

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

FLANIGAN’S ENTERPRISES, INC., )  
)  
Plaintiff, )  
)  
MELISSA DAVENPORT and )  
MARSHALL G. HENRY, )  
)  
Intervenors, )  
)  
v. )  
)  
CITY OF SANDY SPRINGS, GA., )  
)  
Defendant. )  
\_\_\_\_\_ )

CIVIL ACTION FILE  
No: 1:13-CV-03573-RLV

**COMPLAINT OF PLAINTIFF-INTERVENORS MELISSA  
DAVENPORT AND MARSHALL HENRY**

COME NOW Melissa Davenport (Davenport) and Marshall Henry (Henry) and file this Complaint as Plaintiffs-Intervenors and challenge, on its face and as applied, the portion of Sandy Spring Ordinance § 38-120 that prohibits the sale of sexual devices in the City of Sandy Springs.

**JURISDICTION AND VENUE**

1.

This action arises under the authority vested in this Court by virtue of 42 U.S.C. § 1983, 42 U.S.C. § 1985, 28 U.S.C. § 1331, 28 U.S.C. § 1343, and 28 U.S.C. § 1367 (pendant jurisdiction). Venue is proper in this Court.

**PARTIES AND SERVICE**

2.

Plaintiff Davenport is a Kennesaw, Georgia resident who has sought, and still seeks, to purchase and sell in Sandy Springs sexual devices that are barred for sale. She does not fall within the exceptions set forth in Sandy Spring Ordinance § 38-120(d).

3.

Plaintiff Henry is an Atlanta, Georgia resident who has sought, and still seeks, to purchase, exhibit, and sell in Sandy Springs sexual devices that are barred for sale. He does not fall within the exceptions set forth in Sandy Spring Ordinance § 38-120(d).

4.

Defendant City of Sandy Springs, Georgia, is a municipality of the State of Georgia, and is subject to the jurisdiction and venue of this Court.

**STATEMENT OF FACTS**

**Plaintiff Davenport**

5.

Melissa Davenport and her husband, Mark Davenport, have been married for 24 years. She was diagnosed with Multiple Sclerosis (“MS”) in 1996. (See generally [http://en.wikipedia.org/wiki/Multiple\\_sclerosis](http://en.wikipedia.org/wiki/Multiple_sclerosis))

6.

By approximately 2003, Davenport and her husband had largely ceased sexual intimacy because the quality of their intimate sexual relations was negatively impacted by the progression of her MS.

7.

Davenport’s sexual intimacy was impacted because sexual arousal begins in the central nervous system, where MS strikes. The disease can damage nerve pathways to the sexual organs. Sexual response, including arousal and orgasm, can be directly affected. In addition, spasticity and fatigue impact sexual intimacy for persons with multiple sclerosis.

8.

While no medical practitioner or psychiatrist has prescribed or advised Davenport to use sexual devices barred by Sandy Spring Ordinance § 38-120(c), she and her husband have found that such devices

significantly enhance their sexual intimacy. She credits the devices with saving her marriage.

9.

Mrs. Davenport and her husband have served as spokespersons in the MS community for the positive impact of these devices on sexual activity. She also sells such devices to others who seek to use them for intimate sexual activity.

10.

Davenport has sought to purchase sexual devices in the City of Sandy Springs, but cannot do so because of the challenged Ordinance. Moreover, while she does not fall within the exceptions of Sandy Spring Ordinance § 38-120(d), that sub-section, in any event, provides only a potential affirmative defense to liability, not a right to purchase the devices. Her ability to purchase these devices depends upon the outcome of this litigation. She also would like to sell such devices to persons in Sandy Springs. She cannot do so, however, because of the challenged ordinance.

**Plaintiff Henry**

11.

Marshall Henry is a bisexual man and an artist.

12.

Henry has sought to purchase sexual devices in the City of Sandy Springs for his own private, intimate sexual activity, but cannot do so because of the challenged Ordinance. Moreover, he does not fall within the affirmative defense found in Sandy Spring Ordinance § 38-120(d). His ability to purchase these devices depends upon the outcome of this litigation.

13.

Mr. Henry has also previously used sexual devices in art displays, and he wants to do so in the future. Moreover, he has sought to purchase these devices for his artwork, and he wants to do so again for this purpose in Sandy Springs. Here, too, however, his efforts are unsuccessful because Sandy Spring Ordinance § 38-120(c) by its terms bars such sales for artistic purposes. Moreover, while Henry would like to sell in Sandy Springs his artwork containing the banned sexual devices, he cannot do so pursuant to the Ordinance. His ability to purchase these devices (and to sell them) depends upon the outcome of this litigation.

14.

Davenport and Henry are currently suffering a harm, and will continue to suffer an injury, in being unable to purchase and/or sell sexual

devices in Sandy Springs or to use them for intimate sexual activity, and in Henry's case, for his art.

**Sandy Springs Ordinance § 38-120(c)**

15.

Sandy Spring Ordinance § 38-120(c) is a policy of the municipality of Defendant Sandy Springs.

16.

Sandy Springs Ordinance § 38-120 is housed in a Chapter titled "Offenses Involving Public Morals," which was most recently amended on April 21, 2009.

17.

Sandy Springs Ordinance § 38-120 is titled "Obscenity and Related Offenses." The preliminary subsections identify the offenses related to "obscene material[s]":

(a) A person commits the offense of distributing obscene material when the following occurs:

(1) He sells, rents or leases any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word "knowing," as used in this section, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter;

(2) A person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect

nature of the material. Sandy Springs Ordinance § 38-120(a)(1) and (2) (Attached hereto and incorporated herein).

18.

Sandy Springs Ordinance § 38-120(c) defines certain devices that Davenport and Henry seek to purchase and sