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IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,)	
)	CVB VIOLATION NO. 3127856
Plaintiff,)	
)	
v.)	GOVERNMENT'S REPOSE TO
)	DEFENDANT'S MOTION TO
FLORENCE EMILY SEMPLE,)	DISMISS
)	
Defendant.)	
)	

The United States of America, by S. Amanda Marshall, United States Attorney for the District of Oregon, William E. Fitzgerald, Assistant United States Attorney and Sarah E. Spring, Law Clerk, hereby responds to defendant Florence E. Semple's motion to dismiss. Because Semple has failed to show that the order to depart was in violation of the First Amendment, her motion to dismiss should be denied.

I. FACTUAL BACKGROUND

The Eugene Federal Building (EFB) is a federal building that houses a variety of federal agencies including the Federal Bureau of Investigation, Drug Enforcement Administration, Bureau of Alcohol, Tobacco and Firearms, and Department of Homeland Security. It is

normally opened from 8:00am – 5:00pm. The plaza outside the building is part of the building, but has been used for a variety of peaceful demonstrations over time. In order to have a demonstration, a permit is required. See 41 C.F.R. § 102-74.465. United States Government Services Administration (GSA) records reveal that, since 1998, at least 138 permits have been issued for a variety of demonstrations. See Gov't Exhibit 2.

On May 1, 2012, approximately thirty members of Occupy Eugene (OE) arrived at the EFB and began to congregate on the federal plaza. Gov't Exhibit 3, at page 2. Members of OE indicated their intention to establish an encampment on the federal plaza, and several members were in possession of bed rolls, sleeping bags, and tents. Id. An overnight presence is not permitted at the EFB pursuant to 41 C.F.R. § 102-74.375(a) and demonstrations require a permit pursuant to 41 C.F.R. § 102-74.465. The permitting process requires a person to fill out an application form, which was created by the Office of Management and Budget (OMB) and GSA.

That afternoon, Inspector Thomas C. Keedy of the Federal Protective Service (FPS) made contact with the group of OE demonstrators to advise them of the regulations governing federal property found under Title 41 of the Code of Federal Regulations. Id. Specifically, Inspector Keedy informed the group that camping was not allowed at the EFB, including on the federal plaza. Id. Inspector Keedy also advised the group that it needed to apply for a permit to use the federal grounds and this application could be obtained from GSA. Id. Inspector Keedy closed by telling the group FPS would not interfere with the demonstrators that evening, so long as there was no camping on federal property or violations of other federal regulations. Id.

On May 2, 2012, members of OE obtained, and subsequently filed, a permit application for use of the EFB plaza with the local GSA office. Gov't Exhibit 4. The permit applicants were Tracy A. Winston and Terrill E. Purvis. Id. at page 1. The application requested use of the EFB

plaza until July 1, 2012. Id.; see also Declaration of Wayne C. Benjamin (hereinafter Benjamin Decl.) attached as Gov't Exhibit 1, at para. 4. The permit application was approved in error because the approving employee did not have authority to approve a permit over thirty days and the employee failed to put the hours when the permit was applicable on the permit. Id. at para. 4. Despite the permit being granted in error, GSA attempted to work with OE until July 1, 2012, when the permit expired. Id. at para. 5.

Over the next sixty days, members of OE continually violated the terms and conditions of this permit. For instance, OE agreed through the permit that it "shall not alter, renovate, remodel, construct or affix objects on the property[;]" that "[p]ermanent or temporary structures are prohibited (such as but not limited to: tents, awnings booths, stands or platforms)[;]" that "[a]ll signs, banners and or placards must be hand held or free standing...[a]ttaching signs, banners and or placards to the building structure or landscaping elements shall not be permitted[;]" and that "[a]pplicant assumes liability for any damages to real or physical property." Gov't Exhibit 4, at page 2.

As illustrated in numerous photographs taken over the course of OE's occupation of the federal plaza, OE erected a large tent in the middle of the plaza, OE affixed signs and placards to every single landscaping element surrounding the plaza, OE damaged federal property by spattering paint on the plaza grounds, and, despite denying affiliation with the perpetrator, OE's painting materials were used to vandalize and damage a door on the EFB. Gov't Exhibit 5, 6, 7, 8, 9, 10, 11, 12, 13. In each of these instances, and many more, OE was continually in violation of the agreed upon terms and conditions of its original permit.

