UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JUAN MARTINEZ,	)	Hon.
Plaintiff,	)	Case No.
vs.	)	
	)	
CITY OF TRENTON, NEW JERSEY,	)	Civil Action
DOUGLAS H. PALMER, and	)	
ERIC TUNSTALL, in their official	)	
capacities, and their successors,	)	
Defendants.	)	

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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PROCEDURAL HISTORY

This is a civil rights action, brought pursuant to 42 U.S.C. § 1983, together with pendent state claims. Plaintiff Juan Martinez, a community activist, claims that Trenton violated his First Amendment and state constitutional free speech rights by prohibiting him from using the city hall atrium for a press conference critical of the mayor. City Hall is an instrumentality of the state, and the officials who barred Mr. Martinez from speaking in the atrium acted under color of state law.

The matter is before the Court on Martinez's motion for a preliminary injunction, filed with his complaint. The motion must be granted if Martinez can show: 1) a probability of success on the merits of his claim; 2) immediate, irreparable harm; and 3) a preponderant benefit to the public interest. AT&T Co. v. Winback & Conserve Program, Inc., 42 F.3d 1421, 1427 (3d Cir. 1994), cert. denied, 514 U.S. 1103 (1995); Bradley v. Pittsburgh Bd. of Ed., 910 F.2d 1172, 1175 (3rd Cir. 1990). See also American Civil Lib. Union of NJ v. Black Horse Pike Reg. Bd. of Ed., 84 F.3d 1471, 1477 n.2 (3d Cir. 1996). For three reasons, Martinez satisfies this standard.

First, Trenton has violated the First Amendment in two distinct ways. It has denied Martinez access to a traditional public forum because of the content of his speech. Its arbitrary system for determining who can use the atrium for expressive activities constitutes an impermissible prior restraint on speech.

Second, the denial of First Amendment rights suffered by Martinez is a classic example of irreparable harm. Elrod v. Burns, 427 U.S. 347, 373 (1976) ("the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). See also Telco Communications v. Barry, 731 F. Supp. 670, 684 (D.N.J. 1990).

Third, the public interest favors a preliminary injunction. An injunction will ensure that the atrium will continue to be used for expressive activities, as it has in the past. It will eliminate any arbitrary allocation of access until the issues raised by Martinez's complaint are resolved. And it will not prejudice city operations.

STATEMENT OF FACTS

Plaintiff Juan Martinez is a community activist who is involved in numerous local issues, many of which affect the Hispanic and other minority communities in Trenton, New Jersey. This action arises from Trenton's violation of Mr. Martinez's First Amendment and state constitutional free speech rights. Specifically, Mr. Martinez has been barred from using a portion of public property, even though the mayor, other politicians, community leaders, and other speakers have used this property for a variety of expressive activities.

A. The City Hall Atrium

The public property at issue is the city hall atrium, a three-story glass enclosure between the old city hall building and the newer city hall annex. The old city hall building was completed in 1911, and embodies the affluence Trenton enjoyed at the beginning of the 20th century. It is built of white marble, in the classical style, with symmetrical facades, two-story columns, bronze gates, banding, and elaborate lintels. The contemporary style annex was built in the 1970s. The two buildings are connected by the glass-enclosed atrium and adjacent landscaped, open-air plaza that contains benches and picnic tables.

The atrium and plaza area form a continuous, single unit and are akin to a public park. The atrium and plaza area are open to the public, and have been since they were built. There is a

bulletin board and a display table in the atrium, both of which contain literature placed there by various community, political and religious groups, as well as by the city. There are sofas, chairs and side tables in the atrium, where members of the public can congregate, as they may also do at the park benches outside. Figure 1 depicts the atrium viewed toward the old city hall building. Figure 2 shows the atrium as viewed toward the annex. Figures 3 and 4 show it from the plaza outside.

The mayor often uses the space for press conferences. Other politicians, community groups and individuals have used the space for press conferences, announcements, campaign kickoffs and endorsements, public information campaigns, and other kinds of expressive activity. The atrium has been used for historical reenactments, public health proclamations, Christmas parties, St. Patrick's Day parade announcements, children's Halloween events, award ceremonies, culinary festivals, bar association functions, and community conferences. See certification of Grayson Barber submitted herewith.

