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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GRANT T. COGSWELL,

Plaintiff,

v.

CITY OF SEATTLE and CITY OF
SEATTLE ETHICS AND ELECTIONS
COMMISSION,

Defendants.

No. C01-1209L

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

On August 7, 2001, plaintiff filed a motion for preliminary injunction to compel the City of Seattle and its Ethics and Elections Commission to publish an uncensored version of his candidate statement in the voters' pamphlet that was issued in connection with the September 18, 2001, primary election. The Court denied the motion for preliminary relief, finding that, in light of the nature of the forum provided by the voters' pamphlet¹ and prior judicial rulings in similar factual contexts,² plaintiff's likelihood of success on the merits was doubtful. The Court further found that the public's interest would not be served by allowing Mr. Cogswell to criticize his opponent when all the other candidates were required to comply with the City's ordinance.

¹ See Hopper v. City of Pasco, 241 F.3d 1067, 1074-75 (9th Cir. 2001); Kaplan v. County of Los Angeles, 894 F.2d 1076, 1080 (9th Cir. 1990).

² See Clark v. Burleigh, 841 P.2d 975 (Cal. 1992); Baker v. Pierce County, C97-5527 RJB (W.D. Wash. September 29, 1997).

ORDER GRANTING PLAINTIFF'S
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1 The constitutional issues raised in this litigation are again before the Court on
2 plaintiff's motion for summary judgment. The parties have fully briefed the issues on a schedule
3 designed to obtain a ruling before the candidates must submit their statements for inclusion in
4 the general election voters' pamphlet. Both sides of this debate are to be commended for their
5 high quality submissions, their obvious mastery of the constitutional issues, and their
6 outstanding oral presentations.

7 In 1985, the City of Seattle accepted the state's invitation to publish and distribute
8 a voters' pamphlet.³ Pursuant to state law, the pamphlets may include "information on
9 candidates," but any statements submitted by the candidate must "be limited to those about the
10 candidate himself or herself." RCW 29.81A.010 and 29.81A.030(3). The City's related
11 ordinance specifically provides that "[a] candidate's campaign statement shall not discuss the
12 opponent." SMC 2.14.060. Plaintiff argues that the City's restriction on the content of his
13 candidate statement violates the federal and state constitutional guarantees of freedom of
14 speech.⁴

15
16 ³ Plaintiff has also challenged the constitutionality of the City's restriction on reference to one's
17 opponent in the video voters' guide statements, as set forth in Rule 3.5 of the 2001 Video Voters' Guide
18 Rules for Participation. The parties agree that the restrictions are similar for purposes of the following
19 constitutional analysis.

20 ⁴ At oral argument, plaintiff withdrew his challenge to the constitutionality of RCW 29.81A.010
21 and 29.81A.030(3), arguing that the state law provisions are susceptible to an interpretation which
22 complies with the Constitution. The Court agrees. The state law requirement that statements be "about
23 the candidate himself or herself" is broader than the City's ordinance which prohibits all references to
24 one's opponent. While the state law clearly prohibits candidates from advertising their businesses,
25 ranting against the policies of the United Nations, or otherwise discussing topics unrelated to their
26 candidacy, it can and should be read to allow the presentation of all information about the candidate and
his candidacy, even if a proper introduction would require mention of an opponent. Plaintiff's
candidacy highlights the differences between the state and local restrictions. Whereas the City rejected
plaintiff's statement simply because it referred to the incumbent, the statements' obvious focus on Mr.
Cogswell, the reasons behind his decision to run for office, and his positions on various issues would
satisfy the requirements of the state law. Nor is Mr. Cogswell's situation unique. A candidate who

1 The Court does not take limitations on speech lightly, and it recognizes that the
2 constitutional guarantee of free speech has its "fullest and most urgent application" in the
3 political arena. Brown v. Hartlage, 456 U.S. 45, 53 (1982) (quoting Monitor Patriot Co. v. Roy,
4 401 U.S. 265, 271-72 (1971)). Nevertheless, there are certain types of speech and certain fora in
5 which, under the Supreme Court's jurisprudence, speech may be regulated and limited by the
6 government without violating the First Amendment. The parties agree that the voters' pamphlet
7 at issue in this litigation is a limited public forum, meaning that the government has created the
8 forum for certain groups and/or has opened up the forum for the discussion of certain topics.
9 See Hopper v. City of Pasco, 241 F.3d 1067, 1074 (9th Cir. 2001). Restrictions on speech are
10 permissible in limited public fora as long as the restriction (1) is reasonable in light of the
11 purpose for which the forum was created and (2) does not discriminate on the basis of viewpoint.
12 See Good News Club v. Milford Central Sch., ___ U.S. ___, 121 S.Ct. 2093, 2100 (2001).

