

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

THOMAS SUTLIFFE, DONALD SISSON and
THE EPPING RESIDENTS FOR PRINCIPLED
GOVERNMENT, INC. on behalf of themselves and
all others similarly situated
Plaintiffs

v.

EPPING SCHOOL DISTRICT, THE TOWN OF
EPPING, BARBARA D. MUNSEY, as
Superintendent of Schools, HAROLD K.
LAPIERRE, as Moderator for the Epping School
District, and

SUSAN MCGEOUGH, THOMAS GAUTHIER
CHRISTOPHER MURPHY, and KIM SULLIVAN,
in their individual and official capacities as members of the
Epping Board of Selectmen, and

MARCI MORRIS, JEFFREY NOLLETT,
SUSAN KIMBALL, PAMELA TIBBETTS,
SCOTT BOOTH, ROBERT LONEK, and
JEFFREY LEDUC, in their individual and official
capacities as members of the Epping School Board, and

MARK A. VALLONE, Principal, in his individual and
official capacity,

Defendants

Case No. _____

COMPLAINT

I. Introduction

1. This is a civil rights case brought to enforce First Amendment violations by governmental officials in the Town of Epping, from whom money damages are sought for activities occurring in 2004 and 2005. The challenged activities include numerous tax funded

mailings presenting one side of an issue to the legislative body of the Town, namely its voters when assembled in a town or school meeting; advocacy by sending one-sided communications home with students; presenting a one-sided presentation at the high school and presenting a one-sided parent newsletter endorsing a group that was supporting public expenditures and taking only one side of the issue: the spenders' side. Under the opinion of the First Circuit in Bonner-Lyons v. School Community of the City of Boston, 480 F.2d 442 (1st Cir. 1973), one-sided presentations are not permitted once a public forum is created. Fairness and equity must provide the other side with equal treatment and access under the First and Fourteenth Amendments.

II. Parties

2. The plaintiff, Thomas Sutcliffe, is a resident of the State of New Hampshire with a mailing address of 2 Plumer Road, Epping, New Hampshire 03042.

3. Donald Sisson is a resident of the State of New Hampshire with a mailing address of 153 Old Hedding Road, Unit 24, Epping, New Hampshire 03042.

4. The Epping Residents for Principled Government, Inc. ("ERPGI") has a principal place of business at 2 Plumer Road, Epping, New Hampshire, 03042 and is a taxpayers group that has opposed certain expenditures in Epping which the group deems to be excessive and/or wasteful. Mr. Sutcliffe is the chairman of the group, and Plaintiff Sisson is a member of the group.

5. Other ERPGI members whose interests are similarly situated include Ron LaChance, Paul Spidle, Nelson Gunn, and Malcolm Hayes, all of whom reside in the Town of Epping, New Hampshire.

6. Defendant Town of Epping is a body corporate and politic, acting under color of state law, and with a principal place of business at Epping Town Hall, 157 Main Street, Epping, New Hampshire 03042.

7. Defendant Epping School District is a body corporate and politic, acting under color of state law, and with a principal place of business at School Administrative Unit #14, 213 Main Street, Epping, New Hampshire 03042.

8. Defendant Barbara D. Munsey is the Superintendent of Schools for School Administrative Unit #14 which includes Epping as part of School Administrative Unit #14. Her place of employment is set forth in paragraph 6. Defendant Munsey resides at 24 Andreski Drive, Fremont, NH 03044.

9. Defendant Harold K. LaPierre was the Moderator for the Town of Epping School District and has a residence address of 20 Dearborn Road, Epping, New Hampshire 03042.

10. Defendant Susan McGeough was a member of the Epping Board of Selectmen in 2004 and 2005. Defendant McGeough resides at 119 Prescott Road, Epping, New Hampshire 03042.

11. Defendant Thomas Gauthier was a member of the Epping Board of Selectmen in 2004 and 2005. Defendant Gauthier resides at 23 Bartlett Street, Epping, New Hampshire 03042.

12. Defendant Christopher Murphy was a member of the Epping Board of Selectmen in 2004 and 2005. Defendant Murphy resides at 82 Prescott Road, Epping, New Hampshire 03042.

13. Defendant Kim Sullivan was a member of the Epping Board of Selectmen in 2004 and 2005. Defendant Sullivan resides at 47 Delaney Road, Epping, New Hampshire 03042.

