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**UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING**

**WYWATCH FAMILY ACTION, INC., a
Wyoming non-profit corporation,**

Plaintiff,

v.

RICH CATHCART, et al.

Defendants.

Civ. No. 12-cv-001-f

**BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS
CURIAE IN SUPPORT OF PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION**

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INTRODUCTION

The American Civil Liberties Union (ACLU) disagrees with the content of Wyoming Family Action's (WyFA) speech. However, if the First Amendment has any meaning, it is that the government cannot suppress the free speech because it – or anyone else – disagrees with the speech. The arbitrary denial of one organization's message on an issue that affects citizens throughout the state puts at risk the right of all organizations to communicate their messages.

When the government decides who may speak based on substantive criteria, it acts as a censor. To guard against the danger that the government will impermissibly use its power to censor disfavored speech, the First Amendment requires careful scrutiny of rules restricting speech. This is true even if the speech takes place on the government's own property. Although the level of scrutiny applied to restrictions on speech on government property varies depending on the nature of the property involved, in no event may the government grant the use of its property to people whose views it finds acceptable but deny use to those wishing to express less favored or more controversial views.

If the State Building Commission¹ intentionally opened the Herschler Gallery to nonprofit organizations' speech designed to influence legislators, including in the form of booths and displays, it is prohibited from excluding the WyFA's message, regardless of viewpoint. This Court should hold that the Herschler Gallery is a designated public forum and that the exclusion of WyFA's display was unreasonable, and infringed on WyFA's rights to freedom of expression guaranteed by the First and Fourteenth Amendments of the United States Constitution.

Only if this Court determines that the government did not designate the space as a forum

¹ Hereinafter referred to as the government.

in which nonprofit organizations seek to influence legislators, is the viewpoint inquiry necessary. As WyFA has ably outlined how the government engaged in viewpoint discrimination, *amicus* will confine itself to arguing that the government's exclusion of WyFA's display violated the First and Fourteenth Amendment's because it was unreasonable and because the Herschler Gallery is a limited public forum. As these important constitutional concerns have not been adequately raised during the process of these proceedings, we feel it is crucial to provide the court with analysis.

INTEREST OF AMICUS

The interest of *amicus curiae* is set forth in the accompanying motion for leave to file this brief, and is not repeated here.

ARGUMENT

I. THE GOVERNMENT'S EXCLUSION OF WYFA'S DISPLAY WAS NOT REASONABLE BECAUSE THERE IS NO EVIDENCE THAT THE DISPLAY WOULD INTERFERE WITH THE HERSCHLER GALLERY.

The government does not have to grant access to "all who wish to exercise their right to free speech on every type of [public] property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities."² The reasonableness of the government's exclusion of speech depends on the purpose of the space from which it is excluded.³ For the restriction to be reasonable, the excluded speech must actually interfere with the forum's stated purposes.⁴ What matters to the reasonableness inquiry is not whether the

² *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 799–800 (1985).

³ *Sumnum v. Ogden*, 297 F.3d 995, 1003 (10th Cir. 2002).

⁴ *Cornelius*, 473 U.S. at 830.

excluded speech reasonably falls into a category of banned speech, or even whether the ban itself is reasonable, but whether the government's justification for banning the speech at issue is reasonable "in light of the characteristic nature and function of the particular forum involved."⁵

To support a determination that a restriction on speech in a non-public forum is reasonable, "there must be evidence that the restriction reasonably fulfills a legitimate need."⁶ It is not enough to determine that the government's policy banning a category of speech is reasonable;⁷ the court must also assess the reasonableness of the application of the policy to the excluded speech at issue. The burden is on the government to prove that its rules and its application of the rules in fact serve a legitimate interest of the state.⁸

The government here may assert that it has a legitimate interest in avoiding disruption. Members of the public expressed concern and made inflamed telephone calls to Cathcart's office. However, there is no evidence that these comments by more sensitive members of society interfered with the use of the forum's purpose.

⁵ *Sumnum v. Callaghan*, 130 F.3d 906, 915 n.13 (10th Cir. 1997), quoting *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51 (1981).

⁶ *Sammartano v. First Judicial Circuit Court*, 303 F.3d 959, 967 (9th Cir. 2002).

⁷ The ACLU does not believe that the SBC Display Policy is reasonable, as it is vague, contains virtually no guidance or standards to determine how to enforce the policy, and risks the exclusion of speech due to arbitrary discrimination.

⁸ *United Food & Commercial Workers Union, Local 1099 v. Southwest Reg. Transit Auth.*, 163 F.3d 341, 357 (6th Cir. 1998) ("SORTA").

