

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-35721

AMERICAN BUDDHA

Plaintiff-Appellant

v.

CITY OF ASHLAND,

Defendant-Appellee

Appeal from the United States District Court
for the District of Oregon

Opening Brief of Plaintiff-Appellant,
American Buddha

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CORPORATE DISCLOSURE STATEMENT

This statement is made pursuant to Federal Rule of Appellate Procedure 26.1. Plaintiff-appellant is a corporate entity and has no parent corporation, subsidiaries or affiliates that have issued shares to the public.

JURISDICTIONAL STATEMENT

The court below had jurisdiction to entertain this matter because all claims brought herein related to alleged violations of the United States Constitution and various federal statutes, including 42 U.S.C. Sec. 1983.

The Ninth Circuit Court of Appeals has jurisdiction to entertain this appeal pursuant to 28 U.S.C. Sec. 1291. Final Judgment was rendered on July 19, 2007. (ER 1.) Plaintiff-appellant filed a timely Notice of Appeal on August 10, 2007. (ER 9.)

NINTH CIRCUIT LOCAL RULE 28-2.6 STATEMENT

Plaintiff has no knowledge of any pending cases related to the issues herein.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the City's operation of a service for hosting websites on the Internet subject its regulation of the Internet medium to strict scrutiny?
2. May appellant, a "digital pamphleteer," sue a City for injunctive relief when a City policy is applied to shut off appellant's website because of its content?
3. Did the City's policy, that allowed a City functionary to prevent websites from publishing "digital pamphlets" based on their content, work a prior restraint upon speech, and demonstrate "deliberate indifference" to the First Amendment rights of the City's digital pamphleteers?
4. Was the City's policy unconstitutional on its face, and as applied, because it vested a single City functionary with unbridled discretion to prevent American Buddha from publishing digital pamphlets?
5. Was summary judgment improper because an issue of fact existed concerning whether the City functionary's assertion that he prevented American Buddha from publishing digital pamphlets at the request of a third party was a mere pretext for censorship?

STANDARD OF REVIEW

The standard of review of the trial court's order of summary judgment is de novo. *Hernandez v. Hughes Missile Systems Co.*, 362 F.3d 564 (9th Cir. 2004).

STATEMENT OF THE CASE

This is an action brought under 42 U.S.C. Sec. 1983 to enjoin application of the City of Ashland's policy for regulating Internet speech, both facially and as applied to appellant, on the grounds that the City policy facially violates the First Amendment ban on prior restraints of speech, and was applied in a manner that violated appellant's First Amendment rights.

STATEMENT OF FACTS

The Parties – American Buddha and the City of Ashland

Appellant, American Buddha, is an Oregon non-profit corporation. (Carreon Aff. Complaint, ¶ 1; ER 108.) Appellee, the City of Ashland (the "City") is a municipal subdivision of the State of Oregon that has operated the Ashland Fiber Net ("AFN") since the summer of 1999. (J. Franell Depo., 24:2-4; ER 40; Exhibit 1 to Carreon Aff.; ER 17.)

AFN – Ashland's Municipally-Owned and Operated Internet "Open Network"

AFN is "100 percent municipally owned," and its goal is "to provide advanced telecommunications services to the citizens of Ashland." (J. Franell Depo., 23:23-24:1; ER 39-40.) The City's official publication states that "AFN is the only true 'Open Network' in the nation." (Carreon Aff., Exh. 1; ER 17.) AFN provides Ashland citizens with access to the Internet, email, and the ability to host websites on the Internet, all of which activities involve speech. (J. Franell Depo, 25:11-26:2; ER 41-42.) AFN provided Internet services to its citizens – email, Internet

access, and website hosting, through a group of Internet Service Providers (“ISPs”), also known as “downstream customers.” (J. Franell Depo., 10:15-22; ER 34.) Although InfoStructure was the “downstream customer” that contracted with American Buddha to provide access to AFN, the City had “direct control over all the modems that are servicing InfoStructure customers.” (J. Franell Depo., 10:15-22; ER 34; Holbo Depo., 58:3-6; ER 87.)

