THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
ELKINS

THE CONSTITUTION PARTY OF WEST VIRGINIA, DENZIL W. SLOAN AND JEFF BECKER,

Plaintiffs,

v.

Civil Action No. 2:08-CV-61
(Judge Bailey)

FRANK JEZIORO,
Director of the West Virginia Division of Natural Resources,

SAM ENGLAND
Superintendent of Stonewall Jackson Lake State Park,

SCOTT WARNER,

and

JOHN DOES 1 and 2.

Defendants.

ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This case is presently before the Court on plaintiffs' Motion for Judgment on the Pleadings or Summary Judgment [Doc. 24], filed on March 16, 2009; defendants' Response to plaintiffs' motion [Doc. 28], filed on April 17, 2009; and plaintiffs' reply in support of its motion [Doc. 14], filed on May 5, 2009. After reviewing the record and the arguments of the parties, the Court finds that plaintiffs' Motion for Judgment on the Pleadings or Summary Judgment [Doc. 24], should be **GRANTED in part** and **DENIED in part**.

BACKGROUND

On April 18, 2008, plaintiffs filed suit in the Northern District of West Virginia alleging violations of their rights under the First and Fourteenth Amendments to the United States Constitution, and their rights under Article III, sections 1, 3, and 7 of the West Virginia Constitution. [Doc. 1]. Plaintiffs brought suit against defendants: Frank Jezioro, Director of West Virginia Division of Natural Resources; Sam England, Superintendent of Stonewall Jackson Lake State Park; and Scott Warner, all in their individual and official capacities as officers and employees of the State of West Virginia. ([Doc. 1] ¶¶ 5-8).

On May 29, 2008, defendants Frank Jezioro, Sam England, and Scott Warner, filed, by counsel, a Motion to Dismiss in Lieu of Answer [Doc. 9], and accompanying Memorandum [Doc. 10]. Defendants moved under Rule 12(b)(1), (2), (3), and/or (6) to dismiss plaintiffs' claims. On January 16, 2009, this Court granted in part and denied in part defendants' motion to dismiss [Doc 23]. Specifically, the Court granted defendants' motion to dismiss plaintiffs' state law claims for injunctive or declaratory relief, but denied defendants' motion as to all other claims.

Prior to ruling on defendants' motion to dismiss, this Court held a Scheduling Conference to set a schedule for the proceedings. [Doc. 22]. Prior to that conference, the parties submitted to the Court a Rule 26(f) Planning Meeting report. [Doc. 20]. After reviewing the report, it appeared to the Court that there were no factual issues in dispute. During the Scheduling Conference the Court asked the parties if this was the case, or if discovery was needed. Both parties agreed that the only issues in the case were issues of law and no discovery was needed. Accordingly, this Court entered a Scheduling

Conference Order setting a briefing schedule for dispositive motions. [Doc. 22].

On March 16, 2009, plaintiffs filed a Motion for Judgment on the Pleadings or Summary Judgment [Doc. 24]. In their motion, plaintiffs argue that because defendants failed to file an answer within ten (10) days of this Court's denial of defendants' motion to dismiss, the Court should deem all allegations in the Complaint as admitted. Additionally, plaintiffs argue that there are no disputed material facts, and that plaintiffs are entitled to judgment as a matter of law. [Doc. 24]. On March 19, 2009, defendants filed an Answer to the Complaint. [Doc. 25].

On April 17, 2009, defendants filed a response to plaintiffs' Motion for Judgment on the Pleadings or Summary Judgment [Doc. 28]. In their response defendants argue that they thought filing an answer would be in violation of this Court's Scheduling Order as this Court only set out dates for dispositive motions. Defendants then go on to argue that discovery is required as there are material issues of fact and as no discovery has occurred due to this Court's failure to enter a Rule 26(f) order. Further, reasoning that it was an innocent mistake which did not prejudice plaintiffs, defendants argue this Court should not deem the allegations of the Complaint as admitted, noting that defendants filed an answer in "an abundance of caution" on March 19, 2009. [Doc. 28].

In addressing the merits of plaintiffs Motion for Judgment on the pleadings or Summary Judgment, defendants argue plaintiffs are not entitled to summary judgment as there are material issues of fact, and as the challenged regulation is a valid content neutral time place and manner restriction which defendants enforced in a non-discriminatory manner. [Doc. 28]. On May 5, 2009, plaintiffs filed a Reply brief with the Court. [Doc. 29].

FACTS

Plaintiffs allege the following: on September 22, 2007, plaintiffs Sloan, Becker, and other Constitution Party of West Virginia (hereinafter "CPWV") members went to Stonewall Jackson State Park, a state park and recreation area located in Lewis County, West Virginia, and operated under the authority of the Department of Natural Resources (hereinafter "DNR"). ([Doc. 1] ¶ 15; [Doc. 25] ¶ 15). Plaintiffs were attempting to obtain signatures on petitions for the purpose of meeting the ballot prerequisites so as to get CPWV candidates on the ballot for the offices of President, Vice President, and Governor. ([Doc. 1] ¶ 15; Sloan Aff. [Doc. 24-2] ¶ 5). On September 22, 2007, Stonewall Jackson State Park was hosting an event in recognition of National Hunting and Fishing Day. ([Doc. 1] ¶ 16; [Doc. 25] ¶ 16). As such, park management and the DNR had allowed vendors to set up display booths within the park. ([Doc. 1] ¶ 16; [Doc. 25] ¶ 16).

Plaintiffs Sloan, Becker, and other CPWV members circulated through the crowd at the National Hunting and Fishing Day event, "approached persons and spoke with them about the CPWV, its political positions, and its candidates, and requested that persons sign a petition so that CPWV candidates for President, Vice President and Governor might have access to the statewide ballot in the following year's elections." ([Doc. 1] ¶ 19; Sloan Aff. [Doc. 24-2] ¶ 9). Eventually, plaintiffs were "approached by Defendants Warner, John Doe 1, and John Doe 2, who informed [plaintiffs] that they must stop their petitioning activities because their activities were contrary to Park and DNR rules and policies." ([Doc. 1] ¶ 22; [Doc. 25] ¶ 22; Sloan Aff. [Doc. 24-2] ¶¶13-17). When plaintiffs asserted that they had a legal right to engage in the petitioning activity, defendant England informed plaintiffs they

could no longer solicit signatures for their petitions. ([Doc. 1] ¶ 24; [Doc. 25] ¶ 24; Sloan Aff. ¶¶14-17). Plaintiffs complied with the instructions of England and Warner and ceased soliciting signatures. ([Doc. 1] ¶ 24; Sloan Aff. [Doc. 24-2] ¶ 17). After this incident, defendant Jezioro affirmed the order given to plaintiffs by defendants England and Warner, and directed plaintiffs to West Virginia Code of State Rules § 58-31-2.16. ([Doc. 1] ¶ 26; [Doc. 25] ¶ 26; McKusick Aff. [Doc. 29-3] ¶¶ 3, 8-10).

After September 22, 2007, plaintiffs, through counsel, sent a letter to defendant Jezioro asking for assurances that plaintiffs would be allowed to petition for signatures at the park. ([Doc. 1] ¶ 25; [Doc. 25] ¶ 25 (noting that correspondence speaks for itself); McKusick Aff. [Doc. 29-3] ¶ 3; [Doc. 28-7]). Defendant Jezioro then replied, through counsel, that absent permission from the Director of the DNR, plaintiffs have no right to petition for signatures at parks operated by the DNR, citing West Virginia Code of State Rules § 58-31-2.16. ([Doc. 1] ¶ 26; Sloan Aff. [Doc. 29-3] ¶¶ 4, 8). West Virginia Code of State Rules § 58-31-2.16 provides: "[h]awking peddling, soliciting, begging, advertising, or carrying on any business or commercial enterprise is prohibited in state parks, state forests, and state wildlife management areas without the written permission of the Director of the Division of Natural Resources."

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(c) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." In resolving a motion for judgment on the pleadings, the court must accept all of the nonmovant's factual averments as true and draw all reasonable inferences in its

favor. ***Bradley v. Ramsey***, 329 F.Supp.2d 617, 622 (W.D.N.C.2004); ***Atwater v. Nortel Networks, Inc.***, 394 F.Supp.2d 730, 731 (M.D.N.C.2005). Judgment on the pleadings is warranted where the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. ***Bradley***, 329 F.Supp.2d at 622. The standard is similar to that used in ruling on Rule 12(b)(6) motion "with the key difference being that on a 12(c) motion, the court is to consider the answer as well as the complaint." ***Continental Cleaning Serv. v. United Parcel Serv., Inc.***, 1999 WL 1939249, at *1 (M.D.N.C. April 13, 1999) (internal citations omitted).

When a defendant files a 12(b)(6) motion to dismiss the complaint, the court should accept the plaintiff's factual allegations as true and view the complaint in the light most favorable to the plaintiff. *See, e.g.,* ***Franks v. Ross***, 313 F.3d 184, 192 (4th Cir. 2002) (quoting ***Mylan Labs., Inc. v. Matkari***, 7 F.3d 1130, 1134 (4th Cir. 1993)). Thus, here, the Court must accept defendants' allegations as true and view the pleadings in the light most favorable to the defendants.

Additionally, a 12(c) or a 12(b)(6) motion can be converted to a Motion for Summary Judgment if matters outside the pleadings are submitted to the court and not excluded. Fed. R. Civ. P. 12(d). Here, both parties submitted affidavits with their briefs and the Court has taken those affidavits into consideration. Plaintiffs' motion is, therefore, converted into a motion for summary judgment.

The moving party is entitled to summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is

entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). *See* ***Charbonnages de France v. Smith***, 597 F.2d 406, 414 (4th Cir. 1979). A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 248 (1986).

In considering a motion for summary judgment, the court is required to draw all reasonable inferences in favor of the nonmoving party and to view the facts in the light most favorable to the nonmoving party. ***Anderson***, 477 U.S. at 255. The moving party has the burden to show an absence of evidence to support the nonmoving party's case. ***Celotex Corp. v. Catrett***, 477 U.S. 317, 325 (1986). The party opposing summary judgment must then demonstrate that a triable issue of fact exists; he may not rest upon mere allegations or denials. ***Anderson***, 477 U.S. at 248. A mere scintilla of evidence supporting the case is insufficient. ***Id.*** at 252.

CONCLUSIONS OF LAW

I. Defendants' Failure to Timely Answer and Alleged Disputed Material Facts

A. Failure to Plead

Defendants failed to file an answer to the Complaint within the time allotted by Federal Rule of Civil Procedure 12(a)(4)(A). According to both the law in this Circuit as well as the Federal Rules of Civil Procedure, the Court should deem the allegations in the Complaint admitted due to defendants' failure to plead. *See* Fed. R. Civ. P. 8(b)(6); ***North River Ins. Co. v. Stefanou***, 831 F.2d 484, 486-87 (4th Cir. 1987).

Defendants have, however, argued that they believed filing an answer would be in violation of this Court's Scheduling Order. [Doc. 22]. Further, defendants argue that their

failure to plead did not prejudice plaintiffs as plaintiffs were aware of the disputed facts from the Parties' Rule 26(f) Conference (citing [Doc. 20]), and because defendants filed a Motion to Dismiss the Complaint. [Doc. 9]. This is an interesting argument as the Court, as well as plaintiffs were assured during the Scheduling Conference–*after the parties' rule 26(f) conference*–that the parties agreed on the facts and that no discovery was required. It appears to the Court that such assurances would lead plaintiff to believe that the allegations of the Complaint were admitted, especially when defendants failed to timely file an answer to the Complaint. Additionally, defendants' reliance on their Motion to Dismiss to convey to plaintiffs that the allegations in the Complaint were not admitted seems misplaced. A motion to dismiss, by definition, requires the Court to review *only* the complaint for legal sufficiency. Defendants could not, and did not, challenge any of plaintiffs' factual allegations in their motion to dismiss.

This Court entered a Scheduling Order setting a briefing schedule for dispositve motions on December 9, 2008 [Doc. 22], but defendants argue a "reasonable misinterpretation" of that Order was that, excepting dispositive motions, no other pleadings were to be filed with the Court. Defendants, therefore, seem to be arguing that they "reasonably misinterpreted" the Order to require the parties to submit dispositive motions without defendants' having filed an answer. The only way such a misinterpretation would seem reasonable is defendants admitted all allegations in the Complaint. The Court notes that it received no communication from defendants asking that discovery be conducted or that defendants be allowed to file an answer.

In spite of defendants' failure to timely plead, the Court will not deem plaintiffs'

allegations in the Complaint as admitted, and has in drafting this Order considered defendants' Answer. The Court grants defendants the benefit of the doubt as to their misunderstanding of this Court's order. The Court also notes that it found any possible prejudice to plaintiffs in filing their summary judgment motion prior to defendants' filing their answer to have been remedied through plaintiffs' opportunity to reply to defendants' response.

B. Alleged Material Issues of Fact

Defendants argue that the case at bar is not ripe for summary judgment and allege the following disputed material facts: (1) whether Friends of Blackwater Canyon is a political cause or party ([Doc. 28] at 3-4); (2) the purpose of the National Hunting and Fishing Days Celebration ([Doc. 28] at 5-6); (3) whether plaintiffs were told by a representative of the DNR that they could not attend National Hunting and Fishing Days and/or whether a representative of the DNR stifled their attempt to do so ([Doc. 28] at 6-8); (4) whether plaintiffs actions at National Hunting and Fishing Days caused any disruption ([Doc. 28] at 8-9); (5) what was said and/or done by plaintiffs to obtain permission to solicit signatures, and what was said/or done by the DNR in response to any inquiries by plaintiffs ([Doc. 28] at 9-13)[1]. As the Court finds none of the above issues to be material to determining the

[1] Defendants also argue that summary judgment cannot be granted in favor of plaintiffs because they have not proven any amount of damages, they did not address the involvement of defendants Warner and England in the text of their motion; and plaintiffs have not proven the identity of John Does 1 and 2. As the Court finds that plaintiffs are seeking injunctive relief on a facial challenge to a statute that defendants Warner and England undisputably enforced on September 22, 2007, the Court finds these arguments

facial challenge before the Court, the Court finds that the above styled case is ripe for summary judgment.

II. West Virginia Code of State Rules § 58-31-2.16 is Unconstitutional on its Face

Here, plaintiffs have mounted both an "as applied" and a "facial" challenge to West Virginia Code of State Rules § 58-31-2.16, arguing that the regulation prevents plaintiffs from exercising rights granted them under the First Amendment to the United States Constitution. As this Court finds that West Virginia Code of State Rules § 58-31-2.16 is unconstitutional on its face, this Court need not reach the issue of the constitutionality of the regulation as applied to plaintiffs.

A. Standing

In order to bring a constitutional challenge of § 58-31-2.16, plaintiffs must first have standing. Article III standing has several components: (1) a particularized injury in fact; (2) a causal nexus; and (3) redressability. Here, in alleging that they were stopped from petitioning at Stonewall Jackson Lake State Park on September 22, 2007, pursuant to West Virginia Code of State Rules § 58-31-2.16, and in violation of their First Amendment right to free speech, plaintiffs have met all the Article III standing requirements.