By its nature, character, layout and public accessibility, the atrium and plaza are not only conducive to public access and expressive activity, but encourage it.

B. Mr. Martinez is Barred from the Atrium

Mr. Martinez made a telephone call to City Hall on March 16, 1999, explaining that he wanted to use the atrium for a press conference on March 23, 1999. He received tentative permission and was told that his press conference would be entered into the scheduling calendar for the atrium. The Office of Public Property directed Martinez to submit his request in writing. He did so by fax dated March 19, 1999, explaining that his group, the Hispanic Churches of

Mercer County, wished to discuss a "city matter." See Certification of Juan Martinez and Exhibit A thereto.

The subject matter of Mr. Martinez's proposed press conference was the mayor's plan to replace the city's police chief with a civilian appointee. See Exhibit B. In particular, Mr. Martinez supported the Deputy Police Chief who was next in line for the position in the mayor's cabinet.[1]

On March 22, 1999, Martinez received a call from the city's director of public relations, who required Martinez to provide the number of participants, the sponsors of the conference, and the topic of the conference. After Martinez disclosed that the conference would be contrary to a position taken by the mayor, his request to use the atrium was denied, on the ground that the topic of the conference was "political." City hall personnel physically prevented Martinez from using the atrium, and he was forced to hold the press conference on the steps outside city hall.

C. Trenton's Practice and Procedures for Press Conferences

Any member of the general public can ask to use the atrium for a press conference. Such requests are routine. Trenton merely requires that written requests must be submitted to the Mayor's Office or the Office of Public Property, setting forth 1) the purpose of the conference, 2) the size of expected audience, and 3) the resources that will be required, such as microphones, podiums, chairs, and tables. For those who wish to use the atrium after 4:30 p.m., additional security is available at an additional (but undisclosed) charge. The only limitation, according to the Office of Public Property, is that press conferences must have "no political content." See Certification of Juan Martinez ¶ 5.

[1] A special referendum was held in Trenton on June 22, 1999. The mayor's initiative passed by a vote of 6664 to 5871.

There are no written ordinances, regulations or guidelines to limit use of the atrium. The decision to grant access to the atrium and plaza is made entirely on an *ad hoc*, discretionary basis; there exist no standards or criteria, formal or informal, written or unwritten. See Certification of Juan Martinez ¶ 9.

Martinez was told that all requests must be submitted in writing. Through his counsel, Martinez asked to look at the written requests that had previously been submitted by others, and requested access to government records that would document the mayor's use of the atrium. See Certification of Juan Martinez Exhibit C. Martinez also asked for a written statement of the fee charged for security after 4:30 p.m., and a copy of the scheduling calendar used by the Office of Public Property. The defendants have failed to produce any of the requested records.

Mr. Martinez intends to continue his involvement in community affairs. He fully expects and intends in the future to request the use of the city hall atrium for expressive purposes, including political speech.

ARGUMENT

I. THE ATRIUM IS A PUBLIC FORUM, TO WHICH THE PUBLIC HAS GUARANTEED ACCESS, SUBJECT ONLY TO CONTENT-NEUTRAL, NARROWLY TAILORED TIME, PLACE, AND MANNER RESTRICTIONS ON SPEECH; HENCE MARTINEZ WILL PROBABLY SUCCEED ON THE MERITS OF HIS FIRST AMENDMENT CLAIMS

When Trenton barred Mr. Martinez from the atrium, it violated his First Amendment rights in at least two ways. First, it has denied public access to a traditional public forum on the basis of the content of speech. Second, its "approval" process for use of the atrium amounts to an impermissible licensing scheme that imposes an unconstitutional prior restraint on speech.

A. The Atrium Is The Equivalent of a Public Park, Built for and Dedicated to Expressive Activity, and Is Therefore a Traditional Public Forum.

The glass enclosure of the atrium is an extension of the plaza between the old city hall building and the new annex -- in essence a public park with a glass roof over a portion of it. In design, purpose, function and use, the city hall atrium must be treated as a "traditional" public forum. Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). Public parks and similar venues "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." Ibid., quoting Hague v. CIO, 307 U.S. 496, 515 (1939). See also Schneider v. New Jersey, 308 U.S. 147 (1939) (city sidewalk as traditional public forum).

