IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

LINWOOD CHRISTIAN, Plaintiff, v. CITY OF PETERSBURG and W. HOWARD MYERS, Defendants.	)	Civil No. 3:15cv00449

PLAINTIFF'S RESPONSE TO DEFENDANT CITY OF PETERSBURG'S MOTION TO DISMISS

Plaintiff, by counsel, responds to Defendant W. Howard Myers' Motion to Dismiss as follows:

INTRODUCTION

On January 20, 2015, Mayor W. Howard Myers, duly presiding over a City Council meeting pursuant to the City Charter and the City Council's rules, banned Petersburg resident Linwood Christian from speaking at the meeting solely on the basis of unpaid fines. Because Mr. Christian's fines bore no relationship to the purposes of a City Council meeting, this action violated his First Amendment right to free speech. Myers claims he is entitled to qualified immunity, even though the law was clearly established that public comment periods are limited public forums, and that restrictions on speech in such a forum must be reasonably related to the purposes of the forum. The Mayor's Motion to Dismiss should be denied.

STATEMENT OF FACTS

Plaintiff Linwood Christian is a resident of the Petersburg, Virginia. (Compl. ¶ 3.) As such, he is eligible to speak at the "Public Information Period" that is part of every regular Petersburg City Council meeting. (Compl. ¶ 12; Ex. A p. 5.) Defendant W. Howard W. Myers is the Mayor of Petersburg (Compl. ¶ 5), and, in that role, presides over City Council meetings. (Compl. ¶¶ 10, 11; Ex. A.)

On January 20, 2015, Mr. Christian signed up to speak during the Public Information Period at the City Council meeting. (Compl. ¶ 12, 16; Ex. A.) The Mayor, presiding over the meeting, banned Mr. Christian from speaking during the Public Information Period solely because of an unpaid fine owed to the City. (Compl. ¶¶ 17, 21; Ex. B; Ex. C.)

STANDARD OF REVIEW

A complaint must contain "a short and plain statement of the claim showing that the pleading is entitled to relief." Fed. R. Civ. P. 8(a)(2). To survive a motion to dismiss under Rule 12(b)(6), the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcraft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. (citing *Twombly*, 550 U.S. at 556). "Factual allegations must be enough to raise the right to relief above the speculative level," *Twombly*, 550 U.S. at 555, with all the allegations in the complaint taken as true and all reasonable inferences drawn in the plaintiff's favor. *Chao v. Rivendell Woods, Inc.,* 415 F.3d 342, 346 (4th Cir. 2005). In deciding a Rule 12(b)(6) motion, "a court evaluates the complaint in its entirety as well as

documents attached to or incorporated into the complaint." *E.I. Dupont de Nemours & Co. v. Kolon Indus.,* 637 F.3d 435, 448 (4th Cir. 2011).

ARGUMENT

I. THE MAYOR'S EXCLUSION OF MR. CHRISTIAN FROM THE PUBLIC INFORMATION PERIOD VIOLATED HIS FIRST AMENDMENT RIGHT TO FREE SPEECH.

The City banned Mr. Christian from speaking during the Public Information Period solely on the basis of unpaid fines owed to the City. The Defendants insist that this arbitrary and vindictive act was consistent with the First Amendment, a baffling position. Both Defendants concede, as they must, that the Public Information Period is a limited public forum. (City Mem. at 8; Myers Mem. at 3.)[1] *See Bach v. Sch. Bd. of Va. Beach,* 139 F. Supp. 2d 738, 741 (E.D. Va. 2001*)* ("by incorporating a public comment period into its agenda, [government body] created a limited public forum."); *Steinburg v. Chesterfield County Planning Commission*, 527 F.3d 377, 385 (4th Cir. 2008) (identifying public meeting as a limited public forum); *accord City of Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 175-76 (1976) (prohibiting government body from barring speakers based on employment status). Neither Defendant, however, has identified any significant or even legitimate government interest for barring Mr. Christian from the forum – let alone an interest that is in any way related to the purposes of that forum.