First, plaintiffs have shown a particularized injury in fact because plaintiffs were prevented from petitioning which is recognized in First Amendment jurisprudence as "speech." ***Myer v. Grant***, 486 U.S. 414, 422 n.5 (1988). Defendants argue that there are material issues of fact as to whether plaintiffs were 'wholly barred' from petitioning in the park and whether plaintiffs were prohibited from participating in National Hunting and

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unavailing.

Fishing Days. Presumably, defendants are arguing that there are material issues of fact as to whether plaintiffs suffered the 'injury in fact' required to give them standing. These facts are not, however, material to determining standing.

In ***City of Lakewood v. Plain Dealer Publishing Co.***, 486 U.S. 750, 755-56 (1988), the Supreme Court held that when a party challenges a statute requiring a permit as an unconstitutional prior restraint on free speech, that party need not have first applied for and been denied a permit. ***Id.*** at 758. The Court stated, "[r]ecognizing the explicit protection accorded speech and the press in the text of the First Amendment, [United States Supreme Court] cases have long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." ***City of Lakewood***, 486 U.S. at 755-56. The Court reasoned that, "[a]t the root of this long line of precedent is the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." ***Id.*** at 757. "And these evils engender identifiable risks to free expression that can be effectively alleviated only through a facial challenge." ***Id.*** at 757. "... [T]he mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." ***Id.*** at 757.

As such, whether or not plaintiffs were 'wholly barred' and whether or not plaintiffs first sought a permit to petition, or sought to conform to the requirements set out for

participants in National Hunting and Fishing Days are irrelevant.[2] Here, plaintiffs began petitioning and were told to leave National Hunting and Fishing Days because West Virginia Code of State Rules § 58-31-2.16 required that plaintiffs obtain the permission of the

[2] Defendants argue in their Response that plaintiffs called and asked about the requirements in order to set up a booth at National Hunting and Fishing Days. Then, after plaintiffs learned that their group and activities would not fit the requirements, plaintiffs did not seek to conform their activities but instead 'just showed up anyway' and petitioned. ([Doc. 28] at 6-8). Even granting defendant such facts, plaintiffs would still have standing as the harm plaintiffs allege is not that the National Hunting and Fishing Days participation policies interfered with their rights, but that West Virginia Code of State Rules § 58-31-2.16 is an unconstitutional prohibition which prevented plaintiffs from petitioning in the park during National Hunting and Fishing Days regardless of their participation in the official event. Presumably, since no other group was reportedly removed from petitioning, the DNR's approval of certain groups to set up booths at National Hunting and Fishing Days also amounted to the permission required by West Virginia Code of State Rules § 58-31-2.16.

If defendants are arguing that as plaintiffs did not seek permission to be a part of National Hunting and Fishing Days and, therefore, cannot claim that permission was denied pursuant to West Virginia Code of State Rules § 58-31-2.16, such a claim also fails. *See* West Virginia Code of State Rules § 58-31-2.16 (prohibiting "Hawking, peddling, soliciting, begging, advertising, or carrying on any business or commercial enterprise... in *state parks, state forests, and state wildlife management areas without the written permission of the Director of the Division of Natural Resources*" (emphasis added)); ***City of Lakewood ,*** 486 U.S. 750 (holding that a newspaper need not have applied for a newspaper stand permit before challenging the constitutionality of a law requiring permits to place newspaper stands on city streets).

Director of the DNR before petitioning in the park. Those facts are sufficient to constitute a particularized injury in fact for purposes of a facial challenge.

Second, plaintiffs must show some causal nexus between the challenged rule and the alleged injury[3]. As the Supreme Court noted in ***City of Lakewood***, not every regulation granting discretion to a government official creates a sufficient causal nexus to allow a party to challenge the regulation under the First Amendment. As an example, the Court set out the hypothetical of statute requiring permission of a government official to obtain a building permit. ***Id.*** 486 U.S. 761. The Court noted that a statute giving a government official discretion with respect to whether to grant or deny building permits did not have a sufficient causal nexus to allow a party to challenge the statute on First Amendment grounds. ***Id.*** The Court reasoned that such a statute would be unlikely to result in abuse and would not present the same threat of self-censoring present in cases where discretion was granted

[3] The opinion in ***City of Lakewood*** was authored by Justice Brennan, who was joined by Justices Marshall, Backmun, and Scalia. Justice White filed a dissenting opinion in which Justices Stevens and O'Connor joined. Justices Rehnquist and Kennedy took no part in the consideration or the decision of the case.

The dissenters in ***City of Lakewood*** take issue with the majority's characterization of a "'nexus' to expression," noting that the Court has allowed facial challenges where "the expressive conduct which a city sought to license was an activity which the locality could not prohibit altogether." ***Id.*** 486 U.S. at 777. Justice White then went on to write that "[s]treets, sidewalks, and parks are traditional public fora; leafleting, pamphletting, and speaking in such places may be regulated; but they may not be entirely forbidden." Thus, whether under the rationale of the majority or the minority a facial challenge to § 58-31-2.16 is proper.

to an official to decide what speech to allow and what speech to prohibit. ***Id.*** In contrast, here, plaintiffs have established a causal nexus between the challenged rule prohibiting solicitation without permission of the Director of the DNR, and the alleged harm that the rule stifled plaintiffs' speech.