The government may also state a desire to maintain neutrality on controversial issues⁹ as a legitimate interest, but permitting WyFA's display does not engage the government in controversial issues. Rather, it provides a forum in which an organization may educate legislators about its position on an issue. Nothing about WyFA's display would cause a legislator or citizen to believe that the government was endorsing the organization's message or taking sides on a controversial issue. Moreover, organizations who erect displays in the Herschler Gallery commonly seek to influence legislators on one side or the other of bills before the legislature.

The similarity of the purpose of WyFA's speech (to influence legislators) and its display (posters), to that of other organizations, the lack of interference with the purpose of the forum, and the lack of risk that the government would be associated with a controversial issue, demonstrate that the advertisement is compatible with the purposes of the forum.

II. THE GOVERNMENT'S CONTENT-BASED EXCLUSION OF WYFA'S DISPLAY IS SUBJECT TO HEIGHTENED SCRUTINY BECAUSE THE HERSCHLER GALLERY IS A DESIGNATED PUBLIC FORUM, AND THE DISPLAY WAS CONSISTENT WITH THE PURPOSE OF THE FORUM.

A designated public forum is created because the government intentionally does so.¹⁰ Whether the government intended to designate the Herschler Gallery as a public forum is gauged

⁹ The State Building Commission Display Policy states that "Approval by SBC Secretary. SBC Advised of All Displays. *Controversial Displays* -Secretary Will Flag or Personally Discuss Requests with Governor's Office." Doc. 01-main, ¶ 31; Doc. 02-3 (emphasis added).

¹⁰ *Cornelius*, 473 U.S. at 802.

by its policies and practices in using the space and also the nature of the property and its compatibility with expressive activity.¹¹

The imposition of some restrictions on the use of the forum does not preclude creation of a public forum, but may demonstrate that the government intends to create a limited public forum, open only to certain kinds of expression.¹² But even in a limited public forum, the constitutionality of a restriction on expression that is consistent with the forum's purpose is determined using the more rigorous public forum standard.¹³

Exclusions of speech that otherwise comport with the purpose of the forum are subject to strict scrutiny while restrictions on speech that fall outside the general purpose for which the government opened the forum need only be reasonable and viewpoint-neutral.¹⁴ The

¹¹ *Hawkins v. City & County of Denver*, 170 F.3d 1281, 1286-87 (10th Cir 1999).

¹² *Summum v. Callaghan*, 130 F.3d 906, 916 (10th Cir.1997).

¹³ *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009); *Cornelius*, 473 U.S. at 800.

¹⁴ *See Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) ("If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny."); *Cornelius*, 473 U.S. at 806 (speaker may be excluded from limited public forum only "if he is not a member of the class for whose especial benefit the forum was created"); *Perry Educ. Ass'n v. Perry Educators' Ass'n*, 460 U.S. 37, 48 (1983) (once limited forum has been created, entities of "similar character" to those allowed access may not be excluded); *Zalaski v. City of Bridgeport Police Dept.*, 613 F.3d 336, 342 (2d Cir. 2010) ("In a limited public forum, strict scrutiny does not apply to expressive activities outside the general purpose for which the government opened the forum. Restrictions

government has, *in practice*, opened up the Herschler Gallery to nonprofits and state organizations seeking to influence legislators on current legislation. There is no evidence in the record that WyFA’s display has interfered with the ability of organizations to communicate their messages and to attempt to influence legislators. The nature of the Herschler Gallery, coupled with the government’s practice of permitting organizations to set up displays, establishes that the government has dedicated the space to expressive activity similar to that of WyFA. Accordingly, the government’s removal of the display violated the First Amendment rights of WyFA unless it was narrowly tailored to a compelling governmental interest.

A. The Government’s Past Practice Demonstrates that It Has Intentionally Opened the Forum to Displays Like WyFA’s Posters.

The government’s statement of its intent alone does not resolve the public forum question.¹⁵ Instead, forum classification must be examined according to the circumstances of the

on activities outside the established purpose of the forum need only be reasonable and viewpoint neutral.”); *ACLU v. Mote*, 423 F.3d 438, 444 (4th Cir. 2005) (“Once a limited or designated public forum is established, the government cannot exclude entities of a similar character to those generally allowed.”); *United States v. Goldin*, 311 F.3d 191, 196 (3d Cir. 2002) (“the constitutionality of a restriction on expressive activity that is consistent with a limited public forum’s purpose is determined using the more rigorous public forum standard”); *see generally* Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 *Nova L. Rev.* 299, 326-27 (2009) (explaining that two levels of scrutiny apply to speech excluded from limited public fora).

