

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

THE PUTNAM PIT, INC., GEOFFREY)	
DAVIDIAN)	
)	
Plaintiffs/Appellants)	
)	
versus)	
)	CASE NO. 01-6599
THE CITY OF COOKEVILLE, TENNESSEE,)	
JIM SHIPLEY, in his official capacity as)	
city manager for the City of Cookeville, TN)	
)	
Defendants/Appellees)	

**RESPONSE OF PLAINTIFFS/APPELLANTS TO OPPOSITION TO
MOTION FOR PERMISSION TO FILE AMICI CURIAE BRIEF**

The motion for leave to file an amici curiae brief on behalf of Silha Center for the Study of Media Ethics and Law, the Association of Alternative Newsweeklies, and Project Censored should be granted.

Legal Argument

The amici curiae brief parallels the arguments raised by the Appellants’ opening brief, despite the Appellees’ intent to avoid an examination of their expression suppression policies on the merits by claiming that the brief does not address issues raised by this appeal. This case presents an outrageous example of censorship by public officials/politicians through superficial, hypertechnical,

spurious “policies” which served no purpose other than to attempt to justify petty acts constituting First Amendment retaliation against Mr. Davidian for his writing of his opinions in *The Putnam Pit*. The issue of whether these policies allowed unfettered discretion to permit the inevitable censorship requires this Court to examine whether or not the purported policies were vague and overbroad as stated and as applied. The amici curiae brief addresses these issues. Appellees disingenuously seek to misdirect the Court toward technical procedural form rather than to the direct substantive issue of viewpoint discrimination.

In the Rule 50 post-trial motion (attached hereto as Exhibit A), the Appellants clearly raised the issue of law in paragraph 8 therein. The issue was always a part of this case as an issue of law to be decided ultimately by judge not jury.

The City’s requirement that web sites eligible to be linked to the City’s site promotes the City’s tourism, industry, and economic welfare gives broad discretion to city officials, raising the possibility of discriminatory application based upon viewpoint. Putnam Pit v. City of Cookeville, 221 F.3d 834, 844 (6th Cir. 2000).

The Appellants discussed the issue that there is no standard for allowing or disallowing web links at the beginning of day three of trial.

MR. HARRIS: Your Honor, if I could address something that the Court raised yesterday. The Court has obviously reached its opinion before we have even had a chance.

THE COURT: Yes, sir, I will tell you how I reached my opinion. I read that deposition of Mr. Gibson, but I listened to your proof from Mr. Davidian. And that last -- the straw that broke the camel's back, as far as I am concerned, Mr. Harris, is that last Exhibit that you put in in which he says, "I am furnishing you an example to show I fit your oft-repeated criteria." And then he proceeds to say things in there that are the antithesis of the category of linkage that the City has set up. It's just --

MR. HARRIS: Your Honor, I am sorry. I think the Court -- I understand where the Court is coming from, but I think the Court may have reached that opinion before we have even had an opportunity to redirect. I think it should be made clear that it was satire. Also, this was not offered by us as evidence; this was offered by them as evidence.

THE COURT: It's part of the evidence, and it's admitted that he did it. And that is the question at issue in this case is whether or not he fits the criteria.

MR. HARRIS: Yes, Your Honor. And, in fact --

THE COURT: And whether or not that criteria was established as a methodology of exclusion. And --

MR. HARRIS: Your Honor, apparently you oppose the viewpoint in the way he chose -- as he indicated he was ridiculing the fact that there is no standard here. **And I think we have shown that there was no standard.**

THE COURT: Mr. Harris, as I said yesterday, I don't believe any reasonable Jury is going to believe that. But you may convince them.

Transcript 250-251

Appellees seek to have the Court adopt a very rigid, technical procedural

approach whereby a party must enunciate a talismanic phrase such as “facial challenge,” “void for vagueness,” or “overbreadth” in order to have raised a claim. The previous Sixth Circuit opinion had made clear it was an issue that affected whether viewpoint discrimination had occurred. Whether the City had vague or overly broad policies as a mechanism for viewpoint discrimination was clearly an issue of which Appellees were aware.

If the City’s purported policies allowed unfettered discretion, then viewpoint discrimination has occurred.

This is not a factual issue. It is clearly a question of law so as to avoid "impermissibly delegat[ing] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth., 163 F.3d 341, 359 (6th Cir. 1998). Accordingly, the City’s *ad hoc* and subjective standard for allowing links only to those web sites promoting the economic welfare, commerce, tourism, and industry of the local area results in unfettered discretion which is tantamount to unrestrained censorship.

The *Amici* are organizations committed to the protection of our first amendment rights. In the case of the Association of Alternative Newsweeklies, they

have constituents who actually exercise their First Amendment rights by expressing alternative views, on the right, the left, the middle, and sometimes beyond the outer limits. The ability of local public officials to play games with the First Amendment by repeatedly creating meaningless, vague, and overly broad “policies” so as to have unfettered discretion to suppress different points of view is an issue with which all citizens are concerned. It is entirely understandable that these *Amici* would come forward to have government uphold the First Amendment in its practices rather than stand by idly while local officials attempt to evade the power unleashed by the freedom the First Amendment provides.

The *Amici Curiae* Brief provides an alternative point of view as to the issues raised by this case. The Appellants urge this Court not to suppress the *Amici Curiae*'s brief based on the non-existent procedural issue that the Appellees hope to interject into this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Response of Plaintiffs/Appellants to Opposition to Motion for Permission to File Amici Curiae Brief has been served upon Appellees in this matter, by placing same in the U.S. mail, first-class, addressed to Appellees' counsel, John Duffy, 800 South Gay Street, Suite 1700, P.O. Box 131, Knoxville, TN 37901-0131 and Lawrence P. Zieger, Counsel for Amici Curiae, 735 North Water Street, Suite 836, Milwaukee, WI 53202.

This the 23rd of April, 2002.

Samuel J. Harris