City Personnel Involved In The Case - Joe Franell, Mike Franell and Rick Holbo
Joe Franell was the City Information Technology Director, in charge of AFN. (J. Franell Depo., 5:23-6:1; ER 30-31.) Mike Franell, City Attorney, consulted with Holbo. (M. Franell Depo., 5: 7-13; ER 92.) Rick Holbo (“Holbo”) was the AFN administrator who devised the City’s policy for handling copyright complaints, that had been in use for years prior to the matters giving rise to this case. (Holbo Depo., 21:1-25; ER 80.)

American Buddha’s Website – Hosted Through AFN

American Buddha operated a computer network through a server for which AFN provided a “MAC address” that permitted appellant’s server to connect to the Internet. (J. Franell Depo., 26:16-27:21; ER 42-43.) Using the MAC address, appellant was able to host its own website, www.American-Buddha.com. (J. Franell Depo., 27:16-22; ER 43.) Appellant’s website offered political speech to Internet users. (Carreon Aff. ¶ 7; ER 13.) The American-Buddha.com website featured political commentary, including satirical images of public figures, and had a member list of approximately fifty-thousand members. (Carreon Aff. ¶ 5 – 7; ER 13.)

The City's Policy – Originated by Holbo, Approved by Joe Franell, and
Well-Established With The City's Network of ISPs

The City had a policy regarding how to respond to complaints of copyright infringement that had been in effect for “the past number of years,” and was known to the ISPs long before Holbo reduced it to writing after the events giving rise to this case. (Holbo Depo., 21:1-25; ER 80.) Holbo shut off appellant’s website in accordance with a City policy recorded in an exhibit to his deposition. (Carreon Aff., Exhibit 4; ER 52; J. Franell Depo., 8:9-20; ER 33; Holbo Depo., ER 72, lines 13 – 18.) The City’s policy did not require that anyone contact the website operator before shutting down their modem, and thus, their website. (J. Franell Depo., 22:18-21; ER 38.) The City’s Technology Director, Joe Franell, testified that the policy had been followed in a number of prior cases when modems had been shut off. (J. Franell Depo., 21:18 – 22:17; ER 37-38.)

Kathleen Parker’s Calls and Email to Holbo

On August 1, 2006, Holbo received a phone call from Kathleen Parker (“Parker”), who said she was offended by an image that appeared on www.American-Buddha.com. (Holbo Depo., 11:9-13; ER 74.) Holbo spoke to Parker twice by phone, and told her to send him an email, and “we will see what we can do.” (Holbo Depo., 11:9-13; ER 74; Holbo Depo. 13:4-7; ER 76.) Parker followed Holbo’s instructions, and sent him an email that stated, “I am asking your help in getting this image off the Web as soon as possible. The website in question is American-Buddha.com....” (Exhibit 8 to Carreon Affidavit; ER 60.) Holbo found the image by looking on Google. (Holbo Depo., 13:14-22; ER 76.) Holbo knew he had no power to remove the image from Google. (Holbo Depo., 13:21-22; ER 76.)

Holbo's Application of the City Policy to Parker's Email

Parker's email contained a complaint about an image her children had discovered on Google.com. (Exhibit 8 to Carreon Aff., ER 60.) Parker's email did not identify an allegedly copyright-infringing image, nor did it name a copyright-holder. (Exhibit 8 to Carreon Aff., ER 60.) Although Holbo claimed that "It is not my job to determine whether something was copyright infringement or not," it was his job to deal with "an email from a lady who was alleging copyright infringement." (Holbo Depo., 20:7-22; ER 79.) Because he had counsel available in the form of the City Attorney, Holbo held "communications with counsel" before he shut off appellant's website. (J. Franell Depo., 13:21-24; ER 35, M. Franell Depo, 5: 7-13; ER 92.)