As the Supreme Court noted in ***City of Lakewood*** ,"[s]elf-censorship is immune to an 'as applied' challenge, for it derives from the individual's own action, not an abuse of government power." ***Id.*** 486 U.S. at 757. Plaintiffs, therefore, need only establish a nexus between the rule and the likelihood of self-censorship, which the Supreme Court already found in a similar statute in ***City of Lakewood*** which granted similar authority to the mayor to grant or deny permits for newspapers to put news racks on city sidewalks. *See* ***Id.*** at 755-56. Specifically, the Court found that the unbridled discretion granted to the mayor to grant or deny the permits could result in undetected self-censorship by newspapers (by engaging in speech the mayor would favor) so as to ensure a place for their newsracks on city sidewalks.

Finally, in order to establish Article III standing, plaintiffs must show that their injury is redressable by order of this Court. Defendants argue that because plaintiffs have not applied to petition in the park since the time of the alleged incident any alleged constitutional deprivation is complete and, therefore, irredressable[4]. The Supreme Court

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[4] Defendants argued in their brief that there were disputed issues of material fact as to whether plaintiffs had applied for permission and been denied permission by the DNR. ([Doc. 28] at 12-13).

has held that this is not the case.

Plaintiffs' challenge falls into one of the exceptions to the mootness doctrine: those cases that are capable of repetition, yet evading review. *See* ***Southern Pac. Terminal Co. v. Interstate Commerce Commission***, 219 U.S. 498, 515 (1911); ***Richmond Newspapers, Inc. v. Virginia***, 448 U.S. 555, 563 (1980). Here, plaintiffs were prevented from petitioning by park officials acting under § 58-31-2.16. The regulation still stands, regardless of whether plaintiffs are currently seeking to petition in Stonewall Jackson Lake State Park. Thus, any further attempt by plaintiffs to petition at any West Virginia state park could be blocked so long as the statute remains in place. As such, plaintiffs' claims are not moot, and they have established Article III standing.

B. Plaintiffs' Challenge to the Regulation

The First Amendment right to free speech is not absolute but is subject to regulation. ***City of Lakewood***, 486 U.S. at 760. West Virginia Code of State Rules § 58-31-2.16 prohibits all "[h]awking, peddling, soliciting, begging, advertising, or carrying on any business or commercial enterprise," and as such it is a prior restraint on expressive conduct protected by the First Amendment. *See* ***Myer v. Grant***, 486 U.S. 414, 422 n.5 (1988) ("solicitation of signatures for a petition involves protected speech.")

In order to determine if § 58-31-2.16 is an unconsitutional prior restraint on expressive conduct, the court must first: (1) determine if the challenged regulation is content neutral or content based, (2) determine the type of forum regulated; and (3) apply the appropriate level of scrutiny to the challenged regulation. *See* ***Cornelius v. NAACP***

Legal Defense and Educational Fund, Inc., 473 U.S. 788, 802 (1985); ***Frisby v. Schultz***, 487 U.S. 474, 479-80 (1988).

1. West Virginia Code of State Rules § 58-31-2.16 is Content Neutral

In determining whether a regulation is content neutral or content based, the court should look to the purpose behind the regulation. ***Ward v. Rock Against Racism***, 491 U.S. 781, 791 (1989). "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." ***Turner Broadcasting System, Inc. v. FCC***, 512 U.S. 622, 642-43 (1994). "Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech." ***Ward***, 491 U.S. at 791 (internal quotations omitted).

Here, West Virginia Code of State Rules § 58-31-2.16 prohibits all "[h]awking, peddling, soliciting, begging, advertising, or carrying on any business or commercial enterprise...without the written permission of the Director of the Division of Natural Resources." As the regulation makes no distinction based on what individuals are ""[h]awking, peddling, soliciting, begging, advertising, or [what type of] business or commercial enterprise [individuals are carrying on]" the regulation is content neutral. *See* ***Ward***, 491 U.S. at 791.

2. West Virginia Code of State Rules § 58-31-2.16 Regulates a Public Forum

The Supreme Court has identified three types of public fora: "the traditional public forum, the public forum created by government designation, and the nonpublic forum."

Cornelius, 473 U.S. at 802. "Traditional public fora are those places which 'by long tradition or by government fiat have been devoted to assembly and debate.' [***Perry Educ. Ass'n v. Perry Local Educators' Ass'n***,] 460 U.S. [37], at 45 [1983]... Public streets and parks fall into this category. *See* ***Hague v. CIO***, 307 U.S. 496, 515...(1939)." ***Cornelius***, 473 U.S. at 802. A public forum may also "be 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." ***Cornelius***, 473 U.S. at 802 (citing ***Perry Education Assn.***, 460 U.S. at 45, 46 n. 7).