¹⁵ *Hopper v. City of Pasco*, 241 F.3d 1067, 1075 (9th Cir. 2001) (in gauging whether government established designated public forum, “[w]hat matters is what the government actually does —

particular case and should be evaluated based on what the government does. When it comes to intent, the government's "actual practice speaks louder than words."¹⁶ This factual inquiry ensures that the state has not created a vague policy in order to justify suppression of a particular message. A written policy must be consistently enforced in practice if it is to have any weight in determining the government's intent to open a channel for expressive communication.¹⁷ Here, the government's policy merely says that "Posters, Banners, etc., are Not to be Attached to Buildings or Fixtures."

The unprincipled application of its written policy and lack of clear standards for inclusion and exclusion in the forum make it impossible to glean any intent from the government's written policy. The government's intent to designate the Herschler Gallery as a forum for speech like that of WyFA must instead be judged by its past practice in accepting similar displays.

1. The Government's Practice Has Been to Permit Displays of Nonprofit and State Organizations like WyFA.

specifically, whether it consistently enforces the restrictions on the use of the forum that it adopted"); *SORTA*, 163 F.3d at 352 ("[w]e do not believe [government]'s stated intent to operate its advertising space as a non-public forum, without more, is dispositive.

¹⁶ *Grace Bible Fellowship, Inc. v. Maine Sch. Admin. Dist. No. 5*, 941 F.2d 45, 47 (1st Cir. 1991).

¹⁷ *See, e.g., Hopper*, 241 F.3d at 1076 ("A policy purporting to keep a forum closed (or open to expression only on certain subjects) is no policy at all for purposes of public forum analysis if, in practice, it is not enforced or if exceptions are haphazardly permitted.").

Determining whether the government's past use of the Herschler Gallery demonstrates an intent to open the space as a forum for speech like the WyFA display is an inherently factual inquiry. The objective evidence in this case reveals that the government's past practice was to permit the erection of booths/displays by nonprofit and state organizations seeking to influence legislators and thus it intended to open up the space to displays like that of WyFA. As detailed in WyFA's brief, the government granted authorization to numerous displays sponsored by nonprofit and government groups.

Because of the risk that government officials will use their discretion to interpret an ambiguous policy as a pretext for censorship, closer scrutiny is required when the government bans speech under such a protean standard.¹⁸ Accordingly, when the government follows "an ad hoc policy where the acceptability of an advertisement depends on the whim of the decision-maker," as government has, there is a presumption that a public forum has been created.¹⁹

¹⁸ See *Hopper*, 241 F.3d at 1077-78 ("Absent objective standards, government officials may use their discretion to interpret the policy as a pretext for censorship. Therefore, 'the more subjective the standard used, the more likely that the category will not meet the requirements of the First Amendment.'") (quoting *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 575 (9th Cir. 1984)) (internal citations omitted); *Hopper*, 241 F.3d at 1080 (in absence of objective criteria set out in advance, "we must scrutinize [government's] actual practice all the more closely for apparent inconsistency or abuse in enforcing the policy"); *SORTA*, 163 F.3d at 352.

¹⁹ *SORTA*, 163 F.3d at 353 n.6 (evidence that governmental entity "has not consistently followed its written policy, but instead has maintained an ad hoc policy where the acceptability of an advertisement depends on the whim of the decision-maker... strongly suggest[s] that [entity] has

2. *The Government Cannot Distinguish WyFA's Display from Speech Permitted in the Forum by Labeling its Content "Controversial."*

The government has no guidelines for deciding what constitutes a controversial display, and the term "controversial" is not "immediately obvious" or "self-defining," so the court must look past labels and compare the excluded display with other displays that the government has permitted.²⁰ The government has opened the forum to displays that, like WyFA's posters, are designed to persuade legislators on matters of current legislation, but purportedly rejected WyFA's display simply because it resulted in messages of concern and inflamed phone calls. The appearance of viewpoint discrimination is heightened by the government's lack of guidelines for determining what constitutes a controversial display.

Given the lack of any definition of "controversial display" in the policy, and the similarity of WyFA's display to other displays approved for the Herschler Gallery, support the conclusion that the Herschler Gallery is a designated public forum for speech like WyFA's display.

B. WYFA'S DISPLAY, WHICH WAS INTENDED TO INFLUENCE LEGISLATORS ABOUT MATTERS OF CURRENT LEGISLATION, WAS CONSISTENT WITH THE FORUM'S PURPOSE.

created a public forum").

²⁰ *Airline Pilots Ass'n Int'l*, 45 F.3d 1144, 1154 n.7 (7th Cir. 1995)(instructing district court to compare excluded advertisement to ones previously displayed to determine if content is similar, rather than rely on government's assertion that advertisement violated policy barring "political" speech because "content of the word 'political' is not immediately obvious").

