RECORD NO. 12-1832

In The
United States Court of Appeals
For The Fourth Circuit

SONS OF CONFEDERATE VETERANS, VIRGINIA DIVISION,

Plaintiff – Appellant,

v.

CITY OF LEXINGTON, MARILYN E. ALEXANDER, DAVID COX, MIMI ELROD, T. JON ELLESTAD, BOB LERA, GEORGE R. PRIDE, CHARLES SMITH, and MARY P. HARVEY-HALSETH,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA AT ROANOKE

BRIEF OF APPELLANT

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Pursuant to Fed. R. Civ. P. 26.1 and Local Rule 26.1, Appellant Sons of Confederate Veterans, Virginia Division, makes the following disclosures:

1. Appellant is NOT a publicly held corporation or publicly held entity.

2. Appellant does NOT have any parent corporations.

3. Appellant does NOT have stock that is owned by a publicly held corporation or other publicly held entity.

4. There is NOT a publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of this litigation.

5. Appellant is NOT a trade association.

6. This case does NOT arise out of a bankruptcy proceeding.

These disclosures were made and served on Appellants on July 12, 2012.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343 as it is an action that arises under the Constitution and laws of the United States and seeks to secure relief under an Act of Congress, specifically 42 U.S.C. § 1983, providing for the protection of civil rights.

This Court has jurisdiction over this appeal under 28 U.S.C. §§ 1291 and 1294, as it is from a decision and order entered in the United States District Court for the Western District of Virginia. The order that is the subject of this appeal was entered in the District Court on June 14, 2012 (App. 4) and the Appellant timely filed a notice of appeal from that order on July 3, 2012 (App. 4). The order that is subject to this appeal is a final order that disposes of all the parties' claims in the action (App. 44).

STATEMENT OF ISSUES

1. Does the Appellant's Complaint state a claim that the Appellees violated the First Amendment by enacting an ordinance closing a forum for expression maintained by the City of Lexington in order to silence the expression of the Appellant and because of the Appellees' disapproval of and discrimination against the viewpoint of the Appellant's expression?

2. Did the Appellees violate a consent decree entered in the District Court in 1993 granting the Appellant the right to display the Confederate flag or facsimiles thereof?

STATEMENT OF THE CASE

The instant case is a civil action brought by the Appellant, Sons of Confederate Veterans, Virginia Division (hereinafter "SCV"), seeking injunctive and other appropriate relief under 42 U.S.C. § 1983 for a deprivation and violation of the First Amendments rights of SCV and asserting a violation of a consent decree entered in August 1993 (App. 5-13). The SCV's Complaint was filed in the United States District Court for the Western District of Virginia, Roanoke Division. The Appellees, the City of Lexington, Virginia and members of its City Council (hereinafter "the City") answered by moving to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) (App. 3). After the parties briefed the issues raised by the motion, a hearing was held on June 11, 2012, the Hon. Samuel G. Wilson, District Judge, presiding. On June 14, 2012, the District Court entered an opinion and order granting the City's motion and dismissing the SCV's claim under 42 U.S.C. § 1983 and the claim for relief under the 1993 Consent Decree (App. 43-44). SCV timely filed a notice of appeal from the order of dismissal on July 3, 2012 (App. 4).

STATEMENT OF FACTS

As alleged in the Complaint, SCV is a division of Sons of Confederate Veterans, a national fraternal organization (App. 5). In 1993, SCV sued the City alleging violations of the SCV's rights under the First Amendment to the United States Constitution. The lawsuit resulted in the entry in August 1993 of a Consent Decree (App. 14-15). The Consent Decree provides that "a permanent injunction shall be entered under which neither the City of Lexington, nor any individual," . . . "officer(s), agent(s)" . . . "may deny or abridge the right of the plaintiff organization or its members" . . . "to wear, carry display or show, at any government-sponsored or government-controlled place or event which is to any extent given over to private expressive activity, the Confederate Flag or other banners, emblems, icons, or visual depictions designed to bring into public notice any logo of 'stars and bars' that ever was used as a national or battle flag of the Confederacy." (App. 8, 15).

In early 2010, SCV began planning and organizing a parade and accompanying events to be held within the City of Lexington in January 2011. In November of 2010, the Plaintiff requested the use of the flag standards owned by the City of Lexington in order to temporarily place various flags of the Confederacy on the parade route (App. 8). The flag

standards are located upon and affixed to certain light poles within the City (App. 18, 21). In response to SCV's request, City Manager Larry Mann prepared a memo to the City Council and Mayor concerning the request and the City's policy regarding display of flags from the flag standards. The memo recognized that the City had previously granted the request of the Kappa Alpha fraternity to fly flags of this organization from these standards (App. 8).

In fact, the City had granted several requests of other organizations to fly flags from flag standards on light poles within the City. In September 1994, requests were made on behalf of Washington & Lee University and the Virginia Military Institute to allow flags representing those organizations to be flown from the flag standards on five or six occasions each year. The City Council granted the requests and passed a resolution allowing these organizations to fly their flags from the flag standards on three occasions per year. In 2005, Kappa Alpha Fraternity was granted permission by the City to fly its flag from the flag standards, and in 2009, Kappa Alpha, Sigma Nu and ATO were granted permission to fly their flags to honor the Lexington Triad in April of that year (App. 9).

In response to the November 2010 request of SCV, the City, through its City Council, agreed at the Council's December 2, 2010 meeting to allow

the placement of various flags of the Confederacy by SCV in the flag standards owned by the City for the SCV's January 2011 parade. The vote on the motion to allow the request was 5 to 1, with Defendant Bob Lera, a member of the City Council, voting against the motion (App. 9).

At the City Council's December 20, 2010, meeting, Defendant Lera made a motion that the City adopt a flag/banner policy and that the City Attorney and City Manager be charged with developing the policy. The motion passed unanimously. At the City Council's March 17, 2011, meeting, public comments were received expressing opposition to the display of the Confederate flag within the City and requesting the City adopt a policy regarding the display of flags on public property (App. 9-10).

In September, 2011, the City enacted amended ordinance § 420-205, which provides as follows with respect to use of the flag standards in the City:

> 1. Only the following flags may be flown on the flag standards affixed to light poles in the City and no others:
>
> a. The national flag of the United States of America (the "American flag").
>
> b. The flag of the Commonwealth of Virginia, Code of Virginia, Title 1, Chapter 5,
>
> c. The City Flag of Lexington.

> 2. The American flag, the flag of the Commonwealth of Virginia and the City Flag of Lexington may be flown by the City on the light poles that have standards affixed to them on dates adopted by City Council. A copy of the dates for the flying of said flags is available through the City Manager's office or the office of the director of public works. Currently the holidays or designated days are as follows: Independence Day, Labor Day, Veterans Day, Flag Day, Martin Luther King Day, Memorial Day, Lee-Jackson Day, Presidents Day, and on the day of the annual Rockbridge Community Festival. On such dates or days the flag(s) may be flown for more than one day. No other flag shall be permitted. Nothing set forth herein is intended in any way to prohibit or curtail individuals from carrying flags in public and/or displaying them on private property.

(App. 10, 21-22).

The Complaint set forth two counts. Count I alleged that the City was in contempt of the 1993 Consent Decree by enacting amended ordinance § 420-205 because the amended ordinance is in direct conflict with the Consent Decree by making it a violation of local law to display or show a confederate flag on flag standards within the City (App. 11). Count II alleged that amended ordinance § 420-205 deprives SCV of its rights under the First Amendment to the United States Constitution. The Complaint alleges the City, by its prior practice of allowing the flag standards to be used by other organizations for the display of the flags of those organizations on occasions of significance to those organizations, created a forum for expression. The City's adoption of amended ordinance § 420-205,

was in response to the request of SCV to engage in expression within the flag standard forum for expression created and maintained by the City. Moreover, the City's adoption of amended ordinance § 420-205 was based upon its disapproval of the content and/or viewpoint expressed by the SCV and the flags SCV flew from City flag standards in January 2011. Thus, the City's adoption of amended ordinance § 420-305 constituted discrimination against the Plaintiff and the expression of the Plaintiff on the basis of content and/or viewpoint (App. 12).

The City filed a motion to dismiss both counts of the Complaint under Fed. R. Civ. P. 12(b)(6), and the District Court granted the motion. In its memorandum opinion, the District Court accepted as true the allegation in the Complaint that the City had established a designated public forum with respect to the flag standards by making them generally available for use by the public (App. 43). However, it also ruled that a governmental entity may "close the forum as it sees fit." (App. 38). Moreover, it deemed the motive and intent of the City in enacting the amended ordinance to be irrelevant. "[W]hen a regulation plainly prohibits all express in a nonpublic form and has no discriminatory effect, the government's particular motivation in enacting the regulation is immaterial." (App. 40). Because the amended

ordinance applied to all private viewpoints, the District Court deemed it consistent with the strictures of the First Amendment (App. 41).

SUMMARY OF ARGUMENT

The Complaint sufficiently alleged a claim for violation of SCV's First Amendment rights based upon a viewpoint-discriminatory forum closure. The District Court recognized that the Complaint alleged sufficient facts showing that the City's flag standards constituted a public forum for expression. It was further alleged, with particular facts supporting the allegation that the City closed this forum through the passage of amended ordinance § 420-305 because the City opposed the message represented by SCV's flag, a viewpoint-discriminatory purpose. Precedent recognizes that a governmental entity does not have unfettered discretion to close a forum, and may not do so because it disagrees with messages being communicated in the forum. The District Court's avoidance of the viewpoint discrimination issue by ruling that, because the ordinance was facially neutral, the City's motive and intent were irrelevant was error. Numerous Supreme Court decisions recognize that a law neutral on its face still may be unconstitutional if motivated by a discriminatory purpose, and SCV should be allowed the opportunity to prove the City acted with a viewpoint-discriminatory purpose.

Even if this Court finds no violation of constitutional rights, the SCV may still prevail in that the Court may find that the City violated the 1993 Consent Decree and committed civil contempt. The Consent Decree clearly enjoins the City from abridging the rights of the SCV in using a government-controlled forum for private expression. While it is true that the City closed the forum to *all* individuals and organizations, it was done in response to the SCV's desire to utilize private expression in a forum of a type specifically described in the Consent Decree. In its Complaint, the SCV alleged facts sufficient to establish contempt pursuant to this Court's four-pronged test pursuant to *Ashcroft v. Conoco, Inc.*, 218 F.3d 288, 301 (4th Cir. 2000).

ARGUMENT

I. COUNT II OF THE COMPLAINT STATES A CLAIM THAT THE CITY VIOLATED THE FIRST AMENDMENT BY ALLEGING THAT THE CITY CLOSED A PUBLIC FORUM FOR A REASON THAT AMOUNTS TO VIEWPOINT DISCRIMINATION AGAINST THE MESSAGE OF SCV

A. Standard of Review

The standard of review for dismissal pursuant to Rule 12(b)(6) is *de novo*. In addressing the matters on which a district court rules, the usual appellate standard governing motions to dismiss considers questions of law *de novo* and construes the evidence in the light most favorable to the

nonmoving party, applying the same criteria that bound the lower court. To survive a rule 12(b)(6) motion to dismiss, the facts alleged must be enough to raise a right to relief above the speculative level and must provide enough facts to state a claim to relief that is plausible on its face. *Kendall v. Balcerzak*, 650 F.3d 515, 522 (4th Cir. 2011).

B. Discussion of Issues

The Complaint alleges that the City has on various occasions allowed non-City groups and entities to fly their flags from the flag standards at issue in this case (Complaint ¶ 20). Thus, the Complaint specifically refers to instances in the recent past where the City allowed Washington & Lee University and Virginia Military Institute to fly their institutional flags from the flag standards (Complaint ¶ 21). Similarly, in 2005 Kappa Alpha Fraternity was allowed to fly its flag from the standard (Complaint ¶ 22) and in 2009 the "Greek" organizations Kappa Alpha, Sigma Nu and ATO were allowed to fly their flags from the standards to promote and celebrate events they were holding (Complaint ¶ 23). Indeed, the Defendants admit in their memorandum supporting their motion to dismiss that other non-city and non-governmental entities have been allowed to fly flags from the standards and promote their organizations and events (Doc. 5, at 15).

In light of these allegations, SCV has stated a claim based upon creation of a public forum for expression with respect to the flag standards, a point which the District Court conceded (App. 43). Court decisions recognize that citizen access to government property for the purposes of engaging in expression is determined under a "public forum analysis." *Warren v. Fairfax County*, 196 F.3d 186, 190 (4th Cir. 1999). Under this analysis, several types of forums are recognized. There is the "traditional" public forum, which consists of sidewalks, parks, streets and other places which by long tradition have been dedicated to public assembly and debate. *Child Evangelism Fellowship of Md., Inc. v. Montgomery County Public Schools*, 457 F.3d 376, 381 (4th Cir. 2006). A second type is the "nonpublic forum," which consists of public property which is not by tradition or designation a forum for public communication. *Id*. A third category has been referred to as the "designated" or "limited public forum," which is "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Id*. at 382 (*quoting Cornelius v. N.A.A.C.P. Defense Fund*, 473 U.S. 788, 802 (1985). As this Court has held:

> Although the Court has never squarely addressed the difference between a designated public forum and a limited public forum, its most recent opinions suggest that there indeed is a distinction. In a limited public forum, the government creates a channel for a specific or limited type of expression where one did not previously exist. In such a forum, "the State may be justified in reserving [its forum] for certain groups or for the discussion of certain topics," subject only to the limitation that its actions must be viewpoint neutral and reasonable. . . . In a designated public forum, by contrast, the government makes public property (that would not otherwise qualify as a traditional public forum) generally accessible to all speakers. In such a forum, regulations on speech are "subject to the same limitations as that governing a traditional public forum"-namely, strict scrutiny.

CEF of Md., Inc., 457 F.3d at 382 (citations omitted).

Ultimately, whether a public forum has been created by the government and the nature of that forum depends upon the intent, policies and practices of the governmental entity. *Cornelius*, 473 U.S. at 802. That determination is a question of fact. *Hickory Fire Fighters Assn. v. City of Hickory, N.C.*, 656 F.2d 917, 922 (4th Cir. 1981). Whether particular government property is a public forum and the nature of that forum is inherently a question of fact which cannot be resolved at the pleading phase on a Rule 12(b)(6) motion to dismiss. *AFSCME, AFL-CIO Local 3190 v. Maricopa County Bd. of Supervisors*, 2007 WL 809948, at *2 (D. Ariz. March 15, 2007). *See, also, Allen v. Sch. Bd. of Santa Rosa County, Fla.*, 782 F. Supp. 2d 1304, 1324 (N.D. Fla. 2011) (many questions of fact existed

necessary to determining the relevant First Amendment forum analysis; plaintiff's complaint alleging that others were allowed to use government property at issue was sufficient to state plausible claim that a forum for expression existed and required denial of Rule 12(b)(6) motion). Thus, as recognized by the District Court, the Complaint adequately alleged the existence of public forum for private expression with respect to the City flag standards.

Amended ordinance § 420-205 essentially closed this public forum by providing that, apart from the flags of the United States, the Commonwealth of Virginia, and the City of Lexington, "[n]o other flags shall be permitted." (App. at 22). In its Memorandum Opinion, the District Court cited passages from cases suggesting that a governmental entity may close a forum at its pleasure and nothing constrains the government's discretion in this respect (App. at 38-39). However, this is not correct, and several cases have held that viewpoint-based closures of public forums violate the First Amendment. "Once the state has created a forum, it may not condition access to the forum on the content of the message to be communicated, *or close the forum solely because it disagrees with the messages being communicated in it*." *Student Government Ass'n v. Board of Trustees of University of Massachusetts*, 868 F.2d 473, 480 (1st Cir. 1989) (emphasis added; *citing* L. Tribe, *American*

Constitutional Law § 12-24 (2d ed. 1988)). Thus, in *Missouri Knights of the Ku Klux Klan v. Kansas City, Mo.*, 723 F. Supp. 1347 (W.D. Mo. 1989), the court denied the city's motion to dismiss a claim that the city had violated the First Amendment when it shut down a public access cable television channel in order to prevent the plaintiff from obtaining access to the channel because the city disapproved of the views expressed by the plaintiff. The court wrote as follows:

> It is true that there is no obligation to indefinitely maintain a designated public forum. However, the Constitution forbids a state to enforce exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. *Widmar v. Vincent*, 454 U.S. 263 (1981); *Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976). Whether the exclusion is accomplished by individual censorship or elimination of the forum is inconsequential; the result is the same. A state may only eliminate a designated public forum if it does so in a manner consistent with the First Amendment. The complaint alleges Channel 20 was eliminated to censor the viewpoint of the Missouri Knights. At this stage of the proceedings, that is sufficient.

Missouri Knights, 723 F. Supp. at 1352.

Similarly, in *ACT-UP v. Walp*, 755 F. Supp. 1281 (M.D. Pa. 1991), the court upheld the plaintiff's claim that the defendant violated the First Amendment when it closed the gallery of Pennsylvania's House of Representatives in order to prevent the plaintiff's members from attending a session of the House and engaging in expressive activity. After ruling that

the gallery was a public forum where citizens engaged in activity protected by the First Amendment, the court ruled that "[t]he closing of the gallery of the house chamber, which has consistently been open to all who would care to sit and listen, in order to deny access to a particular group is not only in all probability unconstitutional, but also cuts against the grain of the notions of a free and open society embodied in the first amendment. *ACT-UP*, 755 F. Supp. at 1290.

The decision of this Court in *Joyner v. Williams*, 477 F.2d 456 (4th Cir. 1973), is wholly consistent with these principles. There, a public university decided to de-fund and close down a student newspaper because the university's administration disapproved of the editorial stances that had been adopted by the newspaper's editors. In ruling that the action of the university violated the First Amendment, this Court wrote that "[i]t may well be that a college need not establish a campus newspaper, or, if a paper has been established, the college may permanently discontinue publication for reasons wholly unrelated to the First Amendment. But if a college has a student newspaper, its publication cannot be suppressed because college officials dislike its editorial comment." *Joyner*, 477 F.2d at 460. *See also*, *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 77 (1st Cir. 2004) ("[E]ven if MBTA's previous intent was to maintain a designated public forum, it

would be free to decide in good faith to close the forum at any time. . . . [I]f the MBTA revised a guideline merely as a ruse for impermissible viewpoint discrimination, that would be found unconstitutional regardless of the type of forum created.") and Steven G. Gey, *Contracting Away Rights: A Comment On Daniel Farber's "Another View of the Quagmire,"* 33 Fla. St. U. L. Rev. 953, 959 (2006) ("[E]ven in a designated limited public forum, the government may not engage in viewpoint discrimination and may not close the forum in response to speech that the government does not favor.").

