IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

40 DAYS FOR LIFE OF WAUSAU, an unincorporated association, and THERESA WHITAKER, JANET KRAIMER-NICHOLS, and MARY LITSCHAUER, individuals,	**Case No. 11-cv-231**
Plaintiffs,	
vs.	
RALPH ILLICK, MARATHON COUNTY PUBLIC LIBRARY, TIM GIERL, AUDREY ASCHER, GARY BEASTROM, KEN DAY, ALISON MORROW, KATIE ROSENBERG, SCOTT WINCH, MARATHON COUNTY, WISCONSIN, a body politic, and KEITH LANGENHAHN,	
Defendants.	

MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Plaintiffs, 40 Days for Life of Wausau and Theresa Whitaker, Janet Kraimer-Nichols, and Mary Litschauer, by and through their undersigned counsel, submit this memorandum in support of their motion for temporary restraining order and preliminary injunction pursuant to Fed. R. Civ. P. 65(a), as follows:

STANDARDS FOR ISSUING A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

In early March, plaintiffs secured a room reservation at the Marathon County Public Library to show a film ("BloodMoney") at the library on April 3, 2011 from 1 pm to 3 pm. Plaintiffs now are seeking entry of a temporary restraining order and preliminary injunction, enjoining and restraining the library from censoring, banning, and suppressing plaintiffs'

exhibition and screening of the film at that date, time and location, thereby enabling plaintiffs to show the film pursuant to their earlier confirmed reservation, which the library purported to rescind on grounds at war with plaintiffs' fundamental rights under the First Amendment and the corresponding free speech provisions of the Wisconsin Constitution.

"To win a preliminary injunction, a party must show that it is reasonably likely to succeed on the merits, it is suffering irreparable harm that outweighs any harm the nonmoving party will suffer if the injunction is granted, there is no adequate remedy at law, and an injunction would not harm the public interest." *Christian Legal Society v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006)(*citing Joelner v. Vill. of Wash. Park,* 378 F.3d 613, 619 (7th Cir. 2004)).[1] This motion does not seek an *ex parte* temporary restraining order. Therefore the restrictions of Fed. R. Civ. P. 65(b) do not apply. In these circumstances, the standards for the remedies (TRO and preliminary injunction) are the same. *Monk v. Luy* (E.D.Wis., no. 2009-cv-646, June 3, 2010).

PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

This case presents a blatant government suppression of plaintiffs' efforts to express their views about .the subject of abortion. Plaintiffs' desire to screen the movie "BloodMoney" that describes and exposes abortion providers, and aims to educate viewers about abortion – indeed, a prominent, controversial and even "contentious" issue in our contemporary American society. Plaintiff's aim, were it to be realized, would clearly constitutes expression and so fall under the First Amendment's protection against governmental suppression or censorship. The Constitution of the State of Wisconsin contains similar guarantees of the right of its citizens to express

[1] The Court goes on to say, "If the moving party meets this threshold burden, the district court weighs the factors against one another in a sliding scale analysis, *id.*, which is to say the district court must exercise its discretion to determine whether the balance of harms weighs in favor of the moving party or whether the nonmoving party or public interest will be harmed sufficiently that the injunction should be denied." *Id.*

themselves freely and without governmental interference (Wisconsin Constitution, Article I, Section 3), and the library's own endorsement of the American Library Association's "Bill of Rights" guarantee a similar freedom of expression on its premises.[2]

Yet the library finds itself censoring, banning, and suppressing speech about this one issue, abortion. Its justification for doing so is flimsy, a classic case of succumbing to a heckler's veto. Indeed, the library's proffered justification is worse than a "heckler's veto," for there is no specific evidence as to any real threat or likelihood that hecklers – protesters against the showing of the film – will even materialize. Instead, the library executive director, defendant Illick, only speculates that there is the possibility that hecklers will show up, and so the danger of protest is merely hypothetical. And what if they showed up? Is there any threat of violence or disorder? What about police protection, to ward off any disorder? Rather than take reasonable steps to protect the expression of ideas, the library seizes on the mere possibility of a heckler, and opts to censor, suppress and ban expression.

Contrary to the library's position, it is fundamental First Amendment law that "[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

A case from the Seventh Circuit, *Hedges v. Wauconda Community School Dist*, 9 F.3d 1295 (1993), illustrates the temptation to which the library has succumbed. In *Hedges,* a school prohibited students' distribution of religious pamphlets after the school day ended, citing

[2] The library endorses the American Library Association's *Bill of Rights* on the Library's website at http://www.mcpl.us/about/policies/pdf/LS-16.LS-.pdf. Article II states "Materials should not be proscribed or removed because of partisan or doctrinal disapproval." Article III states "Libraries should challenge censorship in the fulfillment of their responsibility to provide information and enlightenment." Article IV states "Libraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas."

potential disruption arising from confusion as to who (the school or the students) was actually distributing religious literature. The Court held the censorship unconstitutional, observing:

> Public belief that the government *is* partial does not permit the government to *become* partial. Students therefore may hand out literature even if the recipients would misunderstand its provenance. The school's proper response is to educate the audience rather than squelch the speaker. Consider a parallel: the police are supposed to preserve order, which unpopular speech may endanger. Does it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto.

