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Laura McKenery

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THE FIRST AMENDMENT—DETERMINING WHETHER A TOTAL BAN ON NEWSPAPER RACKS IN A PUBLIC AIRPORT'S TERMINALS RAISES A GENUINE ISSUE OF MATERIAL FACT CONCERNING ITS CONSTITUTIONALITY

LAURA MCKENERY*

IN NEWS & OBSERVER PUBLISHING CO. v. RALEIGH-DURHAM AIRPORT, the Fourth Circuit upheld the district court’s decision that a ban on coin-operated newspaper racks in an airport was unconstitutional because it infringed on a newspaper publisher’s freedom to distribute and freedom of expression.1 But this holding is misguided because there is a genuine issue of material fact concerning the ban’s reasonableness when weighed against the airport’s interests in “security, aesthetics, preserving revenue, and preventing congestion,” and therefore the case should be remanded for trial.2

In 2002, The News and Observer Publishing Company (the Observer) contacted the Raleigh-Durham Airport Authority (the Authority) and requested permission to place newspaper racks throughout airport terminals.3 Newspapers were only available for purchase from several different shops, which the Airport required to open sometime before the morning flights departed and close after the last flights left in the evenings—usually from 5:30 a.m. to 9:00 p.m.—but there were flights that arrived after the shops had closed.4 The Authority declined to set up newsracks due to safety reasons, concern over losing sales from shops, a lack of floor space,5 and because the airport had

* J.D. Candidate, SMU Dedman School of Law, 2012; B.A., St. Edward’s University, 2009. The author gives special thanks to her family for their constant support and encouragement.
1 597 F.3d 570, 573 (4th Cir. 2010).
2 Id. at 576.
3 Id. at 574.
4 Id. at 574–75.
5 Id. at 575.
received no complaints from customers about the availability of newspapers in the airport.

Then, in 2004, the Observer wrote a letter to the Authority stating that the denial of its request would probably not “survive First Amendment scrutiny,” and again requested permission to set up the newsracks. The Authority denied the request two more times despite the threat of litigation.

A few months later, the Observer sued the Authority in federal district court alleging that denial of its request to set up newspaper racks was a violation of the First Amendment. The Observer ultimately sought a permanent injunction, which would allow it to place 208 newsracks in the airport. Both the Authority and the Observer moved for summary judgment, which the district court ultimately granted to the Observer on its First Amendment claim. The district court stated that the total ban on coin-operated newsracks “substantially burden[ed] the newspaper companies’ expressive conduct[,]” and in response, the Authority appealed the district court’s grant of summary judgment. On appeal, the Fourth Circuit affirmed the district court’s decision, holding that there was “insufficient evidence from which a reasonable jury could conclude that the Authority’s asserted interests justify the total ban on newsracks inside the terminals.” Additionally, the Fourth Circuit stated that there was no support for the contention that setting up the newsracks would frustrate the airport’s “purposes of facilitating air travel and raising revenue.”

The Fourth Circuit held that the ban on newsracks was unreasonable because it “significantly restricted the Publishers’ protected expression” and the Authority did not have legitimate interests that counterbalanced the restriction. The court examined and addressed the Observer’s First Amendment claim by relying on Multimedia Publishing Co. of South Carolina v. Greenville-Spartanburg Airport Dist. Although Multimedia was not a

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6 Id.
7 Id.
8 Id.
9 Id.
10 Id.
11 Id. at 575–76 (internal quotation and citation omitted).
12 Id. at 581.
13 Id. (internal citation omitted).
14 Id. at 578, 580.
15 Id. at 576; see generally Multimedia Publ’g Co. of S.C. v. Greenville-Spartanburg Airport Dist., 991 F.2d 154 (4th Cir. 1993).
summary judgment case, it still provided the court with the "substantive legal framework" to follow when analyzing similar facts.\textsuperscript{16} The court noted that in \textit{Multimedia} the district court found that a newsrack ban was unconstitutional, and the judgment was upheld on appeal.\textsuperscript{17} In addition, the Fourth Circuit stated in \textit{News & Observer} that "the First Amendment protect[ed] distribution as well as publication" of protected material.\textsuperscript{18} In regard to this contention, the Fourth Circuit stated that the Observer's ability to distribute newspapers was restricted because newspapers were not available on certain mornings and once the stores closed each evening; as a result, the Observer could not provide newspapers to customers who arrived on the late evening flights.\textsuperscript{19}

Because courts consider airports nonpublic fora,\textsuperscript{20} 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."\textsuperscript{21} The Fourth Circuit reasoned that because the ban on newsracks did not discriminate based on viewpoint, it "need only consider its reasonableness."\textsuperscript{22}

Next, the court examined the Authority's assertion of four interests, which could possibly justify the total ban.\textsuperscript{23} These interests included "aesthetics, preserving revenue, preventing congestion, and security."\textsuperscript{24} Specifically, the Fourth Circuit concluded that each of these interests, even though legitimate, could not counterbalance the "heavy restriction on protected expression."\textsuperscript{25} The analysis began with aesthetics. The court