The United States Supreme Court has consistently applied a "forum" analysis to determine whether a given rule or regulation violates the First Amendment." A "traditional"

public forum is a place that, like the atrium, has as "a principal purpose the free exchange of ideas." Int'l Society of Krishna Consciousness v. Lee, 505 U.S. 672, 679 (1992) (citations and internal quotations omitted). Streets, parks, municipal auditoriums and theaters are "quintessential" traditional public forums. Perry, 460 U.S. at 45; Marilyn Manson, Inc. v. New Jersey Sports & Expo. Auth., 971 F. Supp. 875, 884 (D.N.J. 1997). Traditional public forums include not only parks and sidewalks, but places that "by government *fiat* have been devoted to assembly and debate." Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 802 (1985), quoting Perry, 460 U.S. at 45.

The grounds and buildings of state and federal capitol complexes and similar buildings have consistently been held to be public forums. See, e.g., United States v. Grace, 461 U.S. 171 (1983) (sidewalk of United States Supreme Court); Grutzmacher v. Public Bldg. Comm'n of Chicago, 700 F. Supp. 1497 (N.D. Ill. 1988) (Chicago's Daley Plaza); Duffy v. Quattrocchi, 576 F. Supp. 336 (D.R.I 1983) (auditorium where legislature held a one-day public hearing); Reilly v. Noel, 384 F. Supp. 741 (D.R.I. 1974) (state house rotunda); Jeannette Rankin Brigade v. Chief of Capitol Police, 342 F. Supp. 575 (D.D.C. 1972), *aff'd mem.*, 409 U.S. 972 (1972) (grounds of the United States Capitol).

The atrium and plaza fall into this category. They form a continuous space that is akin to a public park, part of which has a glass roof over it. Trenton treats the atrium for all intents and purposes like an enclosed public park. The glass enclosure is open to the public for a wide variety of uses, such as historical reenactments, public health proclamations, Christmas parties, St. Patrick's Day parade announcements, children's Halloween events, award ceremonies, culinary festivals, bar association functions, and community conferences.

Moreover, the atrium and plaza are, and have always been, open to the public. They are open, landscaped and furnished spaces that by their nature and configuration lend themselves to speech and assembly. In fact, they have no function other than as a place for gathering and expressive activity, and they have consistently, and exclusively, been used for those purposes. The city has allowed and encouraged that use.

The government cannot deny public access to a traditional public forum. Nor can it regulate access on the basis of the content of the proposed speech. Perry, 460 U.S. at 45. At most, the city may impose content-neutral time, place, and manner restrictions that are necessary to serve a compelling interest and that are narrowly drawn to achieve that end. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Widmar v. Vincent, 454 U.S. 263, 270 (1981).

Even if Trenton were to establish regulations that are content-neutral, they must be limited to time, place or manner, and must be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." 460 U.S. at 45. And no matter what the scope of those regulations, the atrium and plaza *must* remain open to the public. "The privilege to use streets and parks for communication of views on national questions may be regulated in the interest of all, ... but it must not, in the guise of regulation, be abridged or denied." Hague, 307 U.S. at 515-516.

B. Trenton's Treatment of Martinez, And Its Overall Method of Determining Atrium Access, Are Neither Content-Neutral Nor Narrowly Tailored to Serve A Significant Government Interest

Trenton's test for granting access to the atrium appears to be entirely, and impermissibly, content-driven, both as to Mr. Martinez and in general. In a traditional public forum, content-based restrictions on speech are constitutional only if they serve a compelling governmental

interest in the least restrictive way. Texas v. Johnson, 491 U.S. 397 (1989). "Regulation of speech on property that the Government has *expressly dedicated to speech* activity is examined under strict scrutiny." United States v. Kokinda, 497 U.S. 720, 726-27 (1990) (emphasis added).

Trenton's approach to atrium access violates these constitutional standards, in several ways.

First, Trenton clearly rejected Mr. Martinez's request based upon the subject matter -- or content -- of his proposed speech. The mayor's office disagreed with Martinez's message and made that disagreement the explicit basis for its denial of access. More importantly, it withdrew permission *after* examining the content of the message, basing its decision on what it expected Martinez to say.

Second, Trenton can offer no compelling interest for regulating access to the atrium based on the content of the proposed speech. Disagreement with the speaker's message, articulated as an objection to "political" content, is an impermissible government interest, far less a compelling one. But Trenton has advanced no other basis for its approach.

Trenton cannot argue that its expulsion of Mr. Martinez related in any way to promoting a significant government interest. Press conferences do not interfere with city business. The public uses and expressive activities that are permitted in the atrium have not interfered with the day-to-day tasks of accomplishing the city's business, as revealed by the frequency with which the atrium is used for a variety of public events. See press clippings submitted with Certification of Grayson Barber.

Third, even if Trenton were able to articulate some legitimate interest, complete denial of access to the atrium does not constitute the least restrictive way of advancing that interest. That

Mr. Martinez was permitted to hold his press conference on the steps in front of city hall does not help the city. The availability of alternative channels of communication is irrelevant. "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." Schneider v. State, 308 U.S. 147 (1939).

Trenton may argue that its policy of "no political content" is a neutral justification for the restrictions it imposes, and that an intermediate level of scrutiny should therefore apply. This argument fails in light of the mayor's frequent use of the atrium, since every mayoral speech is inherently political. See Stella v. Kelly, 63 F.3d 71, 75 (1st Cir. 1995). Even if the city's distinction between "political" and "non-political" speech were indulged, discrimination on the basis of subject matter is content-based discrimination, see Police Dep't v. Mosley, 408 U.S. 92 (1972), and is prohibited in a public forum.

C. Even If The Atrium Were Deemed a "Designated" Public Forum, Trenton's Content-Based Approach to Access Inevitably Violates the First Amendment

Even if the atrium were viewed as something other than part of a city park, it is nevertheless a designated public forum whose amenability to expressive activity effectively precludes efforts by Trenton to foreclose any form of speech.

The Supreme Court has made it clear that although certain types of public property need not be opened up for public discourse, once they have been "designated" by the state as public forums, those properties are subject to the same constitutional protection for speech as are traditional public forums like streets and parks. Perry, 460 U.S. at 45.

Here, even if the atrium were not treated as a traditional public forum, it is clear under the governing legal standard that Trenton has irreversibly designated it as a forum for public speech:

> The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.... Accordingly, *the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.... The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent.*

Cornelius, 473 U.S. at 802 (emphasis supplied).

Trenton's policy and practice is to make the atrium generally available for people to meet and speak, congregate, orate and expostulate. The city accepts requests to use the atrium on specific dates, and routinely provides enhancements in the way of chairs, tables, microphones and security.

A designated public forum exists when the government intentionally opens for public discourse property that it might otherwise reserve for its own use. In Widmar v. Vincent, 454 U.S. 263 (1981), the Court found that public university meeting places constitute designated public forums. "Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, *even if it was not required to create the forum in the first place*." Id. at 267-268 (emphasis added).

Under this standard, whether it was "required" to do so or not, Trenton has established the atrium as a public forum intending to permit community leaders and members of the general public to hold press conferences there, making the space available to the community for daily use, and providing enhancements (such as microphones, podium and chairs) so that speakers can

express themselves. Trenton cannot articulate any legitimate and substantial government interest that would be served by denying this venue to Mr. Martinez.

Trenton intentionally opened the atrium for the purpose of facilitating discourse. Its conduct is geared toward encouraging and enhancing communication, not reducing or circumscribing speech. Through its policy of accommodating the mayor's press conferences and a host of community events, the city has created a forum generally open for all kinds of speech. See Widmar, 454 U.S. 263 (1981). This distinguishes the atrium from the charity drive in Cornelius and the teacher mailboxes in Perry. In Cornelius, access to the charity drive was designed to minimize the disruption to the workplace that had resulted from unlimited ad hoc solicitation, see Cornelius, 473 U.S. at 805, and in Perry, the teacher mailboxes had been specifically limited by the school board, Perry, 460 U.S. at 48. "[W]hen the government has intentionally designated a place or means of communication as a public forum speakers cannot be excluded without a compelling governmental interest." Cornelius, 473 U.S. at 800.