9 F.3d 1295, 1299-1300 (7th Cir. 1993) (internal citation omitted).

If a school must protect free expression of adolescent students against potential disruptors, how much more so must a library, ostensibly a temple of free expression, protect the free expression of its patrons against those who would disagree and disrupt? The U.S. and Wisconsin Constitutions and library's own Bill of Rights require the library to resist the temptation to throw its lot in with the hecklers. Rather it must resist any hecklers and must protect speakers. Here the library's conduct is egregious because the hecklers the library points to are phantoms, the claimed possibility of disruption mere speculation! But even if hecklers were substantial, the library must protect expression. If disruptive protesters should come to the library, the police should be summoned. Indeed it such disruption is indeed reasonably feared ahead of time, then the library should call the police in advance. The threat should be assessed, and reasonable precautions taken to protect against it. Indeed, the Defendants' constitutional obligation is to protect speech, not suppress it on such flimsy grounds as it has cited here, namely, the mere possibility that its "normal day" may be inconvenienced. *Hedges*, *supra*.

The "normal use" defense highlights a second flimsy justification for the library's conduct. The library claims it may shut down free expression with impunity because the exhibition and screening of "BloodMoney," a film about abortion, will contravene the "normal

use" of the library[3]. The problem here is two-fold. First, there appears to be *no* support for the library director's conclusion that plaintiffs' use of the meeting room for its film screening will interfere with the "normal use" of the library. Actually, the screening is entirely within the normal use and purpose of the library as a forum for the circulation and discussion of ideas. And the director's only reasons for censorship were (1) his commonplace statement that abortion is controversial and even "contentious," and (2) his speculation that some members of the public might be upset with the library (or the exhibitors) for screening the film. In short, there is *no* support for a position that the "normal use" of the library would be disrupted.

The larger problem, though, is that the standard "normal use of the library" "in the opinion of the library director or trustees" is so vague, ambiguous and amorphous as to be deemed standardless. The rule vests virtually unlimited discretion in the director and trustees to grant or deny a member of the public permission to use library facilities. As such it violates the First Amendment, which requires that "any regulations governing the speaker's access to a forum must contain 'narrow, objective, and definite standards' to guide a governmental authority so that such regulations do not operate as a prior restraint that may result in censorship." *Martin DeBoer v. Village of Oak Park*, 267 F.3d 558, 573-574 (7th Cir. 2001) (*citing Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969) ("Where virtually unlimited governmental discretion exists, 'the possibility is too great that it will be exercised in order to suppress disfavored speech.'")).

This is precisely what happened here. The elastic yardstick employed by the library's director, "normal use of the library," afforded him unduly ample scope and virtually unlimited discretion to conclude that the mere possibility of upset (over discussion of abortion at the

[3] The Library's rules provide that it may refuse to reserve a meeting room if, "in the opinion of the Library Director or the Library Board of Trustees, [it] may interfere wit the normal use of the library."

library) constituted "abnormal use" of the library, justifying censorship. This use of the library's standardless standard does not pass muster under the First Amendment.

Finally, First Amendment protections are fully afforded in a designated public forum such as defendants' public library, subject to restrictions that are viewpoint-neutral and are reasonable in light of the purpose served by the forum. *Martin DeBoer v. Village of Oak Brook*, 267 F.3d 558, 565-566 (7th Cir. 2001). The library's policies ape these principles by purporting to provide library space to the public "on an equitable basis, regardless of the beliefs or affiliations of individuals or groups requesting their use" and prohibiting only uses that "may interfere with the normal use of the Library." But viewpoint neutrality is not achieved by suppressing *both* sides of an issue (*i.e.*, no discussion of abortion is allowed), *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 831 (1995), and reasonableness is not established via rules that provide no guidance for their enforcement.

PLAINTIFFS WILL SUFFER IRREPARABLE HARM UNLESS A TEMPORARY RESTRAINING ORDER IS GRANTED

The Supreme Court and this Circuit have long recognized that even minimal deprivation of a First Amendment right is "irreparable." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 ("The loss of First Amendment freedoms, for even minimal period of time, unquestionably constitutes irreparable injury."), *Nuxoll v. Prairie*, 523 F.3d 668, 669 (7th Cir. 2008); *see also Christian Legal Society v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006); *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998); *Tunick v. Safir*, 209 F.3d 67, 70 (2d Cir. 2000).[4]

[4] The Court in *Christian Legal Society v. Walker* stated, "The loss of First Amendment freedoms is presumed to constitute an irreparable injury for which money damages are not adequate, and injunctions protecting First Amendment freedoms are always in the public interest. *Id.; see also Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")." 453 F.3d 853, 859.