14. Defendant Marci Morris was Chair of the Epping School Board in 2004. Defendant Morris resides at 13 Morrill Court, Epping, New Hampshire 03042.

15. Defendant Jeffery Nollett was a member of the Epping School Board in 2004. Defendant Nollett resides at 1 Ben Nevis Lane, Epping, New Hampshire 03042.

16. Defendant Susan Kimball was a member of the Epping School Board in 2004 and was Chair of the Epping School Board in 2005. Defendant Kimball resides at 40 Cote Drive, Epping, New Hampshire 03042.

17. Defendant Pamela Tibbetts was a member of the Epping School Board in 2004 and 2005. Defendant Tibbetts resides at 21 Blake Road, Epping, New Hampshire 03042.

18. Defendant Scott Booth was a member of the Epping School Board in 2004 and 2005. Defendant Booth resides at 134 Blake Road, Epping, New Hampshire 03042.

19. Defendant Robert Lonek was a member of the Epping School Board in 2005. Defendant Lonek resides at 10 Victoria Drive, Epping, New Hampshire 03042.

20. Defendant Jeffrey LeDuc was a member of the Epping School Board in 2005. Defendant LeDuc resides at 5 Jamie Circle, Epping, New Hampshire 03042.

21. Defendant Mark A. Vallone is Principal of the Epping Elementary School and resides at 252 Blake Road, Epping, New Hampshire 03042.

22. All of the above defendants are sued in their individual and official capacities and have acted under color of state law at all times relevant hereto.

III. Jurisdiction & Venue

23. The plaintiffs bring this civil rights lawsuit pursuant to the First and Fourteenth Amendments to the Constitution of the United States and the Civil Rights Act of 1871, 42 U.S.C. § 1983 seeking monetary damages and attorney's fees and costs pursuant to 42 U.S.C. § 1988.

24. This Court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. § 1331 and 1333.

25. Venue lies in this Court pursuant to 28 U.S.C. § 1391(d).

IV. Facts

A. Actions of School Defendants

26. For several years in Epping there has been an ongoing political debate between School officials and the plaintiffs over spending plans for local education.

27. A group supportive of the School Board's plans is known as The Epping Advocates (see Exhibit A home page of theeppingcost.com attached hereto and incorporated herein by reference).

28. School officials, like Mark Vallone, used the elementary school newsletter, *Cool News*, to advocate, both directly and indirectly, promoting a particular result favoring their point of view without affording an opportunity for the expression of differing viewpoints through the same tax funded forum.

29. The *Cool News* newsletter was used by Mark Vallone to indirectly advocate a particular result by advertising the URL (web address) of *The Advocates* (a.k.a. The Epping Advocates), with a private political agenda, pertinent to ballot issues, as well as to support a slate of candidates favorable to their point of view before the voters at the March 9, 2004, Epping Town and School elections. See Exhibits B and C attached hereto and incorporated herein by reference.

30. The *Cool News* newsletter was distributed on school premises to Epping elementary school students, in their respective classrooms, during hours of school attendance and then hand-carried home by them to their parents. The students were used as "mules" to

disseminate information, thus creating a forum not afforded to plaintiffs who advocated a different viewpoint.

31. Use of a school distribution system was enough for the First Circuit to remand the trial court's decision in Bonner v. Lyons, supra: "Since we conclude that by disseminating the notices in question the defendants utilized the school distribution system to support and promote the views of one group while denying the use of the system to groups representing the other points of view. We reverse and grant the injunctive relief specified below." 480 F.2d at 442.

32. Additionally, the School District, its employees and agents, mailed several promotional flyers in 2004 and 2005 containing only their one-sided positions on the School warrant articles to be placed before the voters. The flyers were mailed to every residence in the Town during the three weeks leading up to the elections. These flyers were procured and mailed at the expense of all Epping taxpayers, including those taxpayers who disagreed with the School District's one-sided point of view. The mailings were strategically timed to influence the outcome of the election. See examples at Exhibit D attached hereto and incorporated herein by reference.

33. The cost of these mailers was \$1,615.89 in taxpayer dollars for postage alone in 2004. See Exhibit E attached hereto and incorporated herein by reference.

34. Such advocacy mailers have been going out for at least a decade. See Exhibit F dated January 2001 which is incorporated herein by reference. They continue into 2006. See Exhibit G attached hereto and incorporated herein by reference. One mailer specifically attacked the positions of the ERPGI at taxpayer expense. See Exhibit H attached hereto and incorporated herein by reference at page 4.

35. On January 31, 2005, Thomas Sutcliffe wrote to the Epping School Board placing it on notice of his objection to mailers and advocacy. He also requested a fair and reasonably timely opportunity to be afforded to him and ERPGI and that both sides of the pending votes be circulated at public expense now that the School had created a public forum for its side of the debate. See Exhibit I attached hereto and incorporated herein by reference. On February 16, 2005, the Chairman of the School Board responded and denied the plaintiffs' request.

36. In the period from February 18, 2005, through March 3, 2005, a total of 11,168 advocacy pieces were sent by the School Board and School Administrative Unit #14 to the voters of Epping. The postage cost alone was \$1,384.84. See Exhibit J attached hereto and incorporated herein by reference.

37. On the day of the vote in 2005, the School Moderator, Harold K. LaPierre, refused Plaintiff Sutcliffe and ERPGI the opportunity to provide opposing information at the polls in March as voters entered the polling place to vote on a multi-million dollar school addition. Food was placed outside the entrance of the polls and an information table was manned with someone providing information as to why voters should vote yes to the multi-million dollar school addition. Guided tours were provided for the middle school and the model display of the new addition was prominently placed. See photographs at Exhibit K attached hereto and incorporated herein by reference.

38. When the plaintiffs requested that opposing views be provided at the other side of the entrance (given that an informational forum had been created at the polling place) that request too was denied.

39. Prior to all of these events, the law firm that represents the School District in Epping had provided a Memorandum dated March 1, 1996, concerning free speech and public

funds which in fact was issued to their clients, including Epping, because of a letter instant counsel had sent ten years ago to School officials on behalf of the Granite State Taxpayers Association. In that letter, the School's law firm of Soule, Leslie, Zelin, Sayward & Loughman, agreed that there is no state law permitting advocacy and specifically provided in its advice the following:

The important points to remember are:

1. Public funds cannot be used for the preparation of "campaign" material.
2. If material that impermissibly advocates a particular viewpoint is distributed by the government, the government must allow those with opposing views to distribute material in the same manner the material containing impermissible advocacy was distributed. This should not be construed as permitting the expenditure on advocacy positions in the first place.

See Exhibit L attached hereto and incorporated herein by reference.

B. Actions of Town Defendants

40. Leading up to the town meeting vote in March of 2004, the Epping Selectmen effectuated a mailing advocating a number of selected warrant items that they wished the voters to approve. See Exhibit M attached hereto and incorporated herein by reference.

41. The information was one-sided and did not allow opponents to share their views on the selected articles which were advocated by the Town Selectmen at taxpayer expense to the legislative body of the Town.

42. The several thousand pieces of mail cost \$1,001.88. See Exhibit N attached hereto and incorporated herein by reference.

43. In response to a request to provide for a mailing by ERPGI in 2004 the Town was given specific advice by the New Hampshire Municipal Association, which is an association of towns and cities to which Epping belongs.

44. In that letter by Attorney Gary Bernier, the Municipal Association on February 26, 2004, cautioned against advocacy and pointed out that there was no state statutory authority authorizing the Selectmen to even engage in advocacy. See Exhibit O attached hereto and incorporated herein by reference.

45. On March 1, 2004, Selectwoman Gilbert read Attorney Bernier's letter out loud in a publicly televised session of the Board of Selectmen. See Exhibit P attached hereto and incorporated herein by reference.

46. That action constituted a waiver of any attorney-client privilege held by the Selectmen by making the advice and letter fully public.

47. The Epping Conservation Commission in conjunction with the Epping Planning Board used public resources to produce a newsletter which was bulk mailed to all Epping residents at public expense prior to the March 9, 2004, town meeting. The newsletter was used to advocate a particular viewpoint in order to obtain an election result favoring their political positions. This distribution forum was not offered to those with a differing viewpoint. See Exhibit Q attached hereto and incorporated herein by reference. The cost to print was \$251.28 of tax dollars and the mail cost was over three hundred dollars.

48. An earlier mailer by the Conservation Commission had been quite blatant in its headline: Vote No on Articles 18 and 19! See Exhibit R from 2003 attached hereto and incorporated herein by reference.

49. When the plaintiffs challenged these actions, the conduct was brought again to the Selectmen's attention again on January 29, 2005, when the plaintiffs, through ERPGI, wrote a letter to the Selectmen setting forth the requirements of the First Amendment and equal protection law. See Exhibit S attached hereto and incorporated herein by reference.

50. A citizen's group that spends its own money cannot fairly compete to make its voices heard above those in positions of power, namely: elected, or appointed public officials and public employees having at their disposal the use of public resources, public distribution channels and public funding.

COUNT I

(Violation of 42 U.S.C. §1983)

51. The allegations of the preceding paragraphs are incorporated herein by reference.

52. The plaintiffs enjoy federally protected rights under the First and Fourteenth Amendments to the United States Constitution to freedom of speech and equal protection of the laws.

53. Pursuant to these constitutional principles, "it is well settled that once a forum is opened for the expression of views, regardless of how unusual the forum, under the dual mandate of the first amendment and the equal protection clause neither the government nor any private censor may pick and choose between those views which may or may not be expressed." Bonner-Lyons, 480 F.2d at 444.

54. The defendant Town of Epping and the defendant members of the Board of Selectmen acting in their individual and official capacities, and the defendant Epping School District and the defendant members of the Epping School Board acting in their official and individual capacities, together with the defendant Munsey and the defendant LaPierre acting in their individual and official capacities, violated the plaintiffs' First and Fourteenth Amendment rights by opening fora for the expression of views on spending by advocating their positions through school newsletters and promotional flyers paid for with taxpayer funds, while failing and refusing to allow the plaintiffs to express their contrary views regarding spending through such

taxpayer-financed literature. As a direct and proximate result of these constitutional violations as aforesaid, the petitioners have suffered special and general damages First Amendment violation, including, without limitation, costs associated with promulgating their responses to the defendants' messages promulgated in taxpayer-funded literature, future taxes to be paid because of illegal passage of the bond issue, and emotional distress, plus interest and costs. Based on the reckless and callous indifference to the petitioners' federally protected rights, as exhibited by the conduct of the public officials involved herein acting in their individual capacities, the Court should further award the petitioners punitive damages against the defendants Munsey, LaPierre, McGeough, Gauthier, Murphy, Sullivan, Morris, Kimball, Tibbetts, Booth, Nollett, Lonek and LeDuc.

WHEREFORE, the petitioners Thomas Sutcliffe, Donald Sisson and the Epping Residents for Principled Government, Inc. on behalf of themselves and all others similarly situated respectfully pray this Honorable Court:

- A. Schedule this matter for trial by jury;
- B. After trial, enter judgment for the petitioners;
- C. Find that the defendants violated 42 U.S.C. §1983 by creating fora in taxpayer-funded literature and use of the school gym for the expression of their viewpoints regarding spending, while failing and refusing to allow the petitioners access to such fora in order to communicate their contrary viewpoints regarding spending;
- D. Find that the defendants Munsey, LaPierre, McGeough, Gauthier, Murphy, Sullivan, Morris, Nollett, Kimball, Tibbetts, Booth, Lonek and LeDuc, while acting in their individual capacities, acted with reckless and callous disregard for the plaintiffs' federally protected rights;

- E. Award the petitioners full damages as alleged in paragraph 53;
- F. Award the petitioners punitive damages against the defendants Munsey, LaPierre, McGeough, Gauthier, Murphy, Sullivan, Morris, Nollett, Kimball, Tibbetts, Booth, Lonek and LeDuc;
- G. Award the petitioners their reasonable attorneys' fees and costs pursuant to 42 U.S.C. §1988; and
- H. Grant such other and further relief as is just and equitable.

Respectfully submitted,
THOMAS SUTLIFFE, DONALD SISSON AND
THE EPPING RESIDENTS FOR PRINCIPLED
GOVERNMENT, INC.
By their attorneys,
DOUGLAS, LEONARD & GARVEY, P.C.

Dated: December 18, 2006

/s/ Charles G. Douglas, III Esquire
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