Contrary to the District Court's ruling, a governmental entity's decision to close a forum for expression it has maintained is not unconstrained by constitutional principles, and the closing may not be accomplished in order to censor a viewpoint that has been expressed in the forum.[1] The Complaint contains ample allegations supporting the conclusion that amended ordinance § 420-205 was enacted because of the City's disapproval of SCV's expression and in order to silence the viewpoint

[1] None of the cases cited by the District Court for the proposition that a governmental entity may close a public forum "as it sees fit" (App. 38-39) involved a claim that the closing was intended to effect viewpoint discrimination. Indeed, the court in *Ridley*, 390 F.3d at 77, held that where forum closure is effected as a ruse for impermissible viewpoint discrimination, the First Amendment is violated. And the Supreme Court wrote in *Cornelius v. N.A.A.C.P. Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985), that "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."

of the SCV. Thus, it is alleged that SCV's November 2010 request to use the flag standards for display of the Confederate flag generated a report from the City's manager concerning the request and whether the City was obligated to comply with the request (App. 8). Within 10 days after the City determined that is should grant SCV's request, a motion was made by Defendant Lera, who had voted to deny SCV's request, to have the City's policy concerning access to the flag standards changed (App. 9). At the public hearing on changing the policy, public comments were received which expressed opposition to the display of the Confederate flag within the City (App. 9-10). These facts provide specific support for the allegations that amended ordinance § 420-205 was adopted because of the City's disapproval of the viewpoint expressed by SCV's flags and constituted viewpoint discrimination against SCV (App. 12).

The District Court did not address this precedent involving viewpoint-discriminatory forum closure, but instead found it irrelevant by adopting a rule forbidding inquiry into the motivation for the adoption of this regulation. But Supreme Court precedent contradicts the sweeping conclusion of the District Court that the motive or intent of the City is immaterial and may not be inquired into. Thus, the Supreme Court has held that "[u]nder decisions of this Court, a law neutral on its face still

may be unconstitutional if motivated by a discriminatory purpose." *Crawford v. Board of Educ. of City of Los Angeles*, 458 U.S. 527, 544 (1982). More to the point, in *Washington v. Davis*, 426 U.S. 229 (1976), the Court took pains to dispel the notion created by the decision in *Palmer v. Thompson*, 403 U.S. 217 (1971), that inquiry into legislative purpose and intent is "out of bounds":

> To the extent that *Palmer* suggests a generally applicable proposition that legislative purpose is irrelevant in constitutional adjudication, our prior cases as indicated in the text are to the contrary; and very shortly after *Palmer*, all Members of the Court majority in that case joined the Court's opinion in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which dealt with the issue of public financing for private schools and which announced, as the Court had several times before, that the validity of public aid to church-related schools includes close inquiry into the purpose of the challenged statute.

Washington, 426 U.S. at 244 n. 11.

The actual rule is illustrated by the decision in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), where the Court made a searching inquiry of intent and motive to determine whether an ordinance violated the First Amendment by targeting a particular religion. The ordinance broadly prohibited the unnecessary killing of animals, and the Church alleged that the law was targeted at it and its religious practice of animal sacrifice. Even though the ordinance was, on its face, neutral and

generally applicable, and so facially complied with the First Amendment's Free Exercise Clause, *see Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), the Court nonetheless determined that the ordinance violated the First Amendment because it had the impermissible object of suppressing the Church's religious exercise. In reaching this decision, the Court wrote as follows:

> We reject the contention advanced by the city, . . ., that our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause "forbids subtle departures from neutrality," *Gillette v. United States*, 401 U.S. 437, 452 (1971), and "covert suppression of particular religious beliefs," *Bowen v. Roy*, [476 U.S. 693,] 703 [(1986)] (opinion of Burger, C.J.). Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

Church of the Lukumi Babalu Aye, 508 U.S. at 534. It went on to rule that in determining whether the City had an impermissible object in adopting the ordinance by examining both direct and circumstantial evidence. *Id*. at 540.

Thus, the District Court's ruling that the City's motive or object in adopting amended ordinance § 420-205 is "immaterial" is simply not

supported by the controlling precedent. As current Justice Kagan has written:

> First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives. The doctrine comprises a series of tools to flush out illicit motives and to invalidate actions infected with them. Or, to put the point another way, the application of First Amendment law is best understood and most readily explained as a kind of motive-hunting.