Trenton may protest that it never actually intended to create a public forum. "The authority's own statement of its intent, however, does not resolve the public forum question." Christ's Bride Ministries, Inc. v. SEPTA, 148 F.3d 242, 251 (3d Cir. 1998), citing Gregoire v. Centennial School Dist., 907 F.2d 1366, 1374 (3d Cir. 1990) ("intent, as evidenced by a government's statements, is a factor to be considered," but "the forum inquiry does not end with the government's statement of intent.") See also Air Line Pilots Ass'n, Int'l v. Dept. of Aviation, 45 F.3d 1144, 1153-54 (7th Cir. 1995) (government's stated policy is not dispositive with respect to the government's intent in a given forum); Stewart v. Dist. of Columbia Armory Bd., 863 F.2d 1013, 1016-1017 (D.C. Cir. 1998) (intent should be inferred from Cornelius factors).

Trenton's *post hoc* protestations cannot be permitted to determine the nature of the forum. "To allow [] the government's statements of intent to end rather than to begin the inquiry into the character of the forum would effectively eviscerate the public forum doctrine; the scope of first amendment rights would be determined by the government rather than by the constitution." Gregoire, 907 F.2d at 1374.

In addition to looking at the government's policies and practices, the courts examine "the nature of the property and its compatibility with expressive activity." Id. The nature of the atrium is not only "compatible," it appears to have been specifically designed to provide a public venue for expressive and associational activity. Trenton treats requests for press conferences as utterly routine, and makes space available for permanent literature display. Rather than asking the news media to brave the elements on the steps of city hall, the mayor, local leaders, and community organizations hold press conferences and social events under the glass enclosure. The atrium is so suitable for this kind of activity that a scheduling calendar is maintained to keep track of it.

Another touchstone in determining the status of a forum is the *way* it is used. In Perry, the Supreme Court explained that a designated public forum consists of "public property which the State has opened for use by the public as a place for expressive activity." 460 U.S. at 45. As noted, the atrium is open to the general public and is dedicated to expressive activity. The city offers to make microphones, podiums, tables and chairs available, the Mayor's Office uses the space frequently, and a cursory glance reveals that it is a preferred venue for numerous community events.

The courts have recognized the creation of a designated public forum in disparate contexts. See e.g., Widmar, supra, 454 U.S. 263 (1981) (state university meeting facilities); Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 174 (1976) (school board meetings); Southeastern Promotions v. Conrad, 420 U.S. 546, 555 (1975) (municipal auditorium and city leased theater); Cinevision Corp. v. City of Burbank, 745 F.2d 560 (9th Cir. 1984), cert. denied, 471 U.S. 1054 (municipal amphitheater); Christ's Bride Ministries, Inc. v. SEPTA, 148 F.3d 242 (3d Cir. 1998), cert. denied, 119 S.Ct. 797, 142 L.Ed.2d 142 659 (advertising space in train stations).

A city hall rotunda was the subject of analysis in Henderson v. City of Murfreesboro, Tenn., 960 F. Supp. 1292 (M.D. Tenn. 1997), where an artist sued the city for removing her painting from an exhibition in the city hall rotunda. The city had routinely displayed the works of local artists, based upon selections made by an art committee. A visitor to the rotunda was offended by a painting and filed a sexual harassment action, whereupon a city official removed the painting from view. When the artist sued, the city pointed to the compelling state interest in abolishing sexual discrimination. The court held that the trouble was not the government interest, which was indeed compelling, but in the manner in which city hall had acted. The art committee operated with few criteria, and the city official had acted with none. The court held that such standardless discretion operated as an unreviewable prior restraint and was accordingly unconstitutional.

The court's forum analysis resulted in a ruling that the city hall rotunda was a designated public forum. 960 F. Supp. at 1298 (noting that employee work areas were not located in or near the rotunda). Ultimately, however, the court's greatest concern was with the authority vested in

the art committee. "Restrictions which grant state officers unguided discretion fail to regulate with the narrow specificity required by the First Amendment. Id. at 1300 (citations omitted).

A state house rotunda was held to be a public forum in ACT-UP v. Walp, 755 F. Supp. 1281 (M.D.Pa. 1991). The court said "there is no doubt about the Pennsylvania Capitol's status as a public forum, particularly the rotunda," because "many different groups have been allowed access to the interior of the building to demonstrate, protest, and carry on other activities, and that the only restriction appears to be on bringing in implements such as wooden posts for signs which might be used as weapons." 755 F. Supp. at 1287.