13 The Court finds, as it did in the preliminary injunction context, that the prohibition
14 on statements about a candidate's opponent is reasonable in light of the purpose for which the
15 City created this limited public forum. The preponderance of evidence before the Court supports
16 the conclusion that the City created this forum so that a particular class of persons, namely
17 candidates for political office, can distribute information on a very limited range of topics,
18 namely the candidates' basic biographical and philosophical information. The pamphlets were
19 never intended to provide an open-ended campaign tool or to replace public speechmaking and
20 campaigning. They are, after all, a limited forum, both in purpose and in scope. Plaintiff's
21 objections must fail in the context of a First Amendment challenge where the forum is intended

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23 believes the long tenure of an incumbent justifies his removal from office (as in the 1994 Congressional
24 race between George Nethercutt and then-Speaker Thomas Foley) or a candidate who believes the
25 incumbent should be held accountable for reneging on a promise to serve only three terms (as occurred
26 in Representative Nethercutt's 2000 campaign) needs to make such a reference to explain why the
candidate himself or herself is mounting the campaign.

1 only to introduce candidates to the voters, not to generate a stand-alone reference source or to
2 level the electoral playing field. Precluding candidates from mentioning their opponents is a
3 reasonable attempt to focus the candidates on providing the sort of basic introductory
4 information the forum was created to elicit.

5 Whether the City's restriction constitutes viewpoint discrimination is a very close
6 question which, in the preliminary injunction context, the Court was not convinced would go
7 plaintiff's way. Having now had the benefit of the parties' further briefing, and having had
8 additional time in which to consider the factually similar cases on which the City relies,⁵ the
9 Court finds that the restriction on speech imposed by SMC 2.14.060 impermissibly discriminates
10 based on viewpoint. Although the Supreme Court precedent has not been entirely consistent
11 over the years (see, e.g., Boos v. Barry, 485 U.S. 312, 318-20 (1988)),⁶ the issue of viewpoint
12 discrimination was brought to the forefront in 1993 when the Supreme Court decided Lamb's
13 Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993). The rule established by
14 Lamb's Chapel and two subsequent Supreme Court decisions⁷ is clear: restrictions on speech
15 which curtail only one side of an issue or one viewpoint on an otherwise acceptable subject
16 constitute prohibited viewpoint discrimination. Lamb's Chapel, 508 U.S. at 394 ("[a]lthough a
17

18 ⁵ See Clark v. Burleigh, 841 P.2d 975 (Cal. 1992); Baker v. Pierce County, C97-5527 RJB
19 (W.D. Wash. September 29, 1997). Both of these cases conclude, in almost summary fashion, that
20 restrictions like the one at issue here are viewpoint neutral.

21 ⁶ Boos, which involved a restriction on critical speech in a public forum, provides little guidance
22 on the issue of viewpoint discrimination. Justice O'Connor's opinion, which strongly favors the City's
23 position, was joined by only two other justices. The ruling of the concurring justices on the critical issue
24 of viewpoint discrimination is not at all clear in light of Justice Rehnquist's general reliance on Judge
25 Bork's appellate decision, which relied on the dubious assumption that content-based and viewpoint-
26 based discrimination should be treated the same under constitutional law. See Finzer v. Barry, 798 F.2d
1450, 1469 (D.C. Cir. 1986).

⁷ See Good News Club v. Milford Cent. Sch., ___ U.S. ___, 121 S.Ct. 2093 (2001); Rosenberger v.
Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

1 speaker may be excluded from a non-public forum if he wishes to address a topic not
2 encompassed within the purpose of the forum . . . or if he is not a member of the class of
3 speakers for whose especial benefit the forum was created . . . , the government violates the First
4 Amendment when it denies access to a speaker solely to suppress the point of view he espouses
5 on an otherwise includible subject.”) (quoting Cornelius v. NAACP Legal Defense & Ed. Fund,
6 Inc., 473 U.S. 788, 806 (1985)). In the case at hand, one participant in the limited public forum,
7 namely the incumbent, is permitted to discuss the incumbent’s voting record, the projects he’s
8 supported, and his successes as an elected official. All of those topics are permissible in the
9 forum, but only from the viewpoint of the incumbent. All other individuals who are admitted to
10 the forum, namely all of the challengers, are precluded from offering their views on those very
11 same topics.⁸