On June 27, 2012, members of OE filed a new permit application requesting an indefinite extension to occupy the federal plaza as part of a "never-ending protest." Gov't Exhibit 14, at

page 1. Peter D. Grotticelli signed the first page of the application, certifying that the above information was correct. Id. The second page of the application states that “[b]y submitting this form, Applicant agrees to the following terms and conditions[.]” Id. at page 2. On OE’s application, Grotticelli wrote at the top of page two, “[w]e do not agree to all of these conditions.” Id. A second signature was required at the bottom of page two, but Grotticelli did not sign or initial that page. Id. The third page contained more conditions and a space for special terms and conditions. Grotticelli wrote that they wanted “same terms and conditions as permit for May and June.” Id. at page 3.

By failing to agree to the conditions, the application was deficient. GSA, however, did consider the application. GSA provided counsel for OE a list of concerns regarding the permit request. See Gov’t Exhibit 15. A meeting was held to discuss those issues on June 29, 2012 and GSA encouraged OE to resubmit its application to comply with the standard conditions, with the exception that GSA was willing to extend the permit hours to 7:00am to 10:00pm, longer than the building hours of 8:00am to 5:00pm. OE refused to submit to any permit conditions unless it was allowed unfettered access to the plaza twenty-four hours a day. On July 9, 2012, a letter was sent in which GSA made clear its reasons for denying the permit and for the new hours:

1. The request for the permit was not submitted using the current application form that was provided to Occupy Eugene.
2. Occupy Eugene refused to accept conditions of the permit application.
3. Occupy Eugene requested the same conditions as those contained in the previously issued permit for May and June, but only to the extent that those conditions were actually enforced by GSA.
4. Occupy Eugene requested a 24-hour presence on the property. . . .

The primary reason that the permit is not approved is that it seeks to maintain a presence within the plaza for 24 hours a day for a period of 30 days.

GSA has an interest in preserving the plaza for use by the general public, maintaining an aesthetically pleasing area and keeping the public safe.

Regulation of the plaza hours assists in achieving these goals.

See Gov't Exhibit 15, at pages 1-2.

On July 9, 2012, at approximately 2:00pm, GSA managers Wayne Benjamin and Don Murphy approached OE members congregating on the federal plaza. Gov't Exhibit 3, at page 2. GSA verbally advised those OE members present that a permit extension had been denied and that all demonstrators and their belongings must vacate federal property within twenty-four hours. Id.

On July 10, 2012, at approximately 2:10pm, GSA manager Benjamin sent OE attorneys Mary Broadhurst and Lauren Regan an e-mail with an attached letter advising OE that it must vacate the federal plaza within twenty-four hours or GSA would request law enforcement assistance from FPS. See Gov't Exhibit 15. That same day, at approximately 2:45pm, GSA managers Benjamin and Murphy approached the OE members still present on the federal plaza. Gov't Exhibit 3, at page 2. On this occasion, GSA served written notice to the expired permit holder, Tracy A. Winston, that all persons and belongings needed to vacate federal property or a report would be filed with FPS requesting law enforcement assistance. Id.

On July 11, 2012, at approximately 3:45pm, FPS Area Commander Michael Foster and FPS Inspector Thomas C. Keedy arrived at the EFB and approached those members of OE still gathered on the plaza. Id. at page 3. Present at that time were roughly fifty OE demonstrators and members of the local media. Id. Inspector Keedy and Commander Foster advised the OE

demonstrators that the permit for their activity expired July 1, 2012, and that they must immediately vacate the federal plaza with their belongings or face citation or arrest by FPS for failure to comply with lawful direction. Id.

By approximately 4:00pm the vast majority of OE members had left the federal plaza. Id. However, a handful of members were allowed by FPS to remain on federal property for purposes of taking down the large tent structure OE erected on the plaza, and remove other OE belongings. Gov't Exhibit 3, at page 3.