The contours of the government's power to restrict speech in a limited public forum are well defined. A limited public forum has two levels of First Amendment analysis: the "internal standard" and the "external standard." *Goulart v. Meadows*, 345 F.3d 239, 250 (4th Cir. 2003) quoting *Warren v. Fairfax County*, 196 F.3d 186, 193-194 (4th Cir. 1999) (en banc). The

[1] For ease of reference, the Defendants' memoranda in support of their motions to dismiss (Dkt. Nos. 5 and 7) are cited as "City Mem." and "Myers Mem.," respectively.

internal standard applies when "the government excludes a speaker who falls within the class to which a limited public forum is made generally available." *Id.* quoting *Ark. Educ. Tv Comm'n v. Forbes*, 523 U.S. 666, 677 (1998). Such exclusions are subject to strict scrutiny; the government may only "enforce regulations of the time, place, and manner of expression which are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Goulart*, 345 F.3d at 248 quoting *Perry Educ. Ass'n Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

The external standard "places restrictions on the government's ability to designate the class for whose especial benefit the forum has been opened." *Goulart,* 345 F.3d at 250 (quoting *Warren,* 196 F.3d 194). "[T]he selection of a class by the government must only be viewpoint neutral and reasonable in light of the objective purposes served by the forum." *Id. Accord*, *Steinburg,* 527 F.3d at 385; *Child Evangelism Fellowship of South Carolina v. Anderson School District Five*, 470 F.3d 1062, 1067-68 (4th Cir. 2006). The government may impose reasonable restrictions related to time, place, and manner in conducting limited public forums. *Steinburg*, 527 F.3d at 385.

In this case, the internal standard applies, because Mr. Christian, a Petersburg resident, is unquestionably a member of the class generally permitted to use the forum. *See* Compl. Ex. A p. 5 (speakers during Public Information Period must be residents or business owners in the City). Neither Defendant has asserted any significant governmental interest to which the exclusion of Mr. Christian was "narrowly tailored." Even applying the more deferential external standard, Mr. Christian's exclusion from the public comment period violates the First Amendment because it bore no relationship to the purpose of the forum.

The purpose of a comment period in a public meeting is to allow residents and business owners to inform City Council matters of public concern.[2] Thus, courts have held that the government may limit speech to specific agenda topics, limit the duration of speech, and cut off speech that is reasonably perceived to threaten or disrupt a meeting. *Steinburg,* 527 F.3d at 390. When necessary, the government may impose reasonable measures to conduct limited public forums in a fair and orderly manner. *Id.*; *Adams v. City of Wellsburg,* 2008 U.S. Dist. LEXIS 45444 (N.D. W. Va. June 6, 2008).

That is not what happened here. Rather, the City banned Mr. Christian from speaking at the City Council meeting solely on the basis of unpaid fines owed to the City. Such a reason has no relation whatsoever to the purpose of the Public Information Period, let alone a reasonable one. Otherwise, any resident with an unpaid parking ticket could be barred from speaking at City Council meetings. The City has not and cannot explain how Mr. Christian's unpaid fine makes him any less qualified than any other individual to state an opinion to a government body.

Defendant Myers suggests that barring Mr. Christian from speaking was reasonably related to the City's interest in collecting his unpaid fines. (Myer Mem. at. 4.) Even if this were a viable means of collecting unpaid fines – a dubious proposition at best – doing so would still violate the First Amendment. A restriction on speech in a limited public forum is not valid because it serves *some* government interest; it must be related to the *purpose of the forum*. Since

[2] The free speech concerns here are magnified because speaking to City Council on matters of public concern is "core" speech that goes to the heart of the First Amendment. The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964)."[Speech] concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). The Supreme Court has frequently reaffirmed that speech on public issues occupies the "'highest rung of the hierarchy of First Amendment values,'" and is entitled to special protection. *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980). *Connick v. Myers*, 461 U.S. 138, 145 (1983).

the purpose of this forum is to allow residents to express views to City Council, rather than to collect outstanding debts, Mr. Christian's exclusion does not meet this requirement.[3]

Defendant City of Petersburg argues that its exclusion of Mr. Christian was constitutional because it did not amount to viewpoint discrimination. (Def. City Mem. At 9). While the defendant is correct that viewpoint neutrality is a requirement for restrictions on speech in a limited public forum, it is not the *only* requirement. As explained above, exclusion of an eligible speaker must also be narrowly tailored to serve a compelling government interest, or, applying the more deferential external standard, reasonably related to the purpose of the forum. Even viewpoint-neutral restrictions are unconstitutional if they lack such a relationship. If viewpoint neutrality were the only standard, the City could bar left-handed people from speaking at meetings, as long as the rule applied equally to Republican and Democratic southpaws.