Step One: Holbo Cobbles Together A Groundless Copyright Infringement Claim

Step one of the City policy required that AFN "receive notice of copyright infringement." (Exhibit 4 to Carreon Aff.; ER 52.) The only thing Holbo did to determine whether there was a copyright infringement claim presented was to compare the image Parker was objecting to with one that appeared on the Washington Post website, and noted that "they looked similar." (Holbo Depo. 38:2-3; ER 84.) As the district court concluded, Holbo's description of Parker's complaint as a copyright claim was groundless. (Opinion, footnote 1; ER 3.) Holbo knows "very little" about copyright infringement. (Holbo Depo., 18:12-13; ER 78.) Holbo testified that: (1) Parker's email did not qualify as a claim of copyright infringement, and (2) he would not turn off a website based on that email today. (Holbo Depo., 32:5-16; ER 82.)

Step Two: Holbo Sends InfoStructure A Misleading Email Asserting The
Washington Post Has Made A Copyright Complaint Against American Buddha

Step two of the City policy required that Holbo “attempt to contact downstream customer,” by “phone with follow-up email.” (ER 52.) In order to convince InfoStructure that he was implementing City policy, even though Parker had not told Holbo that the Washington Post was asserting a copyright claim, at 6:54 a.m. on August 2nd, Holbo sent an email from his City email account to InfoStructure (the “6:54 a.m. email”), making it appear that the Washington Post was claiming copyright infringement, by “cutting and pasting” a copyright notice from the Washington Post website into his email.¹ (Holbo Depo., 17:1-11; 39:9-14; ER 77 and 85.) Holbo also used his City computer to locate an image he believed corresponded to Parker’s complaint, and placed a “link” to the “URL”² of the image on American Buddha’s website when he sent the 6:54 a.m. email to InfoStructure. (Holbo Depo., 39:24 – 40:16; ER 85-86.) As noted previously, the City policy did not require that AFN make any attempt to contact the website operator, appellant in this case. (ER 60.) For purposes of City policy, AFN’s “downstream customer” was InfoStructure, an Internet Service Provider that contracted with AFN to provide Internet service to City citizens. (M. Franell Depo., ER 34, lines 15 – 20.) On August 2nd, at 6:54 a.m., Holbo emailed InfoStructure at abuse@mind.net. Holbo’s email to InfoStructure falsely stated that The Washington Post was alleging copyright infringement against one of InfoStructure’s users. (Exhibit 9 to Carreon Aff., ER 62.) Holbo called John Dowd at InfoStructure around 4:15 p.m. (Holbo Aff., ¶ 5; ER 97.)

¹ As a result of Holbo’s invention of a non-existent copyright complaint, appellant initially sued The Washington Post Company, that was later dismissed from the lawsuit because it established it had no part in the matter.

² URL: Acronym for Universal Resource Locator, an Internet address for content.

Steps Three and Four: Holbo Waits The Requisite Eight Hours
Before Turning Off American Buddha's Modem

Step three of the City policy required that Holbo check to see if “infringing material is still available after 8 hours,” after which, Holbo could implement step four of the City policy by shutting off appellant’s website, which Holbo did at 4:15 p.m. on August 2, 2006 when he “disconnected the modem.” (Holbo Aff. ¶ 5; ER 97.) Holbo shut off American Buddha’s website at 4:15 p.m., eight hours and twenty-one minutes after sending the email to InfoStructure at 6:54 a.m.. Holbo kept American Buddha’s modem disconnected for one hour. (Holbo Aff. ¶ 5; ER 97.)

Plaintiff's Lawsuit for Injunctive Relief

Because the threat of future shutoffs of appellant’s website operated as a prior restraint, in order to dispel the chilling effect upon speech resulting from Holbo’s retaliatory actions committed under color of law, appellant filed suit under 42 U.S.C. § 1983 on August 3, 2006, seeking injunctive relief to challenge the City website shutoff policy and prevent the future application of the City’s policy to appellant’s website. (Complaint, ER 108-113.)

The Order on Defendant's Motion for Summary Judgment and This Appeal

On motion of the City, the district court dismissed plaintiff’s action on summary judgment, and entered judgment for the City on the grounds that appellant had failed to raise an issue of fact regarding whether the City’s shutoff of appellant’s website had been performed pursuant to a “City policy,” finding that because Joe Frannel denied making the decision to disconnect the modem, and Holbo blamed InfoStructure, that InfoStructure “was the primary decider ... thus further isolating the City from any liability.” (Opinion, ER 3, footnote 1; ER 4-7.)