By approximately 5:30pm all OE members and their belongings were gone from the federal plaza with the exception of the Defendant, Florence E. Semple. Id. At approximately 6:30pm, FPS secured the plaza and used yellow police tape to indicate that the area was closed to the public. Id. At approximately 7:10pm, Inspector Keedy approached the Defendant, who was the last remaining person on the plaza, and advised her that the plaza had been closed to the public and asked for her cooperation in vacating immediately. Id. Defendant refused to leave the plaza and stated that the only thing that would make her leave was citation or arrest. Id. Inspector Keedy then advised Defendant he was giving her lawful direction to comply with the closure or face citation. Id. Defendant again indicated her refusal to comply. Gov't Exhibit 3, at page 4.

Defendant was subsequently cited with CVB Violation Number 3127856, for Failure to Comply With the Lawful Direction of a Federal Police Officer, pursuant to 41 C.F.R. § 102.74.385. See Gov't Exhibit 16.

II. ARGUMENT

OE wishes to protest on the EFB plaza. To do so, they must obtain a permit and abide by the conditions of the permit. OE insists that the permit requirement violates the First

Amendment and that they should be permitted to essentially live on the plaza of the EFB twenty four hours a day in without abiding by any of the conditions that GSA has established. The conditions are not meant to discriminate against OE or any other group. Rather, they are reasonable conditions designed to allow groups to exercise their First Amendment Rights while at the same time ensuring that the work at the ERB is not disrupted and the building is not damaged. GSA's permit conditions do not violate the First Amendment; the conditions simply allow the work of the EFB and OE's protest to coexist. This is more than reasonable. And because the permit conditions do not violate the First Amendment, defendant's refusal to follow a FPS officer's direction to leave the EFB plaza after the building had closed, properly resulted in a citation that should not be dismissed.

A. The Plaza of the Eugene Federal Building is a Public Area That is Governed By Federal Regulations

The plaza of the EFB is a public area clearly subject to the rules and regulations governing the use of federal property and federal buildings. See C.F.R. 102-71.20 (defining public area as "any area of a building under the control and custody of GSA that is ordinarily open to members of the public, including lobbies, courtyards, auditoriums, meeting rooms, and other such areas not assigned to a lessee or occupant agency"). Because the plaza is a public area, it is governed by 41 C.F.R. Subpart D which "establishes rules and regulations for the occasional use of *public areas of public buildings*[" 41 C.F.R. § 102-74.460 (emphasis added). Defendant's argument that the plaza is not a building and is therefore not subject to the C.F.R. is without merit. The plaza is part of the public area of the EFB that the C.F.R.s are intended to cover.

Because it is a public area, a permit is required to use the plaza. Any individual or organization "wishing to use a public area must file an application for a permit from the Federal

agency buildings manager.” 41 C.F.R. § 102-74.465. This regulation has been in effect and enforced for decades. Id. Case in point, based on U.S. General Services Administration (GSA) records, over 138 permit applications are on file for use of the EFB plaza, dating back to 1998. Defendant’s argument attempts to turn the plaza into a purely public area with no regulation or rules governing its use—meaning any person can set up camp, protest, or carry on business unchecked. Such an argument lacks merit—this is an area of the building that the government must maintain and monitor, and as such it is part of the regulations.

B. GSA Was Within Its Authority to Deny the Renewed Permit Application

When issuing permits, federal agencies may deny any permit application, or cancel an existing permit, for a collection of reasons. See 41 C.F.R. § 102-74.500. “Among the reasons a permit may be denied is that the proposed activity might interfere with access to the public area or would disrupt official use of the property.” United States v. McSweeney, No. 08-1401-TSH, 2008 WL 2952778, at *3 n.5 (1st Cir. July 24, 2008) (citing 41 C.F.R. § 102-74.500). A permit may also be revoked if the proposed use “damages any property,” 41 C.F.R. § 102-74.500(c), or the terms and conditions of the permit are violated.