Here, defendants argue that there are material issues of fact regarding into what type of forum Stonewall Jackson Lake State Park fits. Defendants submit to this court that the park falls not into the fora which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," ***Perry Education Assn.***, 460 U.S. at 45, but instead "is [intended] for the recreational and aesthetic wilderness enjoyment for the citizens of West Virginia, and/or other states." ([Doc. 28] at 22). This Court finds defendants' argument that a state park which is open to the public for "recreational" "enjoyment" would not constitute a public forum for the purpose of First Amendment expressive purposes, to be silly at best. *See* ***Warren v. Fairfax County***, 196 F.3d 186, 195 (4th Cir. 1999) ("One cannot seriously argue with Justice Kennedy's observation that the traditional public fora of streets, sidewalks, and parks are not primarily designed for expressive purposes.")

Defendants cite to no case which supports their proposition that the public park in this case is different than a public park in every other case. *See* ***Hotel Employees & Restaurant Employees Union, Local 100 v. City of New York Dep't of Parks & Recreation***, 311 F.3d 534 (2d Cir. 2002). (addressing free speech rights in a public plaza which defendants note in their brief "was not designated, expressly or impliedly, as [a] public park," ([Doc. 28] at 29)); ***Greer v. Spock***, 424 U.S. 828 (1976) (addressing free speech rights on a federal military reservation); ***Heffron v. International Soc. for Krishna Consciousness, Inc.***, 452 U.S. 640 (1981) (addressing free speech rights at a state fair). Defendants argue that because plaintiffs attempted to solicit signatures at National Hunting and Fishing Days, that the designated public forum analysis should apply. Plaintiffs, however, are challenging their exclusion from National Hunting and Fishing Days on the basis of West Virginia Code of State Rules § 58-31-2.16 which applies to the Stonewall Jackson Lake State Park regardless of whether it is National Hunting and Fishing Days or any other day. Therefore, defendants' arguments that National Hunting and Fishing Days constitutes a designated public forum; that plaintiffs could have applied to participate in the National Hunting and Fishing Days event as an exhibitor; and that plaintiffs' could have solicited signatures outside the park on National Hunting and Fishing Days, are inapplicable to the case at bar.

Plaintiffs have presented a *facial challenge* to West Virginia Code of State Rules § 58-31-2.16. The fact that plaintiffs were excluded from a specific event–National Hunting and Fishing Days–cannot be read to limit the regulation which on its face applies to "state

parks, state forests, and state wildlife management areas." Accordingly, this Court finds that West Virginia Code of State Rules § 58-31-2.16 is a prior restraint on expression in a public forum.[5]

3. Scrutiny Analysis

Any prior restraint on expression in a public forum is subject to strict scrutiny. ***Perry Education Assn.***, 460 U.S. at 45. To withstand constitutional muster, therefore, West Virginia Code of State Rules § 58-31-2.16 must be: a narrowly tailored and content-neutral time, place, and manner restriction, which serves a significant government interest and allows for adequate alternative channels of communication. ***Id***, 460 U.S. at 45. Section 58-31-2.16 fails this strict scrutiny test as it is not narrowly tailored to serve a significant government interest. *See* ***City of Lakewood***, 486 U.S. at 770; ***Shuttlesworth v. City of Birmingham, Ala.***, 394 U.S. 147, 150-151 (1969).

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[5] The Court notes that even if the Court were to accept should defendants' position that the forum is actually a 'limited public forum,' the Court's analysis would not change as the regulation grants the Director of the DNR boundless discretion. *See* ***Child Evangelism Fellowship of Maryland, Inc. v. Mongomerty County Public Schools***, 457 F.3d 376 (4th Cir. 2006) (stating, "there is broad agreement that, even in limited public and nonpublic forums, investing government officials with boundless discretion over access to the forum violates the First Amendment.") (citing ***Atlanta Journal & Constitution v. City of Atlanta Dep't of Aviation***, 322 F.3d 1298, 1306-07, 1310-11 (11th Cir. 2003); ***DeBoer v. Village of Oak Park***, 267 F.3d 558, 572-74 (7th Cir 2001); ***Lewis v. Wilson***, 253 F.3d 1077, 1079-80 (8th Cir. 2001); ***Summum v. Callaghan***, 130 F.3d 906, 919-20 (10th Cir. 1997); ***Sentinel Commc'ns Co. v. Watts***, 936 F.2d 1189, 1200 n.11 (11th Cir. 1991)).

West Virginia Code of State Rules § 58-31-2.16 states:

> Hawking, peddling, soliciting, begging, advertising, or carrying on any business or commercial enterprise is prohibited in state parks, state forests, and state wildlife management areas without the written permission of the Director of the Division of Natural Resources.

Defendants argue that the regulation is "narrowly tailored to serve a significant government interest in curtailing unchecked behavior that would bother, exploit, and/or annoy park attendees who go to West Virginia parks to enjoy the great outdoors." ([Doc. 28] at 25). The Court would note that "[g]overnment generally has a freer hand in restricting expressive conduct than it has in restricting written or spoken word. It may not, however, proscribe particular conduct *because* it has expressive elements.... law *directed at* the communicative nature of conduct must, like law directed at speech itself, be justified by the substantial showing of need that First Amendment requires." ***Texas v. Johnson***, 491 U.S. 397, 406 (1989) (emphasis in original). Here, defendants have failed to meet the "substantial showing of need" required by the First Amendment.