In ACT-UP, a number of AIDS activists were locked out of the visitor's gallery in the Pennsylvania House of Representatives lest their silent presence somehow disturb a speech being given by the governor. The court concluded that the government's interest in preserving decorum was not "compelling," since there was no reasonable basis to fear any disruption of the governor's speech. Barring the door clearly violated the First Amendment. "Even if the interest were compelling, the government did not use the narrowest means possible. They used a club instead of a scalpel." 755 F. Supp. at 1290.

In Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975), the Court concluded that a municipal theater constituted a designated public forum. There, the directors of a city-leased auditorium turned down a request to present the musical "Hair." The Supreme Court held that the city thereby "accomplished a prior restraint under a system lacking in constitutionally required minimal procedural safeguards." Id. at 552. In reaching its conclusion, the Court underscored the "public" nature of the theater. It held that the theater was designed for and dedicated to expressive activities." Id. at 555. The Court noted that the promoter "was not

seeking to use a facility primarily serving a competing use." Id. The Court also observed that [n]o rights of individuals in surrounding areas were violated by noise or any other aspect of the production." Id. at 555-56. On this basis, the Court determined that the government had opened the theater to the public, and its conduct generated a constitutional right of fair access to it.

Trenton has no written policy, regulations or guidelines for approving requests to use the atrium. It is not clear whether anyone other than Mr. Martinez has ever been turned away. If the atrium is a designated public forum, content-based restrictions on speech remain subject to strict scrutiny, and even content neutral regulations (which Trenton has not enacted) would have to be narrowly tailored to advance a significant governmental interest. Kokinda, 497 U.S. at 726-27. Either way, Trenton's conduct toward Mr. Martinez violated his First Amendment rights.

D. Trenton Will Violate the First Amendment If It Seeks to Restrict Atrium Access Only to "Government" Speech

The nature and historical use of the atrium make it ineluctably a place for public expression. There is no government interest, significant or otherwise, that could justify any effort to "undesignate" or "reserve" it for "governmental" speech alone. After making the atrium available to the general public and offering enhancements such as microphones, podium, chairs, and security, the city cannot now advance an argument that the atrium is somehow a non-public forum.

Trenton will undoubtedly argue that "the First Amendment does not guarantee access to property simply because it is owned or controlled by the government." Perry, 460 U.S. at 46. It

may argue that its "proprietary" interest in the property makes the atrium a nonpublic forum. Its conduct still fails under the Perry standard, however. In a nonpublic forum, "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." 460 U.S. at 46. But Trenton is not only acting as the proprietor of the atrium; it is the rule-making authority to suppress speech.

Nothing the city says can change the fact that by its nature, the atrium is a place to meet and talk. Trenton has made the atrium available to the general public at no charge, complete with a public address system and amenities like tables and chairs, and, for a fee, security after 4:30 p.m. Accordingly, the atrium does not fit into the category of "nonpublic" forums. Perry, 460 U.S. at 46. In nonpublic forums, the government may enact and enforce "time, place and manner regulations, [to] reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression because public officials oppose the speaker's view." Id.

The attributes of the atrium, and the manner in which Trenton makes it available to the public, differentiate this case from Kokinda, 497 U.S. 720, where the defendants were convicted of soliciting contributions on the sidewalk in front of a post office. A four-justice plurality concluded that the sidewalk, which was entirely on Postal Service property, was neither a traditional nor a designated public forum. Rejecting the defendants' contention that the sidewalk was a designated public forum, the plurality observed "[t]he Postal Service has not expressly dedicated its sidewalks to any expressive activity. Indeed, postal property is expressly dedicated to only one means of communication: the posting of public notices on designated bulletin

boards.... No postal service regulation opens postal sidewalks to any First Amendment activity." 497 U.S. at 730. Here, in contrast, Trenton did dedicate the atrium to expressive activity, and its policies and practices opened the atrium to speakers and audiences generally.