Notwithstanding the fact that Holbo, a man entirely innocent of copyright law knowledge, had been given the job of devising and implementing the City’s

copyright infringement policy, the district court found American Buddha had not raised an issue of fact concerning whether the City had failed to properly train Holbo to do the job of regulating Internet speech. (Opinion, ER 7.) American Buddha timely filed this appeal. (ER 9.)

SUMMARY OF ARGUMENT

American Buddha seeks reversal of the district court's dismissal on summary judgment of its suit to enjoin enforcement of a City policy regulating Internet speech, because the City policy was facially unconstitutional as a prior restraint on speech that did not serve a compelling government interest, was not narrowly tailored, and vested unbridled discretion in a single City functionary to censor speech. Further, summary judgment was improper because material, disputed issues of fact existed concerning whether content-based animus motivated the City functionary to shut off the American Buddha website.

ARGUMENT

I. THE CITY'S OPERATION OF AFN IS SUBJECT TO FIRST AMENDMENT PROHIBITIONS ON REGULATIONS THAT CREATE THE RISK OF CENSORSHIP, AND ACTUALLY CAUSED FIRST AMENDMENT INJURY IN THIS CASE

In 1999, the City launched AFN as one of the nation's first municipally-owned networks in order to connect the City's population to the Internet, allowing residents to visit webpages, send and receive email, and host websites. The Supreme Court has described the Internet as a medium that can turn any citizen into a "town crier" or "pamphleteer," and is therefore subject to unqualified First Amendment protection.

"[The Internet] provides relatively unlimited, low cost capacity for communication of all kinds. *** This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real time dialogue. Through the use of chat rooms, any

person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. As the District Court found, "the content on the Internet is as diverse as human thought." 929 F. Supp., at 842 (finding 74). We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium."

Reno v. ACLU, 521 U.S. 844, 870, 117 S.Ct. 2329, 2344, 138 L.Ed.2d 874 (1997)

There is a substantial body of law concerning public fora that support the view that the City-owned AFN network is a public forum.³ Within this forum, the City had absolute control over who would be heard or not heard through a communication medium through which American Buddha was publishing "digital pamphlets" throughout the world-wide web. When the City ventured into the realm of providing residents the means to publish websites through AFN, it enabled its citizens to become digital pamphleteers, and the City became a state actor with monopoly power over speech. The touchstone is the fact that AFN facilitates the distribution of First Amendment material.

"The actual 'activity' at issue here is the circulation of newspapers, which is constitutionally protected. After all, '[l]iberty of

³ "[A] public forum may 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. [Citations omitted.] In a designated public forum, speakers cannot be excluded unless it is 'necessary to serve a compelling state interest and the exclusion is 'narrowly drawn to achieve that interest.' [Citations omitted.] *Arizona Life Coalition Inc. v. Stanton*, __F.3d__, 2008 WL 217012 C.A.9 (Ariz.) January 28, 2008.

circulating is as essential to [freedom of expression] as liberty of publishing; indeed, without the circulation, the publication would be of little value.’” *City of Lakewood v. Plain Dealer Publishing Co.*, 108 S. Ct. 2138, 2150, 486 U.S. 750, 768 (1988), quoting *Ex parte Jackson*, 96 U.S. 727, 733 (1878).

Applying strict scrutiny to the City policy for regulating its online public forum requires no extensive analysis – the City cannot identify a “compelling interest” in regulating Internet speech, nor is the blunt instrument of shutting off an entire website⁴ to remove a single image from the Internet “narrowly tailored” to achieve that purpose.

Since the City policy cannot withstand strict scrutiny, the City attempted to make the policy irrelevant to this lawsuit by speaking inconsistently.⁵ Both Joe Franell and Holbo testified that the American Buddha matter was handled according to the approved City policy. (Exhibit 1, ER 52; J. Franell Depo., ER 33, lines 9 – 20; Holbo Depo., ER 72, lines 13 – 18.) Holbo admitted that after receiving Parker’s phone call the day before, he told her to write an email, telling her he’d “see what he could do” to satisfy her desire to shut off the American Buddha website, and the next morning, sent the 6:54 a.m. email to InfoStructure mis-stating the nature of Parker’s complaint as a copyright infringement claim from the Washington Post. Then, in complete compliance with City policy, slightly eight hours after notifying

⁴ Or a number of websites, as occurs when one modem hosts a number of websites.

