

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

SILVIE POMICTER and  
LAST CHANCE FOR ANIMALS,

Plaintiffs,

v.

LUZERNE COUNTY CONVENTION  
CENTER AUTHORITY and  
SMG,

Defendants.

CIVIL ACTION

No. \_\_\_\_\_

**MEMORANDUM OF LAW IN SUPPORT OF THE  
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Respectfully submitted,

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Dated: April 15, 2016

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## **I. INTRODUCTION**

Plaintiffs are opposed to the use of animals by the Ringling Bros. and Barnum & Bailey Circus (the “Circus”). The Circus will be performing several shows at the Mohegan Sun Arena (the “Arena”) at Casey Plaza in Wilkes-Barre, Pennsylvania from April 28 to May 1, 2016. Ms. Pomicter and LCA would like to engage in protesting, leafletting, and other forms of expressive activity on the paved open space area, sidewalks, and grass areas in Casey Plaza when the Circus comes to the Arena, and at future events and performances at the Arena.

But Defendants will not allow that. Instead, Defendants’ Protest Policies require that protesters stand inside a pen constructed of metal barricades. The confinement of the protesters prevents them from being seen or heard by most Circus patrons, and prevents them from offering literature to or discussing the Circus with all but a handful of patrons.

Plaintiffs ask this Court to issue a preliminary injunction barring the Defendants from enforcing their Protest Policies to the extent that they prohibit individuals from engaging in protesting, leafletting, and other expressive activity on the paved open spaces, sidewalks, and grass areas in Casey Plaza. Plaintiffs do not object to regulations that prohibit protestors from obstructing visitors from entering the Arena building or otherwise interfering with the events being

conducted inside the Arena building, or to the use of buffer areas around the entrances and vendors.

## **II. PROCEDURAL HISTORY**

Plaintiffs filed a Verified Complaint on April 15, 2016, seeking declaratory and injunctive relief for violations by the Defendants of their rights under the First and Fourteenth Amendments to the United States Constitution and under Section 7 of Article I of the Pennsylvania Constitution.

## **III. STATEMENT OF FACTS**

Defendant Luzerne County Convention Center Authority (the “Authority”) owns the Mohegan Sun Arena (the “Arena”), Casey Plaza, and the surrounding parking lots. Compl. ¶¶ 4, 10. Defendant SMG performs management services and systems to operate, manage, and promote the Arena as agent for the Authority. *Id.* ¶ 5.

Plaintiffs Silvie Pomicter and LCA are opposed to the use of animals by the Circus. *Id.* ¶¶ 2, 3, 22. Ms. Pomicter has been an animal rights activist for many years, and regularly protests outside businesses and venues that she believes engage in or support cruelty to animals. *Id.* ¶ 2. LCA is a non-profit organization dedicated to eliminating animal exploitation through education, investigations, legislation, and media attention. *Id.* ¶ 3.

The Circus will be performing several shows at the Arena from April 28 to May 1, 2016. *Id.* ¶ 23.

Defendants' "Protest Policies"<sup>1</sup> prohibit individuals from protesting, handing out leaflets and engaging in other expressive activity except from within a small "designated area" in the parking lot. The Protest Policies make clear that non-compliance with the policies "may result in eviction from the property or greater."<sup>2</sup>

Outside the Arena building are expansive sidewalks, grass areas, and a paved open space area for pedestrians (collectively, "Casey Plaza"). Compl. ¶ 13. *See also* Exhibits 2-4 (photos) and Exhibit 7 at ¶¶ 4, 13 (Declaration of Silvie Pomicter).

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<sup>1</sup> A true and correct copy of the Protest Policies is attached hereto as Exhibit 1.

<sup>2</sup> The Protest Policies also state that "[a]ny visual panels or banners considered to be offensive by the facility, in any manner, may not be shown and we will ask that they be removed," that "[a]ny promotional verbiage suggesting vulgarity or profanity is not permitted," and that "artificial voice amplification" is not permitted.

Plaintiffs also allege that these other provisions of the Protest Policies are unconstitutional, but Plaintiffs' Motion for Preliminary Injunction is not seeking a preliminary injunction that would enjoin Defendants' enforcement of these provisions. Instead, the Motion for Preliminary Injunction is solely directed at Defendants' policy and practice of confining protesting, leafletting, and other expressive activity to the barricaded "designated area."



Patrons attending events at the Arena arrive primarily by car: they turn into an access road from Highland Park Boulevard, park in one of the lots outside the Arena, and then proceed on foot to one of two entrance points for the Arena. *See* Exhibit 7 at ¶ 5 (Declaration of Silvie Pomicter). These entrances are called the “East Gate” and the “West Gate” and are on opposite sides of the face of the Arena. A broad paved apron sweeps across the entire face of the Arena, connecting the East and West Gates, with particularly large sidewalks in front of each entrance. *See* Exhibits 2-4 (photos).

There is no fence around Casey Plaza: upon information and belief, the paved open space area, sidewalks, and grass areas in Casey Plaza have been held open for public use. Members of the public are permitted to enter these areas even if they do not have tickets to enter the Arena building itself to watch a performance or event. Compl. ¶ 14. There are no sidewalks outside Casey Plaza alongside Highland Park Avenue. *See* Exhibit 2 (aerial photo); Exhibit 7 at ¶ 6 (Declaration of Silvie Pomicter)

The Defendants’ written “Protest Policies” state “[a]ll persons are welcome to express their views at the Mohegan Sun Arena at Casey Plaza.” Compl. ¶ 15. Despite this stated rule, the “Protest Policies” and the Defendants’ unwritten practices impose restrictions on expressive activity at the Arena and the Plaza, including requiring that any individuals who want to protest, hand out leaflets, or

engage in other expressive activity do so from within a small “designated area” surrounded by barricades in the parking lot. *Id.* ¶ 16. In addition, at past Circus performances, extra barricades have been arranged around the confined protesters to direct foot traffic away from the protesters and toward the doors of the Arena. *Id.* ¶ 17; Exhibit 7 at ¶ 8 (Declaration of Silvie Pomicter); Exhibits 5-6 (photos). Because protesters are confined to the barricaded designated area, they are prevented from approaching passersby and visitors to the Arena to engage in conversation or hand out leaflets. Compl. ¶ 18; Exhibit 7 at ¶¶ 7, 10, 12 (Declaration of Silvie Pomicter). The Protest Policies make clear that non-compliance with the policies “may result in eviction from the property or greater.” Compl. ¶ 19.

Upon information and belief, prior protesting, leafletting, and expressive activity in Casey Plaza has not caused a safety or security problem or impeded the access of visitors to the Arena. *Id.* ¶ 21.

Ms. Pomicter and LCA would like to engage in protesting, leafletting, and other forms of expressive activity when the Circus comes to the Arena, and at future events and performances at the Arena. *Id.* ¶ 24. Plaintiffs hope to hand out leaflets and hold signs and/or banners. They would speak with willing patrons on their way to the Arena building, but would not congregate by the doors or in any

way obstruct the flow of pedestrians or interfere with the sale of merchandise. *Id.* ¶ 25.

The Defendants' Protest Policies and practices, however, will severely and unlawfully restrict Plaintiffs' ability to engage in this expressive activity. *Id.* ¶ 26. The Authority and SMG do not have legitimate reasons for requiring individuals to protest and leaflet from within the barricaded designated area only. *Id.* ¶ 27.

#### **IV. STATEMENT OF QUESTION INVOLVED**

QUESTION: Should the Court grant a preliminary injunction that bars Defendants from prohibiting individuals from protesting, leafletting, and engaging in other expressive activity on the paved open space area, sidewalks, and grass areas at Casey Plaza that does not obstruct visitors from entering the Arena building or otherwise interfere with the events being conducted inside the Arena building, when the expressive activity is protected by the United States and Pennsylvania constitutions and when Defendants have no legitimate reason to impose such a prohibition?

SUGGESTED ANSWER: Yes.

#### **V. LEGAL STANDARD**

In ruling on a motion for preliminary injunctive relief, the Court must consider four factors: (1) the likelihood that the plaintiffs will prevail on the merits; (2) the extent to which the plaintiffs are being irreparably harmed by the

conduct complained of; (3) the extent to which the defendants will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest. *See, e.g., Gerardi v. Pelullo*, 16 F.3d 1363, 1373 (3d Cir. 1994). Notably, to meet this standard:

It is not necessary that the moving party's right to a final decision after trial be wholly without doubt; rather, the burden is on the party seeking relief to make a *prima facie* case showing a reasonable probability that it will prevail on the merits.

*Oburn v. Shapp*, 521 F.2d 142, 148 (3d Cir. 1975) (citations omitted). As the Third Circuit Court of Appeals has explained, a plaintiff "needs only to show a *likelihood* of success on the merits (that is, a reasonable chance, or probability, of winning) to be granted relief. A 'likelihood' does not mean more likely than not." *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) (emphasis in original).

## **VI. ARGUMENT**

The Court should grant the requested injunction because (1) Plaintiffs are likely to succeed on the merits of their First Amendment claim, (2) without a preliminary injunction irreparable harm to Plaintiffs is certain and severe, (3) Defendants' potential hardship is speculative and minor, and (4) the public interest in vindicating and protecting constitutional rights outweighs Defendants' interest in confining protestors to a caged pen in the parking lot.

**A. Plaintiffs Are Likely to Succeed on the Merits.**

Plaintiffs will prevail on their claim that Defendants' Protest Policies and practices are an unconstitutional infringement on Plaintiffs' freedom of speech because Defendants cannot meet their burden to justify the restriction of protesters behind barricades.<sup>3</sup>

**1. Defendants Bear the Burden of Justifying the Protest Restrictions at Casey Plaza.**

Unlike most legal disputes, in First Amendment cases the defendant carries the burden of proof and persuasion. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816, (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.") (citations omitted); *accord Phillips v. Borough of Keyport*, 107 F.3d 164, 172-73 (3d Cir. 1997) (en banc).

The procedural mechanism of seeking a preliminary injunction does not invert this burden or require Plaintiffs to prove a negative. Instead, Plaintiffs must

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<sup>3</sup> There can be no doubt that Defendants are acting under color of state law. The Authority is organized pursuant to the Municipal Authorities Act of Pennsylvania. 53 Pa. C.S. §§ 5601-5623. Thus, the Authority is a public, government entity that is acting under color of state law. SMG, a Pennsylvania general partnership, performs management services and systems to operate, manage, and promote the Arena as agent for the Authority. As the agent for the Authority and a willful participant in joint activity with the Authority, SMG is acting under color of state law. *See Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 941 (1982) (private conduct is considered state action when the private actor "is a willful participant in joint activity with the State or its agents").

present enough evidence and argument to place the constitutionality of Defendants' Protest Policies in doubt, at which point Defendants bear the burden of justifying their restrictions on speech. That is the procedure approved by the Supreme Court for the evaluation of a request for preliminary injunction where the government bears the burden of proof on the merits:

In deciding whether to grant a preliminary injunction, a district court must consider whether the plaintiffs have demonstrated that they are likely to prevail on the merits. . . . . As the Government bears the burden of proof on the ultimate question of COPA's constitutionality, respondents must be deemed likely to prevail unless the Government has shown that respondents' proposed less restrictive alternatives are less effective than COPA. Applying that analysis, the District Court concluded that respondents were likely to prevail. That conclusion was not an abuse of discretion, because on this record there are a number of plausible, less restrictive alternatives to the statute.

*Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004) (internal citations omitted).

Plaintiffs' burden at the preliminary injunction stage, therefore, is to cast doubt on the Defendants' ability to justify their restrictions on protests. Once Plaintiffs' burden is met, it is incumbent upon Defendants to rebut that showing and establish that their Protest Policies are constitutional.

## 2. Defendants Cannot Justify Confining Protesters at Casey Plaza.

The extent to which the government may limit activity protected by the First Amendment on government-owned property depends on the nature of the property where the speech takes place. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-46 (1983). For purposes of Plaintiffs' Motion for Preliminary Injunction, Plaintiffs will assume that the paved open space area, sidewalks, and grass areas in Casey Plaza are a "nonpublic forum."<sup>4</sup>

In a "nonpublic forum," a government's restrictions on speech must be reasonable "in the light of the purpose of the forum and all the surrounding circumstances" and must not represent "an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1992) [hereinafter "*ISKC v. Lee*"]; see also *Cornelius*, 473 U.S. at 802.

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<sup>4</sup> Plaintiffs' assumption is only for purposes of determining whether they are likely to prevail on their claims such that a preliminary injunction is warranted; Plaintiffs do not concede for any other purpose that this property is not another type of public forum. Government-owned property can qualify as one of several categories of public fora for First Amendment analysis purposes: a traditional public forum, a designated public form, a limited public forum, and a nonpublic forum. See, e.g., *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 802 (1985). Plaintiffs reserve their right to argue that the paved open space area, sidewalks, and grass areas in Casey Plaza are a traditional, designated, and/or limited public forum.

Defendants' restriction of protesting, leafletting, and other expressive activity at Casey Plaza to a designated zone is unreasonable in light of the characteristics of the forum and its use as a venue for large scale events. This restriction prevents individuals from approaching passersby and visitors to the Arena to engage in conversation or hand out leaflets. In addition, because of the nature of the facility, the restriction keeps the protesters out of the sight and hearing of a majority of the Arena patrons.

The Supreme Court and lower courts have, time and again, struck down bans on passive distribution of information, such as handing out literature and carrying signs, even where they have upheld restrictions on soliciting signatures or money, holding that activities that do not require patrons to stop are consistent with the government's use of its property. For example, the Supreme Court upheld a regulation forbidding solicitation but allowing leafletting on sidewalks outside Post Offices. *United States v. Kokinda*, 497 U.S. 720, 734-35 (1990). The Court similarly upheld a solicitation ban while striking down a leafletting ban in airport terminals. *ISKC v. Lee*, 505 U.S. at 689-90 (O'Connor, J., concurring); *Lee v. Int'l Soc. for Krishna Consciousness, Inc.*, 505 U.S. 830, 831 (1992).<sup>5</sup>

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<sup>5</sup> Years before the Supreme Court disapproved these bans on leafletting in nonpublic fora, the Third Circuit Court of Appeals upheld a ban on the solicitation of donations while leafletting inside a sports stadium. *See Int'l Soc'y for Krishna Consciousness, Inc. v. N.J. Sports & Exposition Auth.*, 691 F.2d 155 (3d Cir. 1982). But that case is inapposite here, because it did not involve the



Indeed, the Court has emphasized the protected nature of literature distribution in a variety of contexts. In *Greer v. Spock*, 424 U.S. 828 (1976), the Court upheld a regulation banning the distribution of literature on a military base without the prior approval of the base commander, but emphasized that the result could not be a ban on all leafletting: “The only publications that a military commander may disapprove are those that he finds constitute ‘a clear danger to [military] loyalty, discipline, or morale.’” 424 U.S. at 840. In consideration of “buffer zones” around abortion clinics, both the Supreme Court and the Third Circuit have emphasized the importance of protecting the ability of protesters to be close enough to clients entering the clinic to speak to them and offer them literature. See *Hill v. Colorado*, 530 U.S. 703, 727 (2000) (“The burden on the ability to distribute handbills is more serious because it seems possible that an 8-foot interval could hinder the ability of a leafletter to deliver handbills to some unwilling recipients. The statute does not, however, prevent a leafletter from simply standing near the path of oncoming pedestrians and proffering his or her material, which the pedestrians can easily accept. And, as in all leafletting situations, pedestrians continue to be free to decline the tender.”); *Brown v. City of*

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constitutionality of banning leafletting unaccompanied by solicitation, *id.* at 161 n.3 (“We also note that ISKCON does not wish to distribute literature without simultaneously soliciting money.”), or protest activity *outside* such a facility. Furthermore, the Third Circuit has not considered these questions since the Supreme Court’s decisions in *Kokinda* and *Lee*.

*Pittsburgh*, 586 F.3d 263, 282 (3d Cir. 2009) (“With the Ordinance’s multi-zone restrictions, not only are leafleters unable to stand within fifteen feet of clinic entrances, but they are constrained from moving freely even outside of that protective zone. . . . Accordingly, we find the Ordinance’s combination of the two zones to be insufficiently tailored under *Ward*.”).

Courts have reached the same outcome—allowing leafletting even where more disruptive forms of protests are restricted—in a variety of nonpublic fora. *See Chicago Acorn v. Metro. Pier & Exposition Auth.*, 150 F.3d 695, 702-703 (7th Cir. 1998) (finding that commercial purpose of Navy Pier entitled operator to restrict some speech, such as “marches, bullhorns, soliciting, and the like,” but that this did not justify restriction on leafletting and other forms of passive advocacy such as wearing clothing that displays slogans or symbols);<sup>6</sup> *Paulsen v. County of Nassau*, 925 F.2d 65, 66 (2d Cir. 1991) (striking down a ban on leafletting on the grounds of the Nassau County Veterans Memorial Coliseum because distributing handbills was not likely to interfere with the mood or the quality of the Coliseum arena events); *see also Diener v. Reed*, 232 F. Supp. 2d 362 (M.D. Pa. 2002) (striking down a leafletting ban outside a Civil War museum as unreasonable), *aff’d on other grounds*, 77 F. App’x 601 (3d Cir. 2003).

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<sup>6</sup> The court allowed restrictions on “intrusive, noisy, or menacing” forms of demonstration because of the government’s financial interest in the pier’s operations. *Id.* at 702-703.

Casey Plaza does not require any greater restriction on speech than has been applied in the many other nonpublic fora discussed in these cases. The Plaza provides a wide open approach to the doors of the Arena, and the Authority can require that protesters stay away from the doors and other congestion points. To the extent that the Authority simply wishes to prevent protesters from criticizing the Circus or persuading people not to attend, that is not a legitimate purpose of government regulation. *See N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 909 (1982) (citing *Thornhill v. State of Alabama*, 310 U.S. 88 (1940)).

In short, Defendants cannot meet their burden of showing that a ban on Plaintiffs' forms of protest would be constitutional because the form of speech is not disruptive and the restriction is not necessary to prevent the obstruction of visitors to the Arena building or other interference with events taking place inside the building.

**B. Plaintiffs Will Suffer Irreparable Injury if Relief is Not Granted.**

In a First Amendment case, “a plaintiff who meets the first prong of the test for a preliminary injunction will almost certainly meet the second, since irreparable injury normally arises out of the deprivation of speech rights.” *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 866 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997). This is because the loss of First

Amendment freedoms, for even minimal periods of time, constitutes per se irreparable injury. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976).

When restricted to a protest pen, Plaintiffs are greatly inhibited in their ability to speak with Circus patrons and distribute literature. *See* Exhibit 7 at ¶¶ 7, 10, 12 (Declaration of Silvie Pomicter). The Circus will be coming to the Arena from April 28 to May 1, 2016. Without an injunction, Plaintiffs face the threat that their protest and leafleting will be interfered with by Defendants.

C. **Any Harm to Defendants From the Granting of an Injunction Will be Far Outweighed by the Harm to Plaintiffs in the Absence of an Injunction.**

This Court must balance the irreparable harm that Plaintiffs will experience against any harm that Defendants might suffer if Plaintiffs are allowed to protest and distribute leaflets outside the barricaded designated area in the parking lot pending the outcome of the litigation. In this case, the scale tips heavily toward Plaintiffs. The harm to Plaintiffs is certain and severe: the deprivation of their fundamental liberties. The harm to Defendants is speculative. There is no evidence that Plaintiffs' speech would disrupt the activities of Casey Plaza. And Defendants' security guards, who are present whenever there are protesters anyway, should be able to keep Plaintiffs and other protesters away from entrances and ask them to move if they are causing congestion.

**D. The Public Interest Will be Served by an Injunction.**

Finally, the Court must weigh the effect on the public of a suspension of Defendants' speech restriction pending the outcome of the litigation. The public's interest is in respect for the First Amendment: "[i]n the absence of legitimate countervailing concerns, the public interest clearly favors the protection of constitutional rights." *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 884 (3d Cir. 1997). Plaintiffs' speech raises awareness of animal mistreatment issues, enabling the public to make more informed consuming decisions. Although citizens of Wilkes-Barre also have an interest in the success of the Arena, the public interest properly defined does not include an interest in suppressing speech for financial reward.

This being a non-commercial case involving no damages, and the balance of hardships favoring the Plaintiffs, the Fed. R. Civ. P. 65(c) security bond requirement should be waived. *Elliot v. Kiesewetter*, 98 F.3d 47, 59-60 (3d Cir. 1996); *Temple University v. White*, 941 F.2d 201, 219-20 (3d Cir. 1991).

**VII. CONCLUSION**

For the reasons described above, a preliminary injunction is warranted. Plaintiffs have a strong probability of success on their claim. Defendants, through their Protest Policies, are infringing upon the rights of Ms. Pomicter and LCA to express their point of view regarding the use and treatment of animals by the

Circus in clear violation of the First Amendment. This is improper conduct by which Plaintiffs will be irreparably harmed and the public interest disserved if Defendants are not enjoined from interfering with Plaintiffs' constitutionally-guaranteed rights.

Accordingly, the Court should grant Plaintiffs Silvie Pomicter and LCA immediate injunctive relief in the form of the attached form of order.

Respectfully submitted,

Dated: April 15, 2016

/s/ Alexander R. Bilus  
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

SILVIE POMICTER and	:	
LAST CHANCE FOR ANIMALS,	:	
	:	
Plaintiffs,	:	
	:	CIVIL ACTION NO.
v.	:	
	:	
LUZERNE COUNTY CONVENTION	:	_____
CENTER AUTHORITY and	:	
SMG,	:	
	:	
Defendants.	:	

**CERTIFICATE OF COMPLIANCE WITH LOCAL RULES**

I, Alexander R. Bilus, Esquire, hereby certify, pursuant to Local Rule 7.1, that counsel for Plaintiffs Silvie Pomicter and Last Chance for Animals sought concurrence in this Motion from Defendants via phone on April 6, 2016 and April 8, 2016 and concurrence has not been granted.

I further certify that this brief complies with the word-count limit set forth in Local Rule 7.8(b)(2). Excluding tables and the signature block, the brief contains 4,367 words.

Dated: April 15, 2016

/s/ Alexander R. Bilus  
Alexander R. Bilus