63 U. Chi. L. Rev. 413, 414 (Spring 1996).

The two cases cited by the District Court do not persuasively support its conclusion that the City's motive and intent are immaterial, particularly in light of the substantial precedent to the contrary cited above. Nothing in *Hill v. Colorado*, 530 U.S. 703, 724 (2000), holds that legislative motive and intent are irrelevant to constitutional analysis; the ruling cited by the District Court is limited to the point that viewpoint discrimination cannot be found based solely upon the conduct of partisans on one side of the debate. Indeed, in another passage the Court took pains to point out that the legislation at issue was not adopted "because of disagreement with the message" of particular expression and referred to the lower court's analysis of the relevant legislative history. *Id*. at 719. And while *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1290 (7th Cir. 1996), declared that motive is irrelevant in judging the constitutionality of a neutral

rule, it went on to note that the Supreme Court has on numerous occasions held that motive and intent are highly relevant. Indeed, *Grossbaum*'s conclusion, 100 F.3d at 1298, that motive is relevant only where the regulation of speech is explicitly content-based is (1) contrary to Supreme Court precedent that facial neutrality is not determinative, *Church of the Lukumi Babalu Aye*, 508 U.S. at 534, and (2) a highly dubious ruling because if a regulation is content-based the discrimination is already apparent on the face of the regulation.

Thus, the District Court erred in concluding that the City's motive and intent for closing the forum was immaterial. Because a governmental entity may not close a public forum in order to censor viewpoints of which it disapproves, *Student Government Ass'n*, 868 F.2d at 480, the motive and intent of the City in adopting amended ordinance § 420-205 is highly relevant. SCV alleged facts showing that the City's action was taken for the very purpose of suppressing SCV's speech and message conveyed by the Confederate flag. This stated a claim for a deprivation of SCV's First Amendment rights and the District Court's order dismissing the claim in Count II of the Complaint must be reversed.

II. COUNT I OF THE COMPLAINT STATES A CLAIM THAT THE CITY COMMITTED CIVIL CONTEMPT BY VIOLATING THE PROVISIONS OF A FINAL ORDER

A. Standard of Review

As in the previous argument, the standard of review for dismissal pursuant to Rule 12(b)(6) is *de novo*. In addressing the matters on which a district court rules, the usual appellate standard governing motions to dismiss considers questions of law *de novo* and construes the evidence in the light most favorable to the nonmoving party, applying the same criteria that bound the lower court. To survive a rule 12(b)(6) motion to dismiss, the facts alleged must be enough to raise a right to relief above the speculative level and must provide enough facts to state a claim to relief that is plausible on its face. *Kendall v. Balcerzak*, 650 F.3d 515, 522 (4th Cir. 2011).

B. Discussion of Issues

The SCV need not prevail on constitutional grounds in order to prevail in this case. Even if this Court finds that the ordinance does not violate the Constitution, the City may otherwise be liable due to a violation of the Consent Decree. The 1993 lawsuit against the City by the SCV resulted in the entry of a Consent Decree that operated as the Final Order of the case (App. 14-15). The Consent Decree provided that "a permanent

injunction shall be entered under which neither the City of Lexington, nor any individual," . . . "officer(s), agent(s)" . . . "may deny or abridge the right of the plaintiff organization or its members" . . . "to wear, carry display or show, at any government-sponsored or government-controlled place or event which is to any extent given over to private expressive activity, the Confederate Flag or other banners, emblems, icons, or visual depictions designed to bring into public notice any logo of 'stars and bars' that ever was used as a national or battle flag of the Confederacy." (App. 8, 15).

The amended ordinance is in direct conflict with the Order in that by making it a violation of local law to display or show a confederate flag on a flag standard on one or more of the light poles within the City of Lexington, the Defendants have denied and/or abridged the rights of the Plaintiff as provided by the Order.