⁵ Toward the end of his deposition, Holbo testified that he turned off the American Buddha modem because John Dowd of InfoStructure told him it was “on a disconnect list.” (Holbo Depo., 32:17-23; ER 82.) The district court held that Holbo’s disputed contention as to his motivation for turning off the American Buddha website had the effect of “further isolating the City from liability.” (Opinion, page 6; ER 7.) While a jury might have believed Holbo’s denial of anti-speech animus, it would more likely have found it incredible.

InfoStructure, Holbo turned off the modem. There can be no question that the City was the actor that interrupted American Buddha’s digital pamphleteering. As the U.S. Supreme Court stated in a case involving a Rhode Island licensing scheme intended to protect youth from obscene literature:

“These acts and practices directly and designedly stopped the circulation of publications in many parts of Rhode Island. *** What Rhode Island has done, in fact, has been to subject the distribution of publications to a system of prior administrative restraints....”
Bantam Books v. Sullivan, 372 U.S. 58, 70, 83 S.Ct. 631 (1963).

II. A DIGITAL PAMPHLETEER MAY SUE TO ENJOIN A CITY POLICY THAT IMPOSES A PRIOR RESTRAINT UPON SPEECH

The United States of America has been considered the cradle of liberty in large part because it has protected the freedom of the press zealously against all government incursions. This tradition predates even our Constitution, for it was here on American soil that a New England jury refused to convict printer John Peter Zenger of publishing “seditious libel.”⁶ Although the Royal Governor had ordered that some of the works Zenger had printed be “burnt by the hands of the common hangman,” and the judge ordered the jury to convict Zenger, the jury refused, entering a verdict of “not guilty.” Zenger served thirty-five weeks in jail before being released. Such sacrifices by our forebears must not be forgotten in this digital era, because the governmental inclination to suppress unpopular speech has not diminished.

⁶ C.R. Hildeburn, *Sketches of Printers and Printing in Colonial New York*, Chapter II (New York: Dodd, Mead, & Company, 1895).
<<http://www.dinsdoc.com/hildeburn-1-2.htm>>

The Supreme Court itself has recognized that a website may be a vehicle for digital pamphleteering, which places political websites squarely within the highest form of constitutional protection. “This Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment.” *Organization for a Better Austin v. Keefe*, 91 S.Ct. 1575, 1577, 402 U.S. 415, 419 (1971); *City of Lakewood v. Plain Dealer Publishing Co.*, 108 S. Ct. 2138, 2146, 486 U.S. 750, 761 (1988) (peaceful pamphleteering not fundamentally different from the function of a newspaper).

"It is well established that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Hohe v. Casey*, 868 F.2d 69, 72-73 (3rd Cir. 1989). Irreparable harm occurs where a plaintiff shows “a chilling effect on free expression.” *Hohe v. Casey*, at *id.*, quoting *Dombrowski v. Pfister*, 380 U.S. 479, 487, 85 S. Ct. 1116, 1121 (1965). In this case, American Buddha suffered the actual shutoff of its website, which aborted its publication of digital pamphlets. After publication was restored, American Buddha suffered a chilling effect due to the threat of future disruptions of its publication of digital pamphlets. The district court erred in failing to subject this policy to strict scrutiny, both facially and as applied to American Buddha, that suffered an actual shutoff and the chilling effect of the City’s action. *Hohe v. Casey*, at *id.*, quoting *Dombrowski v. Pfister*, 380 U.S. 479, 487, 85 S. Ct. 1116, 1121 (1965) (chilling effect results in censoring of constitutionally protected speech and irreparable harm to plaintiffs).

Standing requirements are relaxed in cases where speech can be chilled by the very existence of a statute or policy that regulates speech overbroadly, or vests

excessive discretion in a government functionary, permitting censorship under color of law:

“Thus, the Court has permitted a party to challenge an ordinance under the overbreadth doctrine in cases where every application creates an impermissible risk of suppression of ideas, such as an ordinance that delegates overly broad discretion to the decisionmaker.”

