easily meets this standard.

Particularly as to the animal shelter, which is specifically mentioned in the Amended Complaint (Doc. 44, pg.6), the Commission has explained that the ban was not enacted because of protests – after all, the protests regarding animal shelter policies referenced in Footnote 3 of the Amended Complaint took place *at the courthouse*, not the shelter, even though the 2023 Resolution had not yet been enacted – but as part of increased security efforts after a break-in, and in recognition of the negative effects that loud protests outside a building would have on the animals housed inside. https://whnt.com/news/northeast-alabama/protestors-speak-out-against-marshall-county-animal-euthanization-policy/ (last accessed 03/04/2024); Doc. 55-4, pg. 3. And it is important to note that the public sidewalks and streets outside these locations may still be available for picketing; it's merely in and around the nonpublic places themselves that such activities are limited in order to ensure that the important operations occurring inside of these locations is not disrupted. The prohibition on picketing in nonpublic forum is a reasonable, content-neutral restriction that does not violate the First Amendment.

II. THE PICKETING RESOLUTION IS CONSTITUTIONAL.

A. The nature of the forum.

Plaintiff contends that the area around the courthouses are traditional public fora. Defendants contend that these areas are limited public fora. "Traditional public fora are public areas such as streets and parks that, since 'time out of mind, have been used for

purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Bloedern*, 631 F.3d at 1231 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). A limited public forum is one that has been opened to the public only under certain conditions that are imposed in order to ensure that the space remains primarily dedicated to its intended purpose. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 829 (1995); *see also Barrett v. Walker County School District*, 872 F.3d 1209, 1225 (11th Cir. 2017).

"The mere physical characteristics of property cannot dictate forum analysis." *U.S. v. Kokinda*, 497 U.S. 720, 727 (1990). In other words, the fact that there is pavement or a green space does not automatically make the area a public sidewalk or a park. *Id.*; *see also Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1203-04 (11th Cir. 1991) (holding that rest areas are not traditional public fora even though they share certain physical similarities with parks). Nor does the fact that the public is generally permitted to freely visit a place transform it into a public forum. *Greer v. Spock*, 424 U.S. 828, 836 (1976). The fact that external areas immediately adjacent to a courthouse or other government office building are not traditional public fora is easily shown by the number of decisions that have held that such areas are, in certain circumstances, actually nonpublic fora. *See, e.g.*, *Hodge v. Talkin*, 799 F.3d 1145, 1158 (D.C. Cir. 2015) (holding that Supreme Court plaza is nonpublic forum); *U.S. v. Gilbert*, 130 F.3d 1458 (11th Cir. 1997) (holding that area outside federal building holding judicial and other

offices had been properly changed from a public forum to a nonpublic forum); *Verlo v. Martinez*, 262 F.Supp.3d 1113, 1149 (D. Colorado 2017) (holding that restricted area outside courthouse is nonpublic forum).

The external areas around the Guntersville and Albertville courthouses are relatively small. The primary purpose of the sidewalks surrounding them and leading to the entrances is to facilitate entering the courthouses; indeed, there are even very clear visible differences between the sidewalks around the Albertville courthouse and the sidewalks across the street or on the adjacent blocks that generally facilitate daily commerce. (Doc. 55-5, pg. 2) *See Kokinda*, 497 U.S. at 727-728 (holding that postal office's sidewalk from parking area to the door was constructed to assist patrons in entering the sidewalk, not to facility the daily commerce and life of the town in general); *cf. U.S. v. Grace*, 461 U.S. 171, 179-180 (1983) (holding that public sidewalks beyond the United States Supreme Court's plaza and delineated grounds are public fora because they are indistinguishable from the other city sidewalks). The small green space surrounding both buildings are lawns that are incidental and adjacent to and supportive of the buildings, not independent parks. These areas accordingly fall into the category of limited public fora.

B. The reasonableness of the restrictions – Limited Public Fora

Content-neutral restrictions on access to limited public fora must only be "reasonable in light of the purpose which the forum at issue serves." *Bloedern*, 631 F.3d

at 1235 (quoting *Perry Educ. Ass'n*, 460 U.S. at 49). The primary purpose of the sidewalks and lawn surrounding these courthouses, or indeed any public building, is to facilitate ingress and egress into the courthouses, to facilitate the use of the buildings by, e.g., providing a meeting place for litigants, to help ensure an adequate safety buffer for the courthouses, and, finally, to contribute to a pleasing aesthetic atmosphere of the small downtowns of Albertville and Guntersville. The permitting scheme and the various requirements serve these purposes by ensuring that the doors are not blocked; the lawns do not become overcrowded with picketers; the din outside does not become disruptive; nobody is injured by climbing on the various monuments and fences; and public property is not defaced or destroyed. These restrictions are all reasonable in light of the need to ensure that the important business taking place inside these courthouses can continue. *See Rowe v. City of Cocoa, Fla.*, 358 F.3d 800, 802-804 (11th Cir. 2004) (holding that restrictions on speaking during public portions of meetings were reasonable).

C. The reasonableness of the restrictions – Traditional Public Fora.

Even if there were a genuine issue of material fact as to the nature of the area surrounding the courthouses, the permitting scheme would still be constitutional. Expressive activity in a traditional public forum may be properly subject to content-neutral time, place, and manner regulation. *See Henderson v. McMurray*, 987 F.3d 997, 1002 (11th Cir. 2021). Such regulations must be content neutral; be narrowly tailored to

serve a significant governmental interest; and leave open ample alternative channels for communication of the information. *See Id.* Content-neutral restrictions need not be the least restrictive or lease intrusive means of furthering the government's interest. *Bloedern*, 631 F.3d at 1238. The government may impose more stringent requirements on expressive conduct such as picketing than on pure speech. *Cameron v. Johnson*, 390 U.S. 611, 617 (1968).

The governmental interest at issue here is significant. The immediate motivating factor – the proximate cause leading to the passage of the Resolution – was the non-hypothetical specter of violence between groups with opposing views, which is well-recognized as a valid public safety concern. *See Holland v. Wilson*, 737 F.Supp. 82 (M.D. Ala. 1989). Further, because the Resolution concerns the small area outside the courthouses, the County also has an interest in ensuring that persons who need to enter the courthouse can do so safely and freely, and that the proceedings inside are not interrupted by picketing activity. Any protest/counter-protest situation significantly raises the chances of interfering with these goals. Given the space and resource limitations, there is no practicable way to separate opposing groups picketing at the same time. The requirement of registering for a permit and the limitation of issuing said permits to one group at a time is narrowly tailored to prevent picketers physically confronting each other.

While Defendants do not understand Plaintiff to object to the other requirements of the 2020 Resolution such as the restriction on blocking ingress/egress and maintaining a safe distance from the building *per se*, these restrictions are also all narrowly tailored to further the County's legitimate interests in ensuring that the courthouses remain primarily dedicated to their stated uses. Plaintiff does appear to object to the entire notion of public monuments; however, public monuments do not implicate the First Amendment as a matter a law. *Pleasant Grove City, Uta v. Summum*, 555 U.S. 460 (2009). Plaintiff has not directly challenged the Alabama Memorial Preservation Act, and this case would not be an inappropriate vehicle for such a challenge. *See State v. City of Birmingham*, 299 So.3d 220 (Ala. 2019) (holding that city lacked standing to challenge Act).

In addition to the permits that have been issued, the pictures and videos submitted by Plaintiff himself show both that picketing has occurred effectively, and that ample alternative channels for communication remain. Citizens may continue to petition the government through non-picketing activities. Citizens may not affix anything to the fences, but they can lean signs against them (Doc. 55-10, pg. 3), and there are still public streets and sidewalks very close to the courthouses that are not governed by the Resolutions, e.g., while citizens cannot draw on the monuments themselves, they can still chalk the street only a few feet away (Doc. 55-10, pg. 4).

III. THE RESOLUTIONS ARE NOT UNCONSTITUIONALLY VAGUE.

A facial vagueness challenge cannot be maintained by one to whom a statute may be constitutionally applied. *United States v. Pugh*, 90 F.4th 1318, 1333 (11th Cir. 2024). Plaintiff admits that he participated in permitted protests, meaning that whatever vagueness existed did not prohibit him or the group with which he was protesting from exercising their First Amendment rights. He accordingly does not have standing to bring this claim.

Even if Plaintiff did have standing to bring this challenge, a law will only be held to be unconstitutionally vague if it fails to give fair notice of its provisions so that a person of ordinary intelligence would have a reasonable opportunity to know what is prohibited. *Pine v. City of West Palm Beach, FL*, 762 F.3d 1262, 1275 (11th Cir. 2014). In *Cameron v. Johnson*, the United States Supreme Court upheld a statute that prohibited picketing "in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any county courthouses." 390 U.S. at 616. The requirements outlined in the Resolutions are far clearer, providing specific distances and rules of engagement. The relative clarity of the Resolutions are established by the fact that various groups have been able to successfully obtain permits and hold picketing events.

CONCLUSION

Wherefore, these premises considered, Defendant Marshall County and Sheriff Phil Sims, in his official capacity, hereby respectfully request that this Court enter summary judgment in their favor pursuant to Fed. R. Civ. Pro. 56.

Respectfully submitted this the 4th day of March 2024.

s/Jamie H. Kidd Frawley
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CERTIFICATE OF SERVICE

I hereby certify that on this the 4th day of March 2024, I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and have served it via U.S. Mail on the following non-CM/ECF participant:

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s/Jamie H. Kidd Frawley
OF COUNSEL