This Court has adopted a 4-pronged standard for establishing civil contempt. In order to establish civil contempt, the SCV must demonstrate the following by clear and convincing evidence:

> (1) The existence of a valid decree of which the alleged contemnor had actual or constructive knowledge; (2) . . . that the decree was the in the movant's "favor"; (3) . . . that the alleged contemnor by its conduct violated the terms of the decree, and had knowledge (at least constructive) of such violations; and (4) . . . that [the] movant suffered harm as a result.

JTH Tax, Inc. v. H&R Block E. Tax Servs., 359 F.3d 699, 705 (4th Cir. 2004) (*quoting Ashcroft v. Conoco, Inc.*, 218 F.3d 288, 301 (4th Cir. 2000)). A plain reading of the Complaint clearly alleges facts sufficient to satisfy each prong of this test.

It cannot be stated with veracity that the City did not have actual or constructive knowledge of the Consent Decree. The Decree was endorsed by counsel for both parties and the predecessors of the current Mayor and City Council of the City. While this should be sufficient for establishing constructive knowledge, the Complaint alleged that the City Manager circulated a memorandum to City representatives in which the City's obligation to allow the flags to be flown was acknowledged. The second prong is likewise easily established in that the Consent Decree was clearly favorable to the SCV in that it granted protection to the rights of SCV members which the City had previously attempted to restrict.

The SCV's argument truly hinges on prong three of the analysis. The City's passage of the ordinance and prohibition of the SCV's banners violated the terms of the Consent Decree which prohibited its agents, employees, officers and representatives from denying or abridging the right of the SCV and its members to wear, carry, display, or show, at any government-sponsored or government-controlled place or event, the

Confederate flag. Using the language of the Consent Decree, the ordinance clearly denies the SCV the right to display a particular flag at any government-sponsored or government-controlled place. (App. 8, 15). If the Court finds that the SCV established prong three of the test, then prong four, the harm prong, is self-evident in that the SCV's rights were abridged.

The key to the prong three analysis is the language from the Consent Decree that describes the forum in which the SCV may display their banners. In order to be held in contempt of the Consent Decree, the forum must be one "which is to any extent given over to private expressive activity." (App. 8, 15). It is uncontroverted that the forum at issue *was* at one point given over to private expressive activity. It is similarly uncontroverted that the City closed this forum due to the specific requests of the SCV to use the forum. So where once a government-controlled forum allowed wide and varied use of private expressive activity for multiple organizations, as alleged in the Complaint, the City closed the forum when the SCV attempted to exercise their rights in accordance with the Consent Decree. If the Court finds that the ordinance does not violate the Constitution, the City may still be liable in this action.

The Consent Decree goes further than bestowing rights, such as constitutional rights, in that it also imposes duties. Because the Consent

Decree literally enjoins the City from interfering with the SCV's rights, the City had a duty to allow the SCV use of government-controlled fora that had been opened for private expression. In November of 2010, when the SCV asked the City for permission to use the forum to display flags, the forum was still open. The Court may determine that the subsequent closing of the forum does not violate constitutional rights in that the ordinance operates as an "equal opportunity" limitation. Because other organizations would be held to the same limitations of private expression, the Court may conclude that the SCV's constitutional rights were not infringed. However, no other private organization entered into a Consent Decree with the City. While it is true that the City closed the forum to *all* individuals and organizations, it was done in response to the SCV's desire to utilize private expression in a forum of a type specifically described in the Consent Decree.

CONCLUSION

For the reasons set forth above, Appellant Sons of Confederate Veterans, Virginia Division, respectfully request that the Order of the District Court granting the Appellees' motion to dismiss be reversed and that this case be remanded to the District Court for further proceedings.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant requests oral argument and believes it would assist the Court in resolving the issues presented on appeal.

Respectfully submitted,

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Dated: August 22, 2012

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 22nd day of August, 2012, I caused this Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 22nd day of August, 2012, I caused the required copies of the Brief of Appellant and Joint Appendix to be hand filed with the Clerk of the Court.

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