\textsuperscript{16} \textit{News & Observer}, 597 F.3d at 576; \textit{see also Multimedia}, 991 F.2d at 156.
\textsuperscript{17} \textit{News & Observer}, 597 F.3d at 576; \textit{see also Multimedia}, 991 F.2d at 163.
\textsuperscript{18} \textit{News & Observer}, 597 F.3d at 576 (quoting \textit{Multimedia}, 991 F.2d at 158).
\textsuperscript{19} \textit{Id.} at 578.
\textsuperscript{21} \textit{Perry Educ. Ass'n v. Perry Local Educators' Ass'n}, 460 U.S. 37, 46 (1983) ("The State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated.") (internal quotations and citations omitted).
\textsuperscript{22} \textit{News & Observer}, 597 F.3d at 577; \textit{see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.}, 473 U.S. 788, 809 (1985) (explaining that reasonableness should be determined "in the light of the purpose of the forum and all the surrounding circumstances"); \textit{Multimedia}, 991 F.2d at 159.
\textsuperscript{23} \textit{News & Observer}, 597 F.3d at 578–79.
\textsuperscript{24} \textit{Id.} at 578.
\textsuperscript{25} \textit{Id.} at 576, 581.
stated that aesthetic concerns can be severe enough to restrict protected expression only if the harm is "substantial and widely recognized," but the Authority did not prove either of these standards and did not "distinguish newsracks from the vending machines . . . [and] ATM machines" already in place. Second, the court considered preserving revenue and rejected the Authority's argument that shops would lose sales if newsracks were permitted. This concern was not considerable enough to counterbalance the restriction on protected expression, according to the court. Third, the court considered the interest of preventing congestion. The Authority argued that because a "standard newsrack projects twenty inches" its size "reduces the pedestrian traffic flow capacity of the corridor by 42 people per minute." The court also rejected this argument and found that the airport would only set up a limited number of newsracks creating only "trivial congestion." The Authority did not distinguish between the congestion the newsracks would cause compared to the vending machines and ATM machines already in place. Lastly, the court examined the interest of security. The Authority argued that newsracks could serve as "hiding places for bombs or weapons." But the court also rejected this argument because the Authority again failed to distinguish newsracks from other places in which bombs could be hidden such as trash cans and vending machines. Thus, the Fourth Circuit held that the "security interest cannot counterbalance the significant restriction on protected expression."

In the dissenting opinion, Judge Davis reiterated that the issue on appeal was "whether the court below properly granted summary judgment to the newspaper publishers" when it held that the total ban on newsracks infringed on the publisher's First Amendment rights. Judge Davis concluded that the record did reflect the existence of a genuine issue of material fact.

26 Id. at 579 (internal quotations and citation omitted).
27 Id.
28 Id.
30 Id.
31 Id. at 580–81.
32 Id. at 581.
33 Id.
34 Id.
35 Id. at 582 (Davis, J., dissenting).
and stated that the district court’s grant of summary judgment should be vacated and remanded for trial.\textsuperscript{36}

The dissent also relied on \textit{Multimedia} and compared the situation at the Greenville-Spartanburg Airport with the same situation at the Raleigh-Durham Airport, finding that the “[a]irport’s customers suffer only a minimal burden” due to the ban.\textsuperscript{37} Judge Davis noted that customers in the current case had access to a greater number of shops that stayed open longer than the stores in the Greenville-Spartanburg Airport.\textsuperscript{38} Specifically, Judge Davis’ dissent stressed that the overall burden on passengers was minor since the overwhelming majority of people pass through the airport when the shops are open and have no difficulty buying newspapers.\textsuperscript{39} Moreover, Judge Davis concluded that the Authority’s four asserted interests created “genuine issues of historical as well as ultimate fact regarding the reasonableness of the ban[.]”\textsuperscript{40}

The Fourth Circuit mistakenly answered the wrong question in concluding that banning newstands was a violation of the Observer’s First Amendment rights. As noted earlier, the question on appeal from a grant of summary judgment is “whether the evidentiary record reflects the existence of genuine disputes of material fact.”\textsuperscript{41} In this case the answer is yes.

Specifically, the Authority was able to establish a “reasonable fit” between its ends and its means with regard to the newstand ban.\textsuperscript{42} The Greenville-Spartanburg Airport had only one shop that sold newspapers, whereas the Raleigh-Durham Airport had eleven.\textsuperscript{43} Moreover, the shops in the Raleigh-Durham Airport noticeably displayed the newspapers in the front of the shops in contrast to being placed “flat and in the back of the shop” as

\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id.} at 583–84; \textit{see also} Multimedia Publ’g Co. of S.C. v. Greenville-Spartanburg Airport Dist., 991 F.2d 154, 156–58 (4th Cir. 1993).
\textsuperscript{38} \textit{News & Observer}, 597 F.3d at 584 (citing \textit{Multimedia}, 991 F.2d at 159).
\textsuperscript{39} \textit{Id.} at 585.
\textsuperscript{40} \textit{Id.} at 586.
\textsuperscript{41} \textit{Id.} at 582.
\textsuperscript{42} \textit{See} Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (noting that a “reasonable fit” is required to justify restriction on protected expression) (internal citation omitted).
\textsuperscript{43} \textit{News & Observer}, 597 F.3d at 574; \textit{Multimedia}, 991 F.2d at 157; \textit{see also} Globe Newspaper Co. v. Beacon Hill Architectural Comm’n, 100 F.3d 175, 185 (1st Cir. 1996) (noting that alternative distribution methods for newspapers were available that made newstands unnecessary).
they were in the Greenville-Spartanburg Airport.\textsuperscript{44} Furthermore, only 10\% of passengers at the Raleigh-Durham Airport arrive after shops close at 9:00 p.m., and it is unlikely that these passengers would want to buy a newspaper at that time of day because “the newspaper that was published earlier that morning contains outdated news, soon to be replaced by the next day’s newspaper.”\textsuperscript{45} Also, “deplaning passengers account for only 10\% of airport purchases.”\textsuperscript{46}

Moreover, the majority incorrectly weighed each interest individually instead of grouping them together as a whole. The Fourth Circuit should have seen each interest as an “evidentiary peg . . . which is to be weighed with others against the burden imposed by the ban.”\textsuperscript{47}

With regard to revenue, federal law states that “the airport owner or operator will maintain a schedule of charges for use of facilities and services at the airport that will make the airport as self-sustaining as possible under the circumstances existing at the airport, including volume of traffic and economy of collection[.]”\textsuperscript{48} In light of this statute, it is clear that the Authority had a legitimate interest in increasing revenue. Not only does selling newspapers in shops create “significant income” from the newspapers themselves, but it generates even more income from “the impulse buys of newspaper purchasers[.]”\textsuperscript{49} Additionally—although it is true that other things such as ATM machines and vending machines are already set up throughout the airport—refraining from adding newsracks improves airport security because it reduces the number of locations in which terrorists could hide explosives while also minimizing the tasks of security officers who check each location.\textsuperscript{50} The majority relied on a conclusion from \textit{Multimedia} that the security risks that could arise from the installation of newsracks were minimal, but this contention is without merit because it was made before the September 11, 2001 terrorist attacks.\textsuperscript{51} It is indisputable that the degree of airport security changed drastically after those attacks,

\begin{thebibliography}{99}
\item 44 \textit{News & Observer}, 597 F.3d at 584; \textit{Multimedia}, 991 F.2d at 160.
\item 45 \textit{News & Observer}, 597 F.3d at 585.
\item 46 \textit{Id.} (internal citations omitted).
\item 47 \textit{Id.} at 590.
\item 49 \textit{News & Observer}, 597 F.3d at 587.
\item 51 \textit{News & Observer}, 597 F.3d at 589; see also \textit{Multimedia Publ’g Co. of S.C. v. Greenville-Spartanburg Airport Dist.}, 991 F.2d 154, 162 (4th Cir. 1993).
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which undercuts the validity of an airport-security argument asserted eight years before.

Further, the majority’s conclusion concerning the interest of preventing congestion also misses the mark. Preventing congestion is a valid concern, and each newsrack “reduces pedestrian traffic flow capacity by 110 people per minute, without allowing for any baggage placed on the floor while the device is in use.” During busy travel times “maximum flow of pedestrian traffic is essential.” Lastly, even the interest of aesthetics is legitimate. The ban would act “as an appropriate means of maintaining the airport’s physical appearance” because newsracks are not “essential to the efficient operation of the terminal facilities.”

In addition, since the Supreme Court decision in Central Hudson Gas & Electric Co. v. Public Service Commission of New York, federal courts have applied the following four-part test to determine whether restricting commercial speech is constitutional under the First Amendment: (1) whether the First Amendment protects the expression; (2) whether the speech is lawful and not misleading; (3) whether the government interest is substantial; and (4) whether the “regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.” In this case, even if the Observer had alleged a violation of the commercial speech doctrine—and the restricted speech was not unlawful or misleading—the Authority’s four interests in aesthetics, security, increasing revenue, and preventing congestion would still outweigh the restriction on protected expression because these interests considered as a whole directly advance the Authority’s two main purposes—“facilitating air travel and raising revenue.”

In conclusion, it is clear that the total ban on newsracks was reasonable because the Authority asserted legitimate interests concerning aesthetics, security, increasing revenue, and preventing congestion. Additionally, the burden imposed on the Observer was minimal because it could easily distribute newspapers in a multitude of different shops to the majority of travelers. The burden imposed on passengers was also minimal. The

52 News & Observer, 597 F.3d at 589.
53 Gannett, 716 F. Supp. at 153.
54 Id. at 152–53 n.16.
56 News & Observer, 597 F.3d at 581 (majority opinion).
handful of passengers who could not buy a newspaper after 9:00 p.m. is not sufficient to deem the ban unconstitutional. The majority incorrectly affirmed the district court's grant of summary judgment in favor of the Observer and did not address the correct question on appeal. In this case, there are genuine issues of material fact that the trial court should resolve upon remand.