Defendants' argument that §58-31-2.16 serves the significant state interest of protecting park-goers from behavior that might "bother, exploit, and/or annoy [them]" is not *per se* invalid, but it is subject to a stringent standard. "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit expression of an idea simply because society finds an idea itself offensive or disagreeable." ***Johnson***, 491 U.S. at 414. Further, as Justice Kennedy noted, "[t]he First Amendment inevitably requires

people to put up with annoyance and uninvited persuasion." ***International Soc. for Krishna Consciousness, Inc. v. Lee***, 505 U.S. 672, 693 n.* (1992)(concurring in the judgment). "It is critical to recall that speech may be 'annoying' without losing its First Amendment protection." ***Gromley v. Director, Connecticut State Department of Adult Probation, et al***, 449 U.S. 1023, 1024 (1980). There have been few cases where the Supreme Court has found a regulation holding out 'protecting citizens from 'annoying speech'' as its only justification, to be sufficiently narrowly tailored to withstand a Constitutional challenge.

In order to be narrowly tailored the regulation must "burden no more speech than necessary to serve a significant government interest." ***Madsen v. Women's Health Center, Inc.***, 512 U.S. 753, 791 (1994). Defendants have failed to show that the regulation at issue "burdens no more speech than necessary." Specifically, it is clear from the text of the regulation that all solicitation is prohibited without permission, and that the Director of the DNR is vested with unlimited discretion to grant or deny a permit. The regulation, thus, burdens a large quantity of speech, and subjects all potential speakers to the whim of the Director of the DNR.

Defendants argue that the Court should presume permission will be granted if speakers seek permission, and argue that plaintiffs have failed to show that the regulation has been applied in a discriminatory or capricious manner. ([Doc. 28] at 25-26). It is undisputed, however, that the language of the regulation does not contain any standards

for the Director of the DNR to use when denying a permit; making any permit denials virtually unreviewable. Based on a review of First Amendment jurisprudence, that fact alone is sufficient to find the regulation overly broad. *See* ***City of Lakewood***, 486 U.S. at 770; ***Shuttlesworth***, 394 U.S. at 150-151; ***Heffron***, 452 U.S. 640. Further, the Court in ***City of Lakewood*** explicitly rejected a similar argument made by defendants in that case, stating:

> the city asks us to presume that the mayor will deny a permit application only for reasons related to the health, safety, or welfare of Lakewood citizens, and that additional terms and conditions will be imposed only for similar reasons. This presumes the mayor will act in good faith and adhere to standards absent from the ordinance's face. But this is the very presumption that the doctrine forbidding unbridled discretion disallows. *E.g.* ***Freedman v. Maryland***, 380 U.S. 51 (1965). The doctrine requires that the limits the city claims are implicit in its law be made explicit by textual incorporation, binding judicial or administrative construction, or well established practice. ***Poulos v. New Hampshire***, 345 U.S. 395 (1953); ***Kunz v. New York***, 340 U.S. 290 (1951). This Court will not write nonbinding limits into a silent statute.

Id. 486 U.S. 769.

Here, neither party has presented to this Court–nor has this Court found of its own accord–any "textual incorporation, binding judicial or administrative construction, or well established practice" showing that the Director of the DNR will only "deny a permit

application... for reasons related to the health, safety, or welfare of [park-goers]." *See* ***Id.*** As such, the unbridled discretion granted to the Director of the DNR on the face of the regulation is an unconstitutional prior restraint on First Amendment rights.[6] ***Id.***

Additionally, the Court would note defendants' argue that § 58-31-2.16 is similar to the regulation upheld by the Supreme Court in ***Heffron***, but finds that ***Heffron*** only lends further support to this Court's determination that § 58-31-2.16 is unconstiutional. In ***Heffron***, the Supreme Court upheld a Minnesota State Fair regulation "confining distribution, selling, and fund solicitation activities to fixed locations [within the fair grounds]." ***Id.*** 452 U.S. at 654. The Rule required that anyone wanting to distribute, sell, or solicit funds within the fairgrounds rent a booth ("[s]pace in the fairgrounds is rented to all comers in a nondiscriminatory fashion on a first-come, first-served basis with the rental charge based on the size and location of the booth.") ***Id.*** at 644. The Court upheld the regulation finding that the regulation served a substantial state interest: managing the flow of the crowd at the fair. ***Id.*** at 654.

Here, defendants make much of the fact that plaintiffs could have applied for a booth

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[6] The Court in ***City of Lakewood*** also noted that a facial challenge of statute or ordinance regulating speech may be permitted even when such a challenge deprives the government of the chance to obtain a construction of the statute by a state court which would render the statute constitutional or establish a local practice which would show it to be constitutional. ***Id.*** 486 U.S. 770 n.11. So any argument that defendants have not been provided the opportunity to obtain such a construction from a state court would also fail.

at National Hunting and Fishing Days, but the similarities of ***Heffron*** to the case at bar stop there. First, §58-31-2.16 applies to all "state parks, state forests, and state wildlife management areas," not to a limited event drawing a large crowd (a state fair) as in ***Heffron***[7]. Second, § 58-31-2.16 requires that anyone wishing to solicit at a West Virginia park property request permission from the Director of the DNR, but–as discussed above–the regulation provides no standards for reviewing the decision of the Director of the DNR; whereas in ***Heffron***, groups wishing to solicit need only to rent a booth.