Forsyth County v. Nationalist Movement, 505 U.S. 123, 129, 112 S.Ct. 2395 (1992).

Thus, even if American Buddha had never suffered impairment of its free speech rights, it would have standing to mount a facial challenge to the City policy to reverse its chilling effect, and the district court should have allowed this action for injunctive relief to proceed on that basis alone. However, since American Buddha actually suffered the chilling effect on its First Amendment activity, it was a particularly egregious error for the district court to ignore its claim. It is unquestionable that tearing up a sign bearing a political message violates the First Amendment, as the Sixth Circuit held in a Nixon-era opinion that pitted an *ad hoc* City policy to destroy the messages of protesters whose speech struck officers as “detrimental” to the President, who was visiting the City of Louisville:

“[A]ppellant Glasson was standing peacefully against a building holding her sign as she awaited the motorcade. Officer Medley [testified] his attention was drawn to appellant's poster on which, he testified, was printed ... a message that he determined was detrimental to the President. ... Officer Medley then approached appellant and, according to his testimony, asked her ‘Would you please take this sign down Lady; it's detrimental to the United States of America.’ When Miss Glasson refused, and replied that

she had a right to display it, Medley took it from her and tore it up.

*** We hold that when Officer Medley destroyed Miss Glasson's poster, she was engaged in activity protected by the First and Fourteenth Amendments; that his action, directed by Officer Johnson and authorized by Chief of Police Hyde, was unreasonable and not taken in good faith; and that it violated her constitutional rights and was actionable under section 1983 of the Civil Rights Acts.”

Glasson v. City of Louisville, 518 F.2d 899 (6th Cir., 1975), *cert. denied*, *Glasson v. City of Louisville*, 423 U.S. 930, 96 S.Ct. 280 (1975).

III. CITY POLICY IMPOSED A PRIOR RESTRAINT BY BLOCKING FUTURE INTERNET PUBLICATION OF DIGITAL PAMPHLETS, AND THUS DEMONSTRATED “DELIBERATE INDIFFERENCE” TO THE RIGHTS OF DIGITAL PAMPHLETEERS ON THE CITY AFN NETWORK

“It is not merely the sporadic abuse of power by the censor *but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion.* *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757, 108 S. Ct. 2138, *quoting Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 741-741 (1940) (emphasis added by the Court).

Websites are evanescent publications that can be blotted out simply by turning off an electric switch on a modem. Computers are printing presses with electronic paper and digital ink. Destroying their works requires nothing more than the click

of a mouse, but the effect is the same as burning a book. During the time Holbo turned off the modem hosting the American Buddha website, until he turned it back on, Holbo silenced political speech as effectively as “the common hangman” who was charged with burning the publications that John Peter Zenger had produced on his printing press.

Under the City policy that allowed Holbo to silence unpopular speech “under color of law,” Holbo was actually more powerful than the hangman who burnt Zenger’s works. The hangman, after all, could only burn what had already been printed; whereas Holbo was able to prevent American Buddha from publishing anything until it suited his will. To accomplish a similar effect, the Royal Governor in the Zenger case would have been required to lock up Zenger’s printing press. Thus, City policy imposed a prior restraint upon publication.

The City’s policy, whether officially adopted or merely a practice and custom that had been in place “for years,” coupled with the failure to adequately supervise the persons responsible for its implementation, subjects the City to liability for violation of constitutional rights under the authority of *Monell v. Department of Social Services*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). A leading Ninth Circuit case on a municipality’s liability for tacitly-implemented policies is *Oviatt v. Pierce*, 954 F.2d 1470 (9th Cir. 1992), which held the County of Multnomah, Oregon liable for an unwritten policy that resulted in the failure to arraign criminally accused persons within a reasonable time. *Oviatt*, 954 F.2d at 1473-1474.

The district court ignored evidence that the City’s policy had been in effect for “the past number of years,” was known to the ISPs like InfoStructure long before the events giving rise to this case, and had been followed in a number of prior cases

when modems had been shut off. (Holbo Depo., 21:1-25: ER 80.) (J. Franell Depo., 21:18 – 22:17; ER 37-38.) These facts established at minimum, an issue of fact requiring trial to determine whether the City policy was sufficiently “official” to support *Monell* liability, and for this reason, the district court’s judgment must be reversed.

IV. THE CITY POLICY VESTED A SINGLE CITY FUNCTIONARY WITH UNBRIDLED DISCRETION TO PREVENT AMERICAN BUDDHA FROM PUBLISHING DIGITAL PAMPHLETS

Each technological innovation in media that increases the reach of speech has incited governments to impose prior restraints upon speech, usually under the guise of protecting public order or morals. The advent of portable electronic amplification gave rise to *Saia v. New York*, 334 U.S. 558, 68 S. Ct. 1148 (U.S. 06/07/1948), in which the U.S. Supreme Court overturned an ordinance prohibiting the use of a loudspeaker in a public place, except by permission of the Chief of Police. Unable to obtain permission to speak in a public park, a Jehovah’s Witness challenged the law, which the Court overturned, holding that any scheme vesting unbridled discretion in a single official could not stand. Referring to a prior opinion involving religious speech, the Court made its position clear:

“In the *Cantwell* case a license had to be obtained in order to distribute religious literature. What was religious was left to the discretion of a public official.” *Saia v. New York*, 68 S.Ct. at 1149.

In this case, what was a copyright infringement was left to Holbo’s discretion. Not only did the City policy make Holbo the arbiter of infringements, it also deprived American Buddha of notice that a policy had been engaged that would cause AFN to turn off its access to the Internet in eight hours. By City Policy, Holbo, inflamed

by Parker's complaint, was permitted to start an eight-hour countdown to shutoff. In this particular case, City Attorney Mike Franell was made aware of the planned shutoff and made no move to prevent it. The actual shutoff was approved at all levels based on past policy. An ordinance vesting unbridled discretion in the licensor should be overruled as a prior restraint of speech. *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). The fact that an oral and written City policy, rather than an ordinance, gave rise to the offenses in this case, is not a meaningful distinction. The City policy was the causal force behind the First Amendment violation in this case, and this case was not unique – other modems had been shut off pursuant to the City policy. (J. Franell Depo., 21:18 – 22:17; ER 37 - 38.) Thus, this case presents the same type of institutionalized “deliberate indifference” that gave rise to liability in *Oviatt*.

Technology often puts an excess of control into the hands of people unqualified to wield it, which well-describes Holbo in this case. Knowing little of copyright law, he did not feel the lack. He used his cut and paste skills to make the Washington Post a copyright holder, sent an email to InfoStructure, made a phone call to John Dowd, and immediately thereafter, turned off the modem that was hosting the website causing Parker so much distress. The entire shutoff was the direct result of the “unbridled discretion” granted Holbo by City policy. Such a policy works an unlawful prior restraint on First Amendment rights because “the specter of content and viewpoint censorship ... 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.” *City of Lakewood v. Plain Dealer Publishing Co.*, 108 S. Ct. 2138, 2147, 486 U.S. 750, 763 (citations omitted).

The unconstitutional policy adopted by the City, purportedly to prevent copyright piracy on the City's AFN network, is grossly overbroad, grants unbridled

discretion to a City functionary, and has served as a secret check on speech in the City of Ashland for years. American Buddha stepped forward as a public citizen seeking judicial scrutiny of this secret system, that established a system of censorship and prior restraint without any meaningful guidelines for the censor to exercise his discretion. The district court erred in treating this case as one unworthy of serious review, disregarding uncontroverted evidence of the existence of an unconstitutional City policy, its approval by AFN Director Joe Franell, and its retaliatory application by Holbo, a classic content-motivated censor with no compunctions about silencing political speech that he found objectionable. The district court's decision must be reversed.