In sum, Mr. Christian was excluded from the Public Information Period for no valid reason relating to the purpose of that forum. Instead, his exclusion was based on an "ad hoc parliamentary ruling by [a] presiding official[]," *Steinburg*,527 F.3d at 385, in violation of First Amendment standards for limited public forums.

II. DEFENDANT MYERS IS NOT ENTITLED TO QUALIFIED IMMUNITY

Qualified immunity may only be granted to officials "who commit constitutional violations but who, in light of clearly established law, could reasonably believe that their actions were lawful." *Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011) (en banc) (citing *Saucier v. Katz*, 533 U.S. 194, 206 (2001)). The standard is objective reasonableness: the "salient question"

[3] More generally, the notion that the government may use a person's rights as leverage to compel performance of a completely unrelated duty is abhorrent to the Constitution. Under such a theory, the government could prohibit a citizen from voting until he registered his vehicle, or bar someone from attending a rally until he filed his overdue tax return.

is whether "the state of the law" at the time of the events at issue gave the official "fair warning" that his conduct was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741 (U.S. 2002). "To prevail under qualified immunity, [the defendant] must show either that there was no constitutional violation or that the right violated was not clearly established." *Durham v. Jones*, 737 F.3d 291, 298-299 (4th Cir. 2013).

"[A] constitutional right is clearly established when 'its contours [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Durham v. Jones*, 737 F.3d at 303, quoting *Hope*, 536 U.S. at 739. Government officials may be "on notice that their conduct violates established law even in novel factual circumstances," even if there are no prior cases with "fundamentally similar" or "materially similar" facts. *Hope,* 536 U.S. at 733; *Jones v. Buchanan*, 325 F.3d 520, 531-32 (4th Cir. 2003).

On January 20, 2015, a reasonable public official would have known that the First Amendment prohibits a local government from barring an individual from speaking during a public comment period based solely on his failure to pay an unrelated fine.

First, in January 2015, it was clearly established that a public comment period at a government meeting is a limited public forum. *Steinburg*, 527 F.3d at 385. Second, it was clearly established in January 2015 that eligible speakers may not be excluded from a limited public forum unless that exclusion is narrowly tailored to serve a compelling government interest, and moreover, that any other restrictions on speech in a limited public forum must be reasonable in light of the purpose of the forum. *Goulart*, 345 F.3d at 250; *Steinburg*, 527 F.3d at 385. Thus, the Defendants were on notice of the well-established "general contours of the applicable First Amendment rights" of Mr. Christian to access the limited public forum.

Any reasonable official would know that those "general contours" do not permit a government body to exclude a person from a public comment period based on an unpaid fine, because such a reason has no relationship at all to the purposes of the public comment period. Indeed, neither Defendant has suggested any kind of relationship between Mr. Christian's debt status and the public comment period. Defendant Myers relies for his qualified immunity argument chiefly on the absence of a case presenting these precise facts. But "officials can still be on notice that their conduct violates established law even in novel factual circumstances," and "factually analogous precedent is not a prerequisite for finding that a right is clearly established." *Tobey v. Jones,* 706 F.3d 379, 391 n.6 (4th Cir. 2013). "[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." *Hope*, 536 U.S. at 741 (internal quotation marks and alteration omitted). That is the case here. The absence of a relationship between paying a fine and speaking at a public meeting is so obvious that it is unsurprising that these precise facts have not appeared in prior cases; it would not even occur to a reasonable public official to engage in such conduct.

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss should be denied.

Dated: September 11, 2015

Respectfully submitted,

LINWOOD CHRISTIAN

By:

/s/ Rebecca K. Glenberg

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 2015, I filed the foregoing document with the Clerk of Court using the CM/ECF system, which will automatically serve an electronic copy on all counsel of record.

/s/ Rebecca K. Glenberg