It is also interesting to note that in their brief defendants state that "[p]laintiffs did not abide by the DNR policies and procedures for the event by completing a Vendor's Registration Form and Policy for Exhibitors and Presenters for National Hunting and Fishing Days. *Nor did they seek written permission to be present under Rule §58-31-2.16*. Had they taken such steps, *their registration might have been granted*, provided they followed the guidelines contained therein and offered the public attendees some activity, exhibit, or demonstration related to hunting, fishing, or wildlife along with their other agendas." ([Doc. 28] at 10)(emphasis added). Thus, based on the facts as presented by defendants themselves, ***Heffron,*** is inapplicable–unless to show that the regulation at issue is not narrowly tailored to serve a significant state interest.

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[7] Defendants attempt to make the relevant forum of § 58-31-2.16, National Hunting and Fishing Day, comparing the event to the state fair in ***Heffron***. In fact, the relevant forum as defined by the text of the statute is all West Virginia "state parks, state forests, and state wildlife management areas."

Nor is this Court convinced by defendants' appeals to this Court to find ***Davis v. Com. of Massachusetts***, 167 U.S. 43, 45 (1897) dispositive of the case at bar. Defendants cite to the language of Davis that "[t]he right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstance such use may be availed of, as the greater power contains the lesser." This language, drawn from a case over 100 years old, was addressed by the Supreme Court in ***City of Lakewood*** , 486 U.S. at 755-56. In ***City of Lakewood***, the Court engages in an extensive analysis of the 'greater includes the lesser' reasoning and finds that it is inapplicable in situations where a government official is granted unbridled discretion to determine what speech will be heard and what speech will be silenced. Specifically, the Court states:

> this Court has long been sensitive to the special dangers inherent in a law placing unbridled discretion directly to license speech, or conduct commonly associated with speech, in the hands of a government official. In contrast, when the government is willing to prohibit a particular manner of speech entirely-the speech it favors along with the speech it disfavors-the risk of governmental censorship is simply not implicated. The "greater" power of outright prohibition raises other concerns, and we have developed tests to consider them. But we see no reason, and the dissent does not advance one, to ignore censorship dangers merely because other, unrelated concerns are satisfied.

Id. 767-68.

As the Court finds that § 58-31-2.16 is an unconstitutional prior restraint on First Amendment expression, it is next necessary to determine if the regulation is severable. *See* ***Oregon v. Mitchell***, 400 U.S. 112, 131 (1970) ("it is a longstanding cannon of statutory construction that legislative enactments are to be enforced to the extent that they are not inconsistent with the Constitution, particularly where the valid portion of the statute does not depend upon the invalid part"); ***INS v. Chadha***, 462 U.S. 919, 931 (1983) (holding that invalid portions of a statute should be severed unless it is clear that the legislative body would not have enacted the statute without the unconstitutional portion). A provision is presumed severable where the statute absent the unconstitutional portion is fully operative as law. ***Chadha***, 462 U.S. at 934.

Here, § 58-31-2.16 grants the Director of the DNR unbridled discretion and lacks any objective standards from which to review any permit denials. The Court has, however, only reviewed the portion of the regulation relating to solicitation. The entire regulation relates to "[h]awking, peddling, soliciting, begging, advertising, or carrying on any business or commercial enterprise..." W.Va. Code of State Rules § 58-31-2.16. As the only portion of the regulation this Court has found unconstitutional is the portion relating to "solicitation," that unconstitutional provision should be severed from the remainder of the regulation. See ***Chadha***, 462 U.S. at 931. The regulation should, therefore, now read:

> Hawking, peddling, ~~soliciting~~, begging, advertising, or carrying on any business or commercial enterprise is prohibited in state parks, state forests, and state wildlife management areas

> without the written permission of the Director of the Division of Natural Resources.

CONCLUSION

Based on the foregoing, plaintiffs' Motion for Summary Judgment [Doc. 24] should be **GRANTED in part** and **DENIED in part**. Specifically, the Court **ORDERS** as follows:

- Plaintiffs' Motion for Summary Judgment [Doc. 24] is hereby **GRANTED** in that West Virginia Code of State Rules § 58-31-2.16 is held unconstitutional as to "solicitation" and defendants are hereby enjoined from enforcing that portion of the regulation; and
- the unconstitutional "solicitation" provision of West Virginia Code of State Rules § 58-31-2.16 should be severed from the remainder of the regulation and it should now read:

> Hawking, peddling, ~~soliciting~~, begging, advertising, or carrying on any business or commercial enterprise is prohibited in state parks, state forests, and state wildlife management areas without the written permission of the Director of the Division of Natural Resources.

- Plaintiffs' Motion for Summary Judgment [Doc. 24] is **DENIED in part** as to plaintiffs' "as applied" challenge of West Virginia Code of State Rules § 58-31-2.16.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: June 3, 2009

JOHN PRESTON BAILEY
CHIEF UNITED STATES DISTRICT JUDGE