V. SUMMARY JUDGMENT WAS IMPROPER BECAUSE HOLBO'S PRETEXTUAL ASSERTION OF INFOSTRUCTURE AS THE CITY'S "STRAW MAN" AT BEST RAISED A DISPUTED ISSUE OF FACT THAT COULD NOT BE RESOLVED WITHOUT TRIAL

The prohibition on making credibility determinations on summary judgment, without the benefit of live testimony and the opportunity to judge witness demeanor, is well-established:

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2519 (1986).

A reader of the deposition testimony given by Joe Franell and Holbo would be forgiven for thinking that there was no dispute that Holbo had been following City policy in turning off American Buddha's modem and preventing its future publication of webpages. Joe Franell was unequivocal – Holbo shut off the modem in compliance with City policy. (Exhibit 4, ER 52; J. Franell Depo., 8:9-20; ER 33) But for Holbo's non-credible assertion that he shut off the modem at the instigation of InfoStructure, his reliance on City policy as the justification for his actions would have been entirely undisputed. (Holbo Depo., 32:17-23; ER 82.) The minor dispute Holbo raised was for the trier of fact to resolve, and a reasonable trier of fact could easily have reached the reverse conclusion – that Holbo's denial of acting pursuant to policy was self-contradictory and pretextual.

Holbo's actions followed City policy in every detail. Holbo invited Parker to send an email, so that he would have a written complaint to work with, and after she sent it, Holbo promised her the City "would see what they could do" (Holbo Depo. 13:4-7; ER 76). He compared the image Parker objected to with her photo on the Washington Post (Holbo Depo., 38:2-3; ER 84); he cobbled together a bogus copyright notice to invoke the Washington Post's clout, and alarm InfoStructure (Holbo Depo., 17:1-11; 39:9-14; ER 77 and 85); he contacted his "downstream customer" by phone and email (Holbo Aff. ¶ 5; ER 97); he never contacted American Buddha, which the City policy did not require (Policy, ER 52); and, he waited the requisite eight hours before actually shutting off American Buddha's modem (Holbo Aff. ¶ 5; ER 97). The inferences to be drawn from this sequence of events should have been drawn in American Buddha's favor, because they raised disputed issues of fact requiring trial. *Valandingham v. Bojorquez*, 866 F.2d 1135, 1137 (9th Cir. 1989). The trial court erred in finding that Holbo's single denial of acting under policy, which was contradicted by his own actions and his boss, Joe Franell's testimony, could resolve the issue favorably to the City.

Furthermore, Holbo's pretext raised no valid defense to his act of blatant censorship. Aside from the district court's bald assertion that the pretext "further isolated the City from liability," Holbo's inconsistent denial provided no legal basis for the court's grant of summary judgment. Allowing the City to escape scrutiny of its policies by blaming a third party for its own direct acts would create a hole in First Amendment jurisprudence large enough to please any censor, who would find a convenient pretext for evading scrutiny simply by utilizing a "straw man" as the supposed source of the impulse to censor, and whose purported involvement would "isolate the City from liability," as the district court put it.

Accordingly, the district court improperly failed to consider disputed issues of fact requiring trial, and its judgment should be reversed.

VI. CONCLUSION

For all of the above reasons, this Court should reverse the district court's order granting judgment to the City and remand this matter for trial.

Respectfully Submitted,

Charles Carreon
Attorney for Plaintiff-Appellant American Buddha

Dated: March 5, 2008

Certificate of Compliance

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1
Case Number 07-35721

I certify that: (check appropriate option(s))

___ 1. Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is:

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Charles Carreon
Attorney for Plaintiff-Appellant American Buddha

Dated: March 5, 2008

PROOF OF SERVICE

The undersigned hereby certifies:

I am over the age of eighteen and not a party to the herein matter;

On March __, 2008, I served the foregoing Appellant's Opening Brief on

Karen M. O'Kasey

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By enclosing the same in an envelope so addressed, and depositing it, on the said date, in a U.S. Postal Service mail receptacle, postage fully prepaid.

I further certify that the original and all required copies of the foregoing Appellant's Opening Brief were filed with the Clerk of the Ninth Circuit Appellate District by mailing the same to the Clerk via U.S. Postal delivery on March __, 2008.

Charles Carreon
Attorney for Plaintiff-Appellant American Buddha

Dated: March __, 2008