

**NEWS & OBSERVER PUBLISHING CO. V.
RALEIGH-DURHAM AIRPORT AUTHORITY**

Last year, in *News & Observer Publishing Co. v. Raleigh-Durham Airport Authority*,¹ the United States Court of Appeals for the Fourth Circuit held that a government-operated airport could not enforce a total ban of news racks inside the airport's terminals because the airport authority's interest in banning the racks was outweighed by the substantial burden upon the newspaper companies' right to exercise expressive conduct in a public place.² The case arose when the airport authority prevented the News and Observer Publishing Company from installing news racks in the airport's terminals, citing security, revenue, congestion, and aesthetic concerns.³ The court's holding reinforced its decision in *Multimedia Publishing Co. of South Carolina, Inc. v. Greenville-Spartanburg Airport District*⁴ and gave further guidance on the scope of newspaper publishers' expression rights under the First Amendment.⁵

The Raleigh-Durham International Airport is a two-terminal airport operated by the Raleigh-Durham Airport Authority (the Authority), an entity that the North Carolina General Assembly chartered.⁶ The Authority operates the airport to facilitate air travel and generate revenue.⁷ The Authority raises revenue through various methods, including leasing advertising space and charging rent to stores and restaurants in the terminals.⁸ The stores that lease space in the airport open before the first flight departs and operate until the last flight departs each day.⁹

In 2002, the News and Observer Publishing Company inquired with the Authority about installing news racks in the airport.¹⁰ The Authority declined the request.¹¹ Then, in 2004, the issue arose again when the News and Observer faxed two letters to the Authority requesting permission to place news racks in the airport terminals and asserting that the Authority's ban on news racks was unconstitutional.¹² The Authority refused both requests.¹³

1. 597 F.3d 570 (4th Cir.), *reh'g en banc denied*, 612 F.2d 301 (2010).

2. *See id.* at 581.

3. *Id.* at 575, 578.

4. 991 F.2d 154 (4th Cir. 1993).

5. *News & Observer Publ'g Co.*, 597 F.3d at 576–77.

6. *Id.* at 573.

7. *Id.* at 574.

8. *Id.*

9. *Id.* at 574–75.

10. *Id.* at 575.

11. *Id.* Specifically, the Authority responded that its policy was to distribute newspapers through newsstands and stores. *Id.* It also voiced concerns about effects on “security, floor space, and losing revenue from shop sales.” *Id.*

12. *Id.* The Observer sent the first letter on February 17, 2004 and the second letter on March 31, 2004. *Id.*

13. *Id.*

In September 2004, four newspaper publishers, including the News and Observer, filed suit against the Authority in the Eastern District of North Carolina.¹⁴ The publishers requested a permanent injunction allowing them to place news racks throughout the terminals.¹⁵ Both parties moved for summary judgment, which the district court denied.¹⁶ The district court subsequently amended its decision by granting summary judgment to the publishers, reasoning that the Authority's ban substantially burdened the publishers' expressive conduct and that the Authority's justifications for the ban did not constitute "sufficiently powerful interests."¹⁷ The Authority appealed.¹⁸

On appeal, the Fourth Circuit reviewed de novo the district court's grant of summary judgment.¹⁹ The court began its analysis by looking at its ruling in *Multimedia Publishing Co. of South Carolina, Inc. v. Greenville-Spartanburg Airport District*,²⁰ finding that the framework of that case was applicable.²¹ The court first observed that in determining whether protected expressive activity should be allowed on government property, the type of property dictates what level of protection applies.²² Because the United States Supreme Court has found airports to be nonpublic forums,²³ a state may reserve an airport "for its intended purposes . . . 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."²⁴

Here, the parties agreed that the Authority's ban on news racks was not a viewpoint-based restriction, so the court focused its discussion on the issue of reasonableness.²⁵ In so doing, the court applied a balancing inquiry from *Multimedia*.²⁶ The test weighs the "degree and character" of the First Amendment restriction against "[t]he validity of any asserted justification" for the restriction.²⁷ In considering these factors, the court was mindful of the airport's intended purposes

14. *Id.* The other three publishers were The Durham Herald Company, The New York Times Company, and the Gannett Company, Inc. *Id.* at 573.

15. *Id.* In addition to injunctive relief, the publishers also requested attorneys' fees and costs. *Id.*

16. *Id.*

17. *Id.* at 575–76 (quoting *News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.*, 588 F. Supp. 2d 653, 658 (E.D.N.C. 2008)) (internal quotation marks omitted).

18. *Id.* at 576.

19. *Id.* at 581.

20. 991 F.2d 154 (4th Cir. 1993).

21. *Id.* (quoting and citing *Multimedia*, 991 F.2d 154).

22. *Id.* at 577.

23. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679–80 (1992).

24. *News & Observer Publ'g Co.*, 597 F.3d at 577 (quoting *Multimedia*, 991 F.2d at 159). The court clarified that merely establishing a regulation as "rationally related to a legitimate governmental objective" is not "reasonableness." *Id.* (quoting *Multimedia*, 991 F.2d at 159) (internal quotation marks omitted).

25. *Id.*

26. *Id.*

27. *Id.* (quoting *Multimedia*, 991 F.2d at 159).

and of the ways the publishers' protected expression might interfere with those objectives.²⁸

Guided by *Multimedia*, the Fourth Circuit began its analysis by examining "the Authority's restriction on the [p]ublishers' protected expressive activity."²⁹ The court made clear that it was not analyzing the ban's effect on newspaper sales but instead was focused on the publishers' access to the airport's patrons.³⁰ Specifically, the court considered the news rack prohibition's effect on the ability of airport patrons to receive the publishers' message.³¹ Travelers were unable to purchase newspapers late at night, early in the morning, or when the shops sold out of copies.³² Also, because of the airport's "tightly contained character," travelers had no alternate means of obtaining newspapers.³³ As a result, the court concluded that the Authority's news rack ban significantly burdened the publishers' expressive rights.³⁴

The court then considered whether the Authority's proffered interests justified its First Amendment restriction.³⁵ The Authority asserted four interests: "aesthetics, preserving revenue, preventing congestion [in the terminals], and security."³⁶ In considering each interest, the court was mindful of the airport's dual purposes of enabling air travel and generating revenue.³⁷

The court quickly addressed the Authority's first two purported interests. Considering aesthetics, the court recognized that a "substantial and widely recognized" harm would justify restricting protected expression but found that a reasonable number of planned news racks would not harm aesthetics, especially given the presence of ATMs, vending machines, and other similar items.³⁸ Regarding the preservation of revenue, the court acknowledged that news racks could lead to less foot traffic—and, consequently, lower sales—in shops, which would decrease the revenue the Authority received from shops' gross profits.³⁹ The court, however, found that this argument did not address how allowing news racks when shops were closed or had sold out of newspapers would adversely affect the Authority's revenue.⁴⁰ Furthermore, the court found that the Authority could charge concessions on news rack sales equal to those charged for shop sales of

28. *Id.* (quoting *Multimedia*, 991 F.2d at 159).

29. *Id.* at 577–78.

30. *Id.* at 578.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 579 (quoting *Multimedia Publ'g Co. of S.C., Inc. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 161 (4th Cir. 1993)) (internal quotation marks omitted).

39. *Id.*

40. *Id.*

newspapers.⁴¹ These considerations led the court to conclude that the Authority's revenue interest did not justify the protected expression prohibition.⁴²

Next, the court addressed the Authority's interest in inhibiting congestion in the terminals.⁴³ The court clarified that the inquiry was whether a limited number, not necessarily a large number, of racks would result in substantial congestion.⁴⁴ In *Multimedia*, the Fourth Circuit found that because strategically placed news racks would cause only minimal congestion, a ban was not justified.⁴⁵ Accordingly, the court in this case determined that the Authority's congestion interest did not "counterbalance the significant restriction on prohibited expression."⁴⁶

Finally, the court examined the potential security issue that allowing news racks would create.⁴⁷ The Authority argued that news racks could serve as "hiding places for bombs or weapons."⁴⁸ In response, the court noted that the Authority's evidence regarding a security risk "indicate[d] little about the security risk created by allowing a carefully calibrated newsrack presence."⁴⁹ In the court's mind, "[s]uch risk could not be more than *de minimis*."⁵⁰ In so finding, the court looked to *Multimedia*'s emphasis on the absence of FAA regulations concerning news racks.⁵¹ Further, the Authority failed to show that news racks posed a greater security threat than various other places in the airport, such as kiosks and trash cans.⁵² As a result, the court concluded that the Authority's security interest failed to justify the ban on news racks.⁵³

In sum, insufficient evidence existed for a reasonable jury to find that the Authority's four asserted interests in banning news racks justified the prohibition.⁵⁴ Furthermore, none of the evidence established that selective placement of news racks in the terminals would impinge on the airport's objectives of enabling air travel and generating revenue.⁵⁵ Consequently, the court upheld the district court's grant of summary judgment to the publishers.⁵⁶

41. *Id.* at 579–80 (quoting *Multimedia*, 991 F.2d at 161).

42. *Id.* at 580.

43. *Id.*

44. *Id.*

45. *Multimedia*, 991 F.2d at 162.

46. *News & Observer Publ'g Co.*, 597 F.3d at 580–81. As further support for the publishers' position, the court pointed out that the terminal was already littered with ATMs, trash bins, plants, and other items and that the authority made no effort to distinguish news racks from those items. *Id.*

47. *Id.* at 581.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* (quoting *Multimedia Publ'g Co. of S.C., Inc. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 162 (4th Cir. 1993)).

52. *Id.* (quoting *News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.*, 588 F. Supp. 2d 653, 658 (E.D.N.C. 2008)).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

Judge Davis wrote a dissenting opinion in which he argued that the majority's analysis was improper for reviewing a lower court's grant of summary judgment.⁵⁷ He opined that the majority failed to view the facts in the light most favorable to the Authority.⁵⁸ According to Judge Davis, the majority made a factual determination but described it as a legal conclusion.⁵⁹ Judge Davis also distinguished *Multimedia* because in that case the court found that the government's justification for the ban was pretextual, meaning that the government's asserted interests lacked credibility—and meaning further that here, the airport's justifications created genuine issues of material fact.⁶⁰ As such, Judge Davis argued that the case should be remanded for trial.⁶¹

After the Fourth Circuit issued its ruling, the Authority petitioned for rehearing en banc, but the court denied the request.⁶² Judge Wilkinson, concurring in the denial, argued that to allow First Amendment expressive rights to be burdened merely because they are inconvenient to a government administration would be “an odd and diminished place indeed for our foremost enumerated right.”⁶³ He further stated that the only issue this case addressed was whether an absolute prohibition against news racks in airport terminals was unconstitutional.⁶⁴ Accordingly, the Authority's arguments regarding aesthetics, revenue, congestion, and security would be taken into account at the remedial phase, when deciding issues such as number, placement, and cost of the news racks.⁶⁵

Judge Davis, again dissenting, reiterated his previous argument that the issue on appeal was whether there was a genuine issue of material fact.⁶⁶ He asserted that the projected outcome of a trial should not minimize the existence of issues of material fact that only a trier of fact should determine.⁶⁷ The judge summarized his argument succinctly: “[U]nder the rule of law, process matters.”⁶⁸

The Fourth Circuit's holding in this case reaffirms its holding in *Multimedia* by again showing deference to First Amendment rights of publishers despite the existence of countervailing government interests. Though its scope is narrow, limited only to the total ban of news racks in an airport terminal, this case demonstrates the extent to which the Fourth Circuit will go to protect expressive rights. A permanent, total ban of news racks is clearly unconstitutional.

57. *Id.* at 582 (Davis, J., dissenting).

58. *Id.* at 585.

59. *Id.* at 591.

60. *Id.* at 586 (citing *Multimedia Publ'g Co. of S.C., Inc. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 162 (4th Cir. 1993)).

61. *Id.* at 591.

62. *News & Observer Publ'g Co. v. Raleigh-Durham Airport Auth.*, 612 F.3d 301, 301 (4th Cir. 2010).

63. *Id.* at 302 (Wilkinson, J., concurring).

64. *Id.* at 304 (quoting *News & Observer Publ'g Co.*, 597 F.3d at 580 n.6).

65. *Id.*

66. *Id.* at 305 (Davis, J., dissenting).

67. *Id.*

68. *Id.*

Additionally, any significant restriction on newspaper distribution in the limited forum of an airport terminal will likely be resolved with great deference for expressive rights and those who exercise them.

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