In this case plaintiffs seek to screen a movie about abortion during their 40 Days For Life campaign, which this year lasts until April 17, 2011. Plaintiffs have incurred costs and expenditure of time and resources to advertise and publicize the screening in the local area. It is too late to undo the advertising, and impossible to redo it effectively as advertising commenced a month before the current April 3, 2011 date, and only around two weeks in the campaign remain. Plaintiffs should not be required to bear the burden of defendants' censorship since, as the Supreme Court in *Elrod v. Burns* stated, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." 427 U.S. 343, 373.

Plaintiffs have sought – and at a late hour, Marathon County Corporate Counsel has offered – an alternative venue for this event, but the venue found by plaintiffs (at the local university) requires an expenditure of funds (while the library venue was to be free of cost) and there is no way to re-advertise the event at another venue. The venue offered by Marathon County is not at the public, visible library space but at county offices closed and empty on a Sunday afternoon. While plaintiffs could stand in front of the library on the day in question (April 3) and attempt to re-direct interested viewers to the other site, there is no truly effective way to accomplish this communication, absent timely advertising, even were the library to assist. Moreover, with Marathon County's alternate venue, plaintiffs will lose the public, visible nature of their witness. No matter the alternate venue offered, the fact remains that plaintiffs should not be required to diminish their communicative efforts and be censored from the ostensibly public meeting rooms at the library. *Elrod*.

DEFENDANTS WILL SUFFER NO LEGALLY COGNIZABLEHARM IN ALLOWING PLAINTIFFS TO USE THE LIBRARY TO SHOW THE FILM

Defendants claim the "normal use" of the library will be jeopardized should the relief plaintiffs request be entered. This is nonsense. Using library rooms and film equipment to show

a film (a film that educates and stimulates debate), falls squarely within the purpose and "normal use" of the library. The only "evidence" (to plaintiffs' knowledge) of potential disruption of the library as a result of showing this film has come from the library's director, and his stated fears of impending disruption are utterly a matter of mere conjecture and speculation, completely unsubstantiated by any credible evidence. Even if persons were to enter the library and cause any actual disruption, the library could ask police to remove the disorderly persons. Better yet, if there is some solid basis for predicting protest and possible disruption, the police should be called in advance and precautions taken as necessary to ward off any actual disruption. In fact, to plaintiffs' knowledge, this film has been presented in numerous public venues throughout the country and plaintiffs know of not even one instance of public disorder or misbehavior occurring in connection with these events. (Plaintiffs themselves are committed to peaceful expression of ideas and to fostering civil discourse and debate regarding the issues they espouse.) There is thus *no* basis for a finding that library will suffer *any* harm as a result of issuance of the relief requested, let alone any actual harm that would be either *legally cognizable* or *irreparable*.

INJUNCTIVE RELIEF IS IN THE PUBLIC INTEREST

In *Christian Legal Society v. Walker*, *supra,* the Seventh Circuit panel stated, ". . . injunctions protecting First Amendment freedoms are always in the public interest." 453 F.3d 853, 859. The importance of free speech in a free society can hardly be overstated. If our country is to remain oriented towards truth, which emerges only through a struggle of ideas, freely and vigorously expressed, free speech must be jealously guarded.

As our Supreme Court observed in *Terminello v. City of Chicago*, 337 U.S. 1, 4 (1949), free speech "best serve[s] its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger," and "[t]he right to

speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes."

If a library, equally as a university, would serve as "one of the vital centers for the Nation's intellectual life," it must not shrink from robust debate and dialogue involving diverse points of view, and it must refrain from discriminating against or attempting to suppress any one of those points of view. *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 836 (1995).

The State of Wisconsin explicitly affirms the importance of free access to information and ideas in its library system. Its statutory provisions regarding state libraries state:

> 43.001 Legislative findings and declaration of policy.
> (1) The legislature recognizes:
> a. The importance of free access to knowledge, information and diversity of ideas by all residents of this state;
> b. The critical role played by public, school, special and academic libraries in providing that access;
> c. . . .
> d. The importance of public libraries to the democratic process;

Chapter 43, Libraries, at Sec. 43.001.

Protecting residents of Wisconsin's "free access to knowledge, information and diversity of ideas," as sought by plaintiffs here, is therefore squarely in the public interest.

WHEREFORE, Plaintiffs respectfully move the Court to enter a temporary restraining order and preliminary injunction immediately restraining and enjoining Defendants, their officers, agents, servants, agents and/or attorneys from:

> Censoring, suppressing, and banning the exhibition and screening by plaintiffs of the movie "BloodMoney," by rescinding plaintiffs' previously confirmed room reservation for showing of the film on Sunday, April 3, 2011, from 1 pm to 3 pm.

Respectfully submitted,

AXLEY BRYNELSON, LLP

Dated: March 30, 2011

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