“The decision of the Government to limit access to the [forum] is not dispositive in itself; instead, it is relevant for what it suggests about the Government’s intent in creating the forum.”²¹ Equally important to the determination of the government’s intent is the compatibility of the excluded speech with the purpose of the forum.²² Typically, no intent will be found if the principal function of the property would be disrupted by expressive activity.²³ On the other hand, “courts will infer an intent on the part of the government to create a public forum where the government’s justification for the exclusion of certain expressive conduct is unrelated to the forum’s purpose” because of the heightened potential for government censorship in those situations.²⁴

As an initial matter, the government’s use of the Herschler Gallery to permit organizations to attempt to influence legislators through expressive activity suggests that the government has dedicated the space to expression in the form of booths and displays. Clearly, this expressive use has not interfered with the government’s provision of providing space to

²¹ *Cornelius*, 473 U.S. at 805.

²² *See id.* at 802-04 (court examines not only policy and practice of government but also nature of property and its compatibility with expressive activity to discern government’s intent); *SORTA*, 163 F.3d at 350 (“Discerning whether the government permits general access to public property or limits access to a select few does not end our inquiry, however, for we must also assess the nature of the forum and whether the excluded speech is compatible with the forum’s multiple purposes).

²³ *Cornelius*, 473 U.S. at 804.

²⁴ *SORTA*, 163 F.3d at 341, 351-52.

organizations, as the government would not have opened the space to organizations' speech in the first place, or would have discontinued its practice. The relevant question, then, is whether WyFA's display is compatible with the purpose of the Herschler Gallery, as judged by the government's previous approval of similar displays and the relationship between the forum's purpose and the government's justification for excluding WyFA's display. If it is, then that suggests that the government intended to open the space to speech like that of WyFA's display.

The government's practice has been to accept displays like WyFA's posters. Most importantly, however, the government cannot that mere concern and inflamed phone calls make WyFA's display any less compatible with the purpose of the forum than any of the posters that have been displayed.

In *Cornelius*, for example, the Supreme Court held that the exclusion of advocacy groups from a federal workplace charitable solicitation campaign was reasonable because it was adopted to avoid interruptions to the performance of the duties of employees.²⁵ And in *Arkansas Educational Television Commission*, the Court held that limits on the number of candidates allowed to participate in a televised political debate were reasonable due to the logistical impossibility of accommodating everyone.²⁶ By contrast, there is no evidence that "the principal function of the property would be disrupted by expressive activity" of the sort that WyFA wishes to engage in.²⁷

²⁵ *Cornelius*, 473 U.S. at 806.

²⁶ *Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666, 680-81 (1998).

²⁷ *Cornelius*, 473 U.S. at 804.

The government's sole basis for removing WyFA's display – expressions of concern and phone calls, in response to what the government might subjectively deem a controversial display – amounts to viewpoint discrimination, which is not a legally permissible basis for deeming a display incompatible with the forum's purpose.

C. THE GOVERNMENT'S REMOVAL OF WYFA'S DISPLAY WAS NOT NARROWLY TAILORED TO A COMPELLING GOVERNMENTAL INTEREST.

Because the government has designated the Herschler Gallery as a public forum for speech similar to WyFA's display, content-based restrictions on speech in the forum must pass strict scrutiny consistent with the First Amendment.²⁸ The government may not grant the use of a forum to speech it finds acceptable, but deny use for less favored or more controversial speech. Accordingly, the government's removal of the WyFA display violated WyFA's constitutional rights unless the government can show that it had a compelling interest in removing the display and that its decision was narrowly tailored to that interest. Given the lack of any evidence that the public's expressions of concern and phone calls would interfere with the government's provision of public space for organizations seeking to influence legislators, the only justification the government has for excluding the display is what the government might assert is a controversial message. Because excluding the display "based on ... the limited possibility of

²⁸ *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45-46 (1983);

International Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678, 112 S.Ct. 2701, 120 L.Ed.2d 541 (1992).

controversy fails this historically stringent test,” the government’s removal of the display violates the First Amendment.²⁹

CONCLUSION

For the foregoing reasons, *Amicus* urges this court to hold that the Herschler Gallery has been opened as a designated public forum and that the exclusion of WyFA’s display was unreasonable, and infringed on WyFA’s rights to freedom of expression guaranteed by the First and Fourteenth Amendments of the United States Constitution. In the alternative, this Court should find that the government engaged in impermissible viewpoint discrimination in excluding WyFA’s display.

Dated this 17th day of January, 2012.

Respectfully submitted,
/s/ Jennifer Horvath

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²⁹ See *Hopper*, 241 F.3d at 1082 (“The mere fact that the works caused controversy is, of course, patently insufficient to justify their suppression.”).