12 As is the case here, the viewpoints excluded in Lamb’s Chapel were of varying
13 kinds and on varying topics. The government entity involved had no animus toward any
14 particular statement or opinion: rather, it simply wanted to silence all religious viewpoints on all
15 topics, regardless of whether the speech reflected a Muslim, Christian, Jewish, or Hindu
16 perspective. In keeping with Lamb’s Chapel and contrary to the City’s argument, plaintiff need
17 not show that the City was intentionally discriminating against his statement, opinions, or views.
18 It is enough to show that, on topics that were otherwise permissible in the forum, he was
19 precluded from entering the debate only because he was critical and spoke from a particular
20 perspective, namely that of a challenger.

21 Such restrictions, which silence one perspective or viewpoint on topics that are
22 otherwise included in the forum, may lead to the most egregious affronts to the freedoms we
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24 ⁸ Of course, there will be times when the incumbent will want to make his opponent’s lack of
25 qualifications or record in another elective position the thrust of his candidate statement. Here, too, the
26 City ordinance stifles an alternative viewpoint.


1 hold dear. Freedom of speech is a fundamental right in this country because of the traditional
2 belief that such freedom is essential to our democratic ideals, not only because it facilitates
3 intelligent self-government, but also because the free exchange of ideas is the best method by
4 which to arrive at the truth. See, e.g., Michael Kent Curtis, Free Speech, "The People's Darling
5 Privilege" 419 (2000) ("The popular tradition insisted that truth was more likely to emerge if the
6 government did not have broad powers to suppress ideas and opinions. So the right to free
7 speech protected ideas that were wrong as well as those that were virtuous, those that were
8 foolish as well as those that were wise."). While any restriction on speech threatens the purposes
9 for which the First Amendment was created, viewpoint-based restrictions are of the greatest
10 concern. Subject-matter restrictions simply remove entire topics of debate from public discourse
11 and public notice. Restrictions on viewpoint, however, affirmatively skew the debate by
12 allowing only one side, or one viewpoint, to be presented to the populace. See, e.g.,
13 Rosenberger, 515 U.S. at 831-32; Geoffrey R. Stone, Restrictions of Speech Because of Its
14 Content, 46 U. Chi. L. Rev. 81, 108 (1978). In the circumstances of this case, allowing the
15 incumbent to talk about his record and achievements while denying plaintiff the opportunity to
16 talk about those same topics provides the public with only one side of a debatable subject and
17 deprives plaintiff of a fair opportunity to present himself and his candidacy to the voters. The
18 City's ordinance is, therefore, viewpoint discriminatory and unconstitutional.

19 The Court recognizes that this ruling adds an entirely new and unexpected level of
20 complexity to the Elections Commission's job when reviewing candidate statements. The bright
21 line rule which allowed the acceptance or rejection of a proposed statement based on the words
22 chosen by the candidate can no longer be used and the Commission must either redefine its
23 review criteria or give up its noble attempt to assist the voters through publication of the voters'
24 pamphlet. With the benefit of the guidance provided in footnote 4, the Court is confident that
25 Ms. VanNoy and her colleagues will meet their constitutional obligations in both the short- and
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1 long-run while still offering this valuable public service to the citizens of Seattle.

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3 For all of the foregoing reasons, the Court finds that, although the City's restriction
4 on statements about one's opponent in the voters' pamphlet and the video voters' guide is
5 reasonable in light of the limited purposes of the fora, the restriction discriminates based on
6 viewpoint in violation of the First Amendment of the United States Constitution. Plaintiff's
7 motion for summary judgment is therefore GRANTED and defendants' cross-motion is
8 DENIED. Because there does not appear to be any reason to resolve the state constitutional
9 issues raised by plaintiff, the Court declines to rule on those issues, preferring to leave
10 adjudication of a state constitutional right to the state courts wherever possible. To the extent
11 plaintiff seeks any further relief in this matter, such as an award of nominal damages and/or
12 attorneys' fees,⁹ he should file an appropriate motion within thirty days from the date of this
13 Order. If no such motion is received by October 22, 2001, judgment shall be entered in favor of
14 plaintiff and this case shall be dismissed.

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16 DATED this 19th day of September 2001.

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19 _____
20 Robert S. Lasnik
21 United States District Judge
22
23

24 _____
25 ⁹ The Court is not soliciting such a request for damages or fees. Mr. Cogswell and counsel have
26 achieved the relief they requested and it would be an acceptable resolution of this case for plaintiff to
end the litigation with no money changing hands.