Trenton may argue that it was acting in a consistent and even-handed manner because Mr. Martinez wanted to address a topic on which not even the mayor would comment in the atrium. But the city cannot use its policies as a pretext for excluding disfavored speakers or unpopular views. "The existence of reasonable grounds for limiting access to a nonpublic forum will not save a regulation that is in reality a facade for viewpoint-based discrimination." Cornelius, 473 U.S. at 811. Obviously, Mr. Martinez wanted to use the atrium to campaign against the mayor's initiative. Even in Cornelius, where the Supreme Court ultimately held that the forum was nonpublic, the Court remanded the matter for a hearing to determine whether the federal government was excluding certain groups because it tacitly disapproved of their views.

In any event, no limitation to "governmental" or "non-political" speech can be content-neutral. Indeed, such a limitation would require the city to discriminate on the basis of viewpoint, just as it did with Mr. Martinez. Such a scheme would restrict not only the use of the atrium, but also the thoughts and words of those who want to speak there.

II. IRRESPECTIVE OF THE NATURE OF THE FORUM, TRENTON'S *AD HOC*, DISCRETIONARY APPROACH TO ACCESS IS AN IMPERMISSIBLE PRIOR RESTRAINT

Irrespective of the nature of the forum, Trenton's "system" for determining who may speak in the atrium lacks objective standards, and permits arbitrary decision-making by its administrators, creating a prior restraint. Restrictions on protected expression that vest unbridled

discretion in municipal officials are impermissible, because they result in unreviewable prior restraints on First Amendment rights. Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750 (1988). "[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. Here, of course, Trenton actually did abuse its discretion when it refused to let Mr. Martinez speak.

In a long and celebrated line of cases, the Supreme Court has stricken statutes that vested officials with unfettered discretion to regulate speech. See Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) (invalidating ordinance that required marchers to obtain permission from a city commission); Cox v. Louisiana, 379 U.S. 536 (1951) (striking standardless breach-of-the-peace statute); Kunz v. New York, 340 U.S. 290 (1951) (invalidating ordinance that prohibited public worship without a permit from the city police commissioner). "[A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." Lakewood, 486 U.S. at 763. The Supreme Court has often and uniformly held that such statutes or policies impose censorship because "without standards governing the exercise of discretion, a government official may decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker." Id., 486 U.S. at 763-764.

As the Supreme Court explained, this principle is closely related to the standards for regulating expressive activity. "A government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion

has the potential for becoming a means of suppressing a particular point of view.'" Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992). "The reasoning is simple: If the permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted." Id. at 131 (internal citations omitted).

In Forsyth County, a civil rights group challenged an ordinance that invested the county administrator with discretion to impose a fee to cover security expenses when different groups applied for parade permits. The administrator based the fee on his own judgment of what would be reasonable. Id. at 132. The United States Supreme Court found that the ordinance was a prior restraint. "The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content. Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit." Id. at 134. Thus, the Court found that the ordinance improperly permitted the government to discriminate on the basis of the content of the message.

Thus, irrespective of the nature of the public forum, any process for city approval of public use must be based on "narrow, objective and definite standards," New Jersey Freedom Organization v. City of New Brunswick, 7 F. Supp. 2d 499, 512 (1997), that do not afford administrators discretion to pick and choose among speakers. As the Supreme Court explained:

> Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.

Lakewood, 486 U.S. at 758.

The Third Circuit addressed this principle in Gannett Satellite Info. Network v. Berger, 894 F.2d 61 (3d Cir. 1990), when it struck down an airport regulation that gave Port Authority officials discretion to issue permits for newspaper vending. "The particular evil associated with a standardless grant of authority is not so much that it will always be exercised illicitly, but that the ordinary course of litigation will invariably fail to provide an adequate check against the likelihood that, at some point, it will." Id. at 66.

The power to deny the use of a forum in advance of actual expression must be subject to "narrow, objective, and definite standards to guide the licensing authority." Shuttlesworth v. Alabama, 394 U.S. 147, 150-51 (1969); see also Niemotko v. Maryland, 340 U.S. 268, 271 (barring city from issuing permits to some but not all religious groups). An ordinance allowing "arbitrary application is 'inherently inconsistent with valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.'" Forsyth County, 505 U.S. at 130-31. See also Lakewood, supra, 486 U.S. at 757 (striking ordinance that gave mayor authority to permit news racks); Kunz v. New York, 340 U.S. 290, 294 (1951) (invalidating city's standardless discretion to penalize religious speech); Saia v. New York, 334 U.S. 558, 560 (1948) (police chief improperly held unbridled discretion to permit the use of sound trucks).