OE had a permit but failed to abide by the terms and when it sought to renew that permit, it failed to submit a valid application or agree to the basic terms required of any permit applicant in a federal building. See Gov’t Exhibit 14. A GSA employee without authority erroneously approved the initial permit for more than 30 days and without any time restrictions. GSA attempted to work with OE and honor the erroneously granted permit, but was well within its authority to revise the terms of any subsequent permit. GSA was willing to provide OE with a new permit on July 1, 2012, but GSA required OE to abide by the basic conditions required of all permit applicants. GSA also imposed time restrictions, a standard practice for all permits. The

original permit's failure to put time restrictions on OE's use of the property was an error. Gov't Exhibit 1 at para. 4.

The permanent and continuous nature of the OE encampment on the plaza of the EFB disrupted official government business and interfered with access to the site. During the occupation, OE damaged federal property, and violated the terms of its original permit. The original, erroneous conditions of the original permit were simply not sustainable. GSA attempted to devise conditions that would not interfere with the work at the EFB while at the same time allowing OE to exercise their rights. GSA made clear that a valid permit application was required and that OE would be required to accept the conditions of the permit application. GSA also imposed time restrictions, though they extended the hours outside of the normal 8:00am to 5:00pm business hours. OE refused to submit a valid application, refused to agree to the terms, and would not agree to any time restrictions. As such, GSA lawfully denied OE's request to continue its encampment on the plaza pursuant to 41 C.F.R. § 102-74.500.

C. The Permit Conditions Were Reasonably Related and Did Not Violate the First Amendment

To be enforceable, GSA's permit requirements must comply with the directives of the First Amendment. The constitutionality of regulations governing the use of public forums depends on whether the regulations satisfy a traditional three-part test. See United States v. Linick, 195 F.3d 538, 543 (9th Cir. 1999); see also United States v. Adams, 388 F.3d 708, 710 (9th Cir. 2004); see also One World One Family Now v. City & Cnty. of Honolulu, 76 F.3d 1009, 1012 (9th Cir. 1996). A government regulation satisfies the First Amendment if it "(1) is content-neutral, (2) is narrowly tailored to serve a significant government interest, and (3) leaves

open ample alternatives for communication.” Adams, 388 F.3d at 710-11 (citing Linick, 195 F.3d at 543). GSA’s permit requirements meet this test.

1. GSA’s promulgation of the regulations governing federal property is content-neutral.

GSA’s enforcement of the regulations governing federal property is content-neutral, and as such, is compliant with the first requirement of the three-prong test for regulating expressive activity. “Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.” Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984). Both the Supreme Court and the Ninth Circuit have held that the first step in evaluating the constitutionality of an alleged restriction on expressive activity is to determine if the disputed restriction is content-neutral. The restrictions in question here will be the regulations governing admission to federal property discussed above. “The requirement that [a] regulation be content-neutral is clearly satisfied...[if the regulation] is not being applied because of disagreement with the message presented.” Id. at 295.

In a recent opinion out of a federal court in the Ninth Circuit, the District of Idaho ruled on a “Motion to Modify or Clarify Preliminary Injunction,” addressing the three-part test for regulating expressive activity in a case with facts very similar to this case. In Watters v. Otter, members of Occupy Boise constructed a symbolic tent city on a public plaza on Idaho state grounds. Watters v. Otter, No. 1:12-cv-001-BLW, 2012 WL 2065549, at *1 (D. Idaho June 8, 2012). In an initial ruling in February, the court enjoined the State from removing the symbolic tent city on the public plaza, but upheld a bill that banned camping on state grounds, and issued an injunction directing Occupy Boise members to no longer camp on the plaza area. Id. Come the summer season, the State motioned to have Occupy Boise remove all tents and other property so as to conduct regularly scheduled summer maintenance on the grounds, and, assess, develop,

and execute a rehabilitation plan for the grounds to repair the significant damage caused by the tent city. Id. at *1-2. Occupy Boise claimed that by removing its symbolic tent city, even to address maintenance needs, the State of Idaho would be infringing on Occupy Boise's constitutionally-protected First Amendment rights; the Court held otherwise. Id. at *2.

In its ruling, the District of Idaho walked through how Occupy Boise's "constitutionally-protected expressive conduct" argument failed to satisfy the traditional three-part test. Id. at *3. Occupy Boise could not show (1) the State's planned repair and maintenance schedule targeted speech and was not content-neutral, (2) that the regular maintenance and repair of state property was not a substantial government interest, and (3) the avenues for communicating its message were unduly impeded. Id. at *4. Addressing the content-neutral factor specifically, the court held that there was "no evidence that the State concocted a routine maintenance schedule as a ruse to silence [Occupy Boise's] demonstration...[t]o the contrary, the evidence shows the [State's] regular mowing and watering schedule applies equally to all groups[.]" Id. For all of these reasons, the District of Idaho granted the State's motion to modify the February injunction and ruled that Occupy Boise must temporarily vacate the area to allow the State to assess the grounds for damage and implement a rehabilitation plan, and thereafter, allow the State unobstructed access to perform regularly scheduled maintenance. Id. at *5.

Defendant makes conclusory statements alleging that the enforcement of the regulations governing federal property is content-based. (Def.'s Mot. to Dismiss 18). These allegations are simply not true, and Defendant presents no facts or evidence substantiating this claim. In the present case, GSA, like the State of Idaho, has evidence that it performed maintenance, repair, and construction on and around the plaza area of the EFB during the summer months for at least the last three years. The government did not concoct a maintenance schedule as a subterfuge to

silence OE protestors. Rather, the need for persons and personal property to be removed from the plaza area in order to repair the damage OE caused, and, facilitate GSA's routine upkeep and preservation of the site applied to *all groups* wishing to use this federal property, regardless of the message presented.

It follows that these regulations are content-neutral because "they do not distinguish between favored speech and disfavored speech based on the ideas or views expressed." Watters, at *4 (citing Hill v. Colorado, 530 U.S. 703, 719-20 (2000)). The regulations governing federal property meet the first requirement of the three-prong test and do not unconstitutionally interfere with Defendant's First Amendment rights.

2. The regulations are narrowly tailored to serve a significant government interest in maintaining federal property.

GSA's enforcement of the regulations governing federal property is narrowly tailored to serve a significant government interest, and as such, is compliant with the second requirement of the three-prong test for regulating expressive activity on a public forum.

The Supreme Court has held that the government has a "substantial interest in maintaining [its property] in an attractive and intact condition[.]" Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 296 (1984). The Court has also declared that "[t]he guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" Greer v. Spock, 424 U.S. 828, 836 (1976) (citing Adderley v. Florida, 385 U.S. 39, 48 (1966)).

Recognizing that "the Government, 'no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985) (citing Greer, 424 U.S. at 836).

3. The regulations governing federal property leave open ample alternatives for Occupy Eugene to communicate its message.

GSA's enforcement of the regulations governing federal property does not preclude all mediums of communication through which Defendant or OE can communicate their message; as such, the enforcement of the regulations is compliant with the last requirement of the three-prong test for regulating expressive activity. "The Supreme Court generally will not strike down a governmental action for failure to leave open ample alternative channels of communication unless the government enactment will foreclose an entire medium of public expression across the landscape of a particular community or setting." Ctr. for Fair Pub. Policy v. Maricopa Cnty., 336 F.3d 1153, 1170 (9th Cir. 2003) (quoting Colacurcio v. City of Kent, 163 F.3d 545, 554 (9th Cir. 1998)).

Defendant and OE are not foreclosed from publicly communicating their message. GSA simply asked Defendant and OE to communicate its message in accordance with the regulations governing federal property, and, to allow GSA access to the EFB plaza to carry out official government business; Defendant and OE refused. The regulations leave open ample alternatives for communication of OE's message, therefore, the third requirement of the three-prong test has been met and the regulations do not unconstitutionally interfere with Defendant's First Amendment rights.

D. Because OE was Present Without the Required Permit, Any Request to Leave Was Lawful

OE was told to that their permit was expired and that to continue their protest a new permit required. OE refused GSA's permit requirements. As of July 1, 2012, when their first permit expired, OE was no longer lawfully permitted to protest on the property. Federal agencies may close property to the public during normal working hours when circumstances

necessitate a closing “to provide for the orderly conduct of Government business.” 41 C.F.R. § 102-74.375(b). When federal property is closed to the public, federal agencies must ensure that admission to federal property is restricted to “authorized” and “register[ed]” persons. 41 C.F.R. § 102-74.375(c). If an unauthorized individual or organization remains on federal property after the property has been closed, they may be cited. Based on the issues with OE, once the permit expired, FPS could ask them to leave.

But even if the Court finds that protest during normal business hours should not require a permit, they were not permitted to make use of the property after hours. Federal agencies must also “[e]xcept as otherwise permitted, close property to the public during other than normal working hours.” 41 C.F.R. § 102-74.375(a). “Nothing suggests that “normal working hours” means anything so unusual that [citizens] would have to guess its meaning.” United States v. Christopher, 700 F.2d 1253, 1257 (9th Cir.), cert. denied, 103 S. Ct. 2436 (1983). If an individual or organization remains on federal property after the property has been closed, they may be cited with violating the above regulation. Being present on federal property after the property was closed is a crime.¹ Christopher, 700 F.2d 1253.

If an individual has been directed by a federal police officer to comply with a closure, but chooses to remain on federal property, they would be in violation of 41 C.F.R. § 102-74.385. Defendant was in the EFB plaza at 6:00pm. This was after OE had been given notice that its permit had expired, told it would be required to leave because protests at any time require a permit, and after the EFB closed for the day. Defendant was asked to leave and she refused.

¹ In Christopher, defendants “set up a table on the corner of federal building property in west Los Angeles...to collect petition signatures...[and] occupy the area continuously for seventeen days.” Id. at 1256. After the federal building closed on the first day of defendants’ occupation, the defendants were told the building was closed and asked to leave the property; those that remained were cited. Id. On a subsequent evening when the occupation resumed, defendants were again told the building was closed and asked to leave the property; those that remained were cited. Id.

Thus, defendant was charged with Failure to Comply with the Lawful Direction of Federal Police Officers in violation of Title 41 of the Code of Federal Regulations Section § 102-74.385. In order to convict the defendant of this charge, the government must prove the following elements beyond a reasonable doubt:

- First: The defendant was on federal government property; and
- Second: The defendant refused to comply with the lawful direction of a Federal Police Officer or other authorized individual.

There is no dispute that the plaza of the EFB is federal property and management of the plaza is under the purview of the federal government. Inspector Keedy is a federal officer employed by the Federal Protective Services (FPS). FPS is a federal law enforcement agency that provides security and law enforcement services to federally owned and leased buildings, facilities, properties, and other assets. 40 U.S.C. §1315.

The issue is here whether Inspector Keedy's command to leave was lawful. It would only be unlawful if asking defendant and more generally, OE, to vacate the EFB plaza violated the First Amendment. If defendant presents evidence establishing that her conduct was protected expression, the government must prove beyond a reasonable doubt that the government's actions fall within the reasonable time, place, and manner test of being content-neutral, narrowly tailored, and leaving open other alternatives for communication of a message. As illustrated above, the government's permitting guidelines meet this test. There is simply no evidence that GSA imposed any unreasonable restrictions or that the restrictions arose out of a disagreement with OE. In fact, the evidence is that GSA went out of its way to accommodate OE while still

attempting to maintain the safety, security, and preservation of the EFB.² There is no basis for dismissing the citation issued to defendant.

III. CONCLUSION

For the reasons set forth above, Defendant Florence E. Semple is not entitled to relief and her motion to dismiss should be denied.

Respectfully submitted this 5th day of November, 2012.

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Law Clerk

² Defendant also argues that the regulations governing federal property violate the Oregon Constitution.

It is a familiar and well-established principle that the Supremacy Clause of the United States Constitution invalidates state laws that “interfere with, or are contrary to,” federal law. Gibbons v. Ogden, 22 U.S. 1, 211 (1824). The Supremacy Clause explicitly provides that “the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2.

The federal regulations governing the use of federal property and federal buildings are not preempted by Defendant’s claim they violate freedom of speech protections under the Oregon Constitution. Further, the freedom of speech protections of the United States Constitution would supersede any state law in this dominion. The regulations governing federal property are clearly constitutional and satisfy the traditional three-part test; Defendant’s argument fails to establish otherwise.