No. 08-30047

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN TODD NETHERLAND,

Plaintiff-Appellee,

v.

CITY OF ZACHARY, LOUISIANA; TROY EUBANKS,
OFFICIALLY AND INDIVIDUALLY,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Louisiana

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE, IN SUPPORT OF APPELLEE

CRAIG M. FREEMAN, La. State Bar # 25672

KATIE SCHWARTZMANN, La. State Bar # 30295
ACLU Foundation of Louisiana
P.O. Box 56157
New Orleans, Louisiana 70156

For the American Civil Liberties Union Foundation of Louisiana

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STATEMENT OF RELEVEANT FACTS

While "sticks and stones may break your bones," words are seldom criminal. The City of Zachary argues that when John Netherland quoted the Bible in a public area, he broke the law. While speaking about his faith in a public area in Zachary, Netherland was threatened with arrest for violating Zachary Code Ordinance §58-93.2. The ordinance proscribes (*inter alia*):

> "addressing any offensive, derisive, or annoying words to any other person who is lawfully in the street, or other public place; or call him by any offensive or derisive name, or make any noise or exclamation in his presence and hearing with the intent to deride, offend, or annoy him, or prevent him from pursuing his lawful business, occupation, or duty."

There are few relevant facts in this matter. John Netherland "positioned himself on a public easement ... about 75-100 feet from the entrance to [the Sideline Grill] and began to spread his message." Rec. Doc. 34 p. 2. He quoted the Bible and preached his basic salvation message. *Id.*, p. 2-3. He did so with a loud voice. *Id.*, p. 3. Police were called to the scene twice. The first set of officers testified that they did not witness illegal activity. *Id.*, p. 4. Forty-five minutes later, another officer responded to a second call complaining about Mr. Netherland's speech. That officer (defendant Troy Eubanks) threatened to arrest Mr. Netherland for disturbing the peace. *Id.*, p. 5. Mr. Netherland left, and has refrained from speaking in public about his religious beliefs since that time. *Id.*

The district court did not find that Mr. Netherland addressed patrons individually or called patrons names. *Id.*, p. 21.

Put simply, the City of Zachary argues that quoting the Bible in public is a criminal offense. In its Amicus Brief, the Louisiana Municipal Association (LMA) argues that "name-calling and degradation" are criminal. The overbreadth of this content-based regulation "raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. ACLU*, 521 U.S. 844, 872 (1997).

ARGUMENT

I. STANDARD OF REVIEW

Because the issue in this case is whether free speech rights have been infringed, the review of the injunction "is a mixed question of law and fact and the appropriate standard of review is de novo." *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471, 480 (5th Cir. Tex. 2002); *Int'l Soc'y for Krishna Consciousness of New Orleans, Inc. v. Baton Rouge*, 876 F.2d 494, 496 (5th Cir. 1989) (citing *Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983), cert. denied, 467 U.S. 1259 (1984)). Findings of fact, however, are reviewed only for clear error. *Sugar Busters LLC v. Brennan*, 177 F.3d 258, 265 (5th Cir. 1999); *Hoover v. Morales*, 164 F.3d 221, 224 (5th Cir. 1998). In other words, this Court

should review the factual findings of the district court for clear error, but legal conclusions should be reviewed *de novo*. *Id.*

II. LEGAL STANDARD

Because the standard of review is *de novo*, a quick review of the elements for a preliminary injunction is in order. The four elements of a preliminary injunction are:

1. substantial likelihood of success on the merits;
2. substantial threat that plaintiff will suffer irreparable injury;
3. injury outweighs any harm that the injunction might cause the defendant; and
4. injunction is in the public interest.

Hoover, 164 F.3d at 224.

As the district court noted, the final three elements for the preliminary injunction have been satisfied. *Ruling,* p. 25-6. The Supreme Court held that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347 (1976); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981). The Sixth Circuit noted that irreparable injury "stems from the intangible nature of the benefits flowing from the exercise of those [First Amendment] rights and the fear that, if these rights are not jealously safeguarded, persons will be deterred, even if imperceptibly, from exercising those rights in the future." *United Food &*

Commercial Workers Union, Local 1099 v. Sw. Ohio Reg'l Transit Auth., 163 F.3d 341, 363 (6th Cir. 1998) (internal quotation marks omitted). Here, Mr. Netherland continues to refrain from speaking publicly about his faith. His reasonable fear of arrest continues to deter him from exercising his constitutional rights.

The third element necessary for a preliminary injunction is also satisfied. The potential harm to the defendants is minimal. Courts have found that "there can be no irreparable harm to a [government] when it is prevented from enforcing an unconstitutional statute because 'it is always in the public interest to protect First Amendment liberties.'" *Joelner v. Village of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004) (quoting *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998)).

Finally, an injunction must be in the public interest. "The public interest is best served by enjoining the effect of any ordinance which limits potentially constitutionally protected expression until it can be conclusively determined that the ordinance withstands constitutional scrutiny." *Wexler v. City of New Orleans*, 267 F. Supp. 2d, 559, 568-69 (E. D. La, 2003).

III. LIKELIHOOD OF SUCCESS ON THE MERITS

The key issue here is whether Mr. Netherland has a substantial likelihood of success on the merits. The City of Zachary argues that it can prohibit Mr. Netherland from expressing a religious message on a public area in the City of Zachary because Mr. Netherland is unlikely to succeed on the merits. However, Mr. Netherland is in fact quite likely to prevail in this matter. The Plaintiff-Appellee fully briefed the strict scrutiny analysis that is appropriate here. His analysis mirrors the district court's analysis, which also characterized section (2)(a) of the Zachary Code Ordinance as a content-based regulation. Instead of devoting more time to that accurate analysis, this Amicus will focus on the claim by Defendant-Appellant that the speech involved is somehow not protected speech, or is lesser-protected speech.

A. Speech is Generally Protected

The government has a very limited right to stop speech, and that applies even to speech that it finds disagreeable. "The First Amendment generally prevents government from proscribing speech or even expressive conduct, because of disapproval of the ideas expressed." *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992). In fact, the ACLU has successfully argued that a preliminary injunction is

proper to protect against an overbroad regulation of speech the government finds disagreeable. *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004). "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." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995), citing *R. A. V. v. St. Paul*, 505 U.S. at 391.

B. There are Very Few Categories of Lesser Protected Speech

While the Constitution protects free speech, it is true that the state may limit certain forms of speech. However, these categories are few, and are carefully limited by the courts, to preserve democracy.

> From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

R.A.V. v. St. Paul, 505 U.S. 377, 383 (1992), citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

The freedom of speech protected by the First Amendment does not include a freedom for obscenity (e. g., *Roth v. United States*, 354 U.S. 476 (1957)), defamation (e. g., *New York Times v. Sullivan*, 376 U.S. 254 (1964)) or "fighting words" (e. g. *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572 (1942)). The City

of Zachary would like to add Bible quotes to that very short list of speech with "slight social value."

C. The "Fighting Words" Exception Does Not Apply

Defendant-Appellants assert that Mr. Netherland's speech constituted "fighting words." In *R.A.V. v. St. Paul*, the Court explained the rationale of excluding fighting words from the scope of First Amendment protection. The court noted that, "despite their verbal character, they are essentially a nonspeech element of communication." *R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992). Words become fighting words because there is some "nonspeech" element that justifies regulation. "It may not be the content of the speech, as much as the deliberate verbal or visual assault that justifies proscription." *Hill v. Colorado*, 530 U.S. 703, 716 (2000) quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-11 n.6 (1975). Fighting words lose their constitutional protection because there is a deliberate "verbal or visual" assault that justifies state intervention. Reading the Bible lacks the verbal or visual assault required for state action. The district court did a careful, reasoned analysis of the facts, and did not find evidence of Mr. Netherland assaulting patrons; that finding should not be overturned absent evidence of clear error. Without such an assault, Mr. Netherland's speech is entitled to full protection under the constitution.

Justice Scalia analogized fighting words to noisy sound trucks. "As with the sound truck, however, so also with fighting words: the government may not regulate use based on hostility – or favoritism – towards the underlying message expressed." *R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992). The reasoning in *R.A.V.* follows a consistent pattern in constitutional law. Absent a clear and present danger, the government cannot proscribe speech because it is concerned with the discomfort it might elicit in listeners. *Brazos Valley Coalition for Life, Inc. v. City of Bryan Texas*, 421 F.3d 314, 327 (5th Cir. 2005), citing *Terminiello v. City of Chicago*, 337 U.S. 1 (1949) and *Cox v. Louisiana*, 379 U.S. 536 (1965). Courts have been absolutely uniform in holding that a message cannot be silenced merely because it is offensive to some listeners. It is only when speech crosses the line of "fighting words" that it may be restricted; that line has not been crossed in the immediate case.

The LMA misses the issue at hand by focusing on the wrong provisions of the Zachary Code Ordinance §58-93.2 – namely the "foreseeably disturb or alarm the public" provision. That provision was not the focus of the district court's injunction. The court enjoined the section that punished speech alone, namely section (2)(a) ("addressing any offensive, derisive, or annoying words ... calling him by any offensive or derisive name ..."). This provision punishes words alone,

not an assault that might allow state intervention. "Because the statute would be applied to expression, it could withstand constitutional attack only if it could not be applied to expression protected by the First Amendment." LMA Amicus Brief, p. 7, citing *Cox v. State of Louisiana*, 379 U.S. 536 (1965) and *Gooding v. Wilson*, 405 U.S. 518 (1972). Reading the Bible, cheering for your favorite team and picketing a workplace all have long histories of protection under the First Amendment. The LMA is correct that *Garner v. State of Louisiana* should guide this Court's decision in the case at hand:

> Peaceful conduct, though conceivably offensive to another class of the public, is not conduct which may be proscribed by Louisiana's disturbance of the peace statute without evidence that the actor conducted himself in some outwardly unruly manner." *LMA Amicus Brief*, p. 10-11, citing *Garner v. State of Louisiana,* 368 U.S. 157, 167 (1961).

Mr. Netherland's loud but peaceful reading of the Bible is not criminal.

The main case cited by the Defendant-Appellant and the LMA underscores the need for some underlying action associated with speech. Both briefs cite *Virginia v. Black*, 538 U.S. 343 (2003), but *Black* involved the prosecution of a man for burning a three-story cross on his neighbor's yard. The apparent motive was to "get back" at the African-American neighbors for complaining about shootings in their backyard. *Virginia v. Black*, 538 U.S. 343, 350 (U.S. 2003).

The act of intimidation was prosecuted in *Black*, not the speech involved in burning a cross. Reading a Bible in public cannot be equated to burning a 30 foot cross on the property of another as "payback."

D. Appellants Ask This Court to Create a New Exception to the First Amendment

As outlined above, the circumstances in which courts have limited the constitutional protection afforded to speech are limited. The LMA, as amici for the City of Zachary, argues that this preliminary injunction prevents municipalities from restricting "name-calling and degradation." *LMA Amicus*, p. 2. However, the cases cited by the LMA actually support the notion that peaceful speech, though conceivably offensive, may not be prescribed. *Id.*, p. 3, citing *Garner v. State of Louisiana*, 368 U.S. 157 (1961). Under the LMA rationale, a prayer by an abortion protestor would be criminal. A cheering fan may disturb the peace by jeering fans of an opposing team. Even striking workers picketing their employer could face criminal sanctions. The Constitution does not allow this.

Similarly, the City asks this Court to allow it to penalize those who deliberately try to "annoy and offend those who choose to patronize a business in an obvious effort to harm the operation of that business." *Appellant's Brief*, p. 10. There simply is no exception to the First Amendment for speech that annoys or

offends. Indeed, speech which is geared toward influencing political decisions of the citizenry is at the very core of democracy in this country, and such speech, by definition, is generally offensive to the opposing party. To allow the banishment of all speech considered "offensive" or "annoying" would effectively silence political debate in this country on all controversial political issues, including war, sexuality and abortion, *inter alia*. Additionally, it would allow for a "heckler's veto"- one disagreeing with the speech could silence the speaker by claiming offense.

"The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience." *Hill v. Colorado*, 530 U.S. 703, 716 (2000). Mr. Netherland attempted to persuade the bar patrons that their actions were unwise in his eyes. While his speech may have offended some patrons of the establishment, at no time did his speech rise to the level that would allow state intervention.

Here, the City does not even allege that there was any potential breach of the peace. It is assumed that the state interest offered by the City of Zachary to justify this statute is prevention of the "haranguing" of its citizens, and "the right to be left alone." *Appellant's Brief*, p. 23. Not only has this not been recognized as a compelling state interest, but it has been expressly rejected by the courts, including

the case cited by the City. In *Hill v. Colorado*, 530 U.S. 703, 734 (2000), the Court upheld an 8 foot buffer zone between a speaker and his audience, noting that the buffer was not an unconstitutional prior restraint on speech, because it did not require the speaker to cease communication, but only required the speaker to remain a distance from their listener. It is simply impermissible to prohibit speech on the grounds that it offends a listener, and there is no jurisprudence that can be found that holds otherwise. One court, when faced with a port authority's restriction on speech, explained,

> We acknowledge the legitimacy of the Port's interest and recognize that many of those who communicate with the public, whether they represent Jews for Jesus, the Ku Klux Klan, the Socialist Workers' Party, or the Moral Majority, may deeply offend or antagonize members of the public. We cannot agree, however, that this interest of the Port justifies the infringement of fundamental first amendment rights. " '(A) function of free speech under our system of government is to invite dispute. It may indeed serve its high purpose best when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger....' *Terminello v. Chicago*, 337 U.S. 1,4-5 (69 S.Ct. 894, 895-896, 93 L.Ed. 1131)." *Edwards v. South Carolina*, 372 U.S. 229, 237-238, 83 S.Ct. 680, 684 (1963). To preserve this important function, it is the duty of the state to protect, rather than restrict, those who express unsettling views.

Rosen v. Port of Portland, 641 F.2d 1243, 1248 (9th Cir. 1981).

CONCLUSION

The First Amendment prevents the government from limiting speech because of disapproval of the ideas expressed. *Cantwell v. Connecticut*, 310 U.S. 296, 309-311 (1940). Content-based regulations are presumptively invalid. *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). This is a content-based regulation, as there is no way for an officer on the street to determine whether a speaker is being "offensive, derisive or annoying" without reference to the content of the communication. Because this is a content-based restriction, strict scrutiny is appropriate, and there is no compelling state interest that would justify this law either facially, or as applied to this speaker. There is no basis for arguing that this speech is not protected by the Constitution. When a citizen attempts to quote the Bible in public, the Constitution protects his right to do so without fear of criminal prosecution.

Respectfully submitted,

CRAIG M. FREEMAN, La. State Bar # 25672
2205 Myrtle Avenue
Baton Rouge, LA 70806
Phone (225) 343-0863

KATIE SCHWARTZMANN, La. State Bar # 30295
ACLU Foundation of Louisiana
P.O. Box 56157
New Orleans, Louisiana 70156
Phone: (504) 592-8056

For the American Civil Liberties Union of Louisiana

BY: KATIE SCHWARTZMANN

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing Amicus Brief has been mailed this the 27th day of May, 2008 via first-class U.S. mail to:

Mr. Kevin Theriot and Mr. Joel Oster
Alliance Defense Fund
Kansas Regional Service Center
15192 Rosewood Drive
Leewood, Kansas 66224
Counsel for Plaintiff-Appellee, John T. Netherland

Mr. James L. Hilburn
4960 Bluebonnet Blvd., Suite A
Baton Rouge, Louisiana 70809
Attorney for City of Zachary, LA and Lt. Troy Eubanks, Defendants-Appellants

KATIE SCHWARTZMANN

CERTIFICATE OF COMPLIANCE

Pursuant to the Fifth Circuit Rule 29(c)(5), the undersigned certifies this brief complies with the type-volume limitations of Fifth Circuit Rule 29 and Federal Rule of Appellate Procedure Rule 29:

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Respectfully submitted,

CRAIG M. FREEMAN, La. State Bar # 25672

KATIE SCHWARTZMANN, La. State Bar # 30295
ACLU Foundation of Louisiana
P.O. Box 56157
New Orleans, Louisiana 70156

For the American Civil Liberties Union of Louisiana

BY: KATIE SCHWARTZMANN