Several District Judges in New Jersey have unhesitatingly granted preliminary injunctions in comparable First Amendment/prior restraint cases. See New Jersey Freedom Org. v. City of New Brunswick, 7 F.Supp.2d 499 (D.N.J. 1997) (Lechner, J.); Marilyn Manson, 971 F. Supp. 875 (D.N.J. 1997) (Wolin, J.); Indo-American Cultural Society v. Township of Edison, 930 F.

Supp. 1062 (D.N.J. 1996) (Lifland, J.); M.U.S.I.C. v. Stafford Township Bd. of Comm'rs, No. 98-1389 (D.N.J. April 20, 1998) (Cooper, J.).

In Marilyn Manson, for example, the New Jersey Sports and Exposition Authority attempted to exclude the heavy metal band from performing with other groups at an event called "Ozzfest," which had been previously approved. The NJSEA expected certain "antics" from Marilyn Manson, which it deemed a threat to security. The court held that NJSEA's decision, based on its anticipation, was a prior restraint. The court also held that NJSEA's acts were unrelated to the governmental interests espoused; there had been no security problems associated with Marilyn Manson's antics at any other venue on the Ozzfest tour.

In New Jersey Freedom Organization v. City of New Brunswick, 7 F.Supp.2d 499 (D.N.J. 1997) (Lechner, J.), the court invalidated an ordinance that required a permit for any event where 50 or more people were expected to attend and pay admission fees, holding that it violated both due process and the First Amendment. The court found, among other things, that the ordinance vested in the police department the authority to impose "special conditions" on permit applicants.

Mr. Martinez fully expects and intends to continue holding press conferences. He and other community leaders must be permitted to do so. Trenton must be enjoined from using its current standardless discretion to eject them from the atrium.

III. TRENTON'S CONDUCT MERITS INJUNCTION UNDER THE STATE CONSTITUTION AS WELL AS UNDER THE FIRST AND FOURTEENTH AMENDMENTS

Trenton's ejection of Mr. Martinez violates the constitution of the State of New Jersey, as well as the First and Fourteenth Amendments of the United States Constitution. Both its content-

based test for access and its use of standardless discretion to silence Martinez's speech violate the New Jersey Constitution, Article I, Paragraphs 6 and 18.

The basis for a claim under the state constitution was explained by the New Jersey Supreme Court in State v. Schmid, 84 N.J. 535, 553 (1980) (citing cases), app. dismissed, 455 U.S. 100 (1982). In Schmid, the defendant, a member of the Labor Party, distributed pamphlets concerning the Labor Party on the campus of Princeton University although he had been forbidden to do so. When university security guards arrested him for violating the university's regulations governing on-campus distribution of materials, he contended that the arrest violated his rights of freedom of speech and expression. In response, the New Jersey Supreme Court determined that the defendant had a right under the state constitution to distribute political information on campus. It held that under the state constitution, the University's standardless discretion could not be invoked to prohibit Schmid's exercise of political speech. 84 N.J. at 567.

> [T]he test to be applied to ascertain the parameters of the rights of speech and assembly upon privately owned property and the extent to which such property reasonably can be restricted to accommodate these rights involves several elements. This standard must take into account (1) the nature, purposes, and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property.

Id. at 563.

As noted, Trenton used no standards whatever when it ejected Martinez, in spite of its open invitation to the public to use the atrium as a forum for expressive activity. Its sole basis for denying access to Martinez was the subject of his speech. Its conduct violated, and will in the future continue to violate, Martinez's free speech rights.

CONCLUSION

Unless Trenton is enjoined from perpetuating its "system" for granting access to the atrium, Martinez will suffer irreparable harm in the form of violation of his constitutional rights. No substantial harm will accrue to the city, because the general public is already invited to use the atrium without any interference with city business. The public interest will be advanced because an injunction will bring Trenton into compliance with constitutional standards.

For all the reasons set forth above, plaintiff Juan Martinez respectfully asks this Court to enter an order preliminarily enjoining the City of Trenton from continuing to use, in any fashion, its current method of granting or denying access to the city hall atrium and plaza on a content-driven, *ad hoc*, totally discretionary basis.

GRAYSON BARBER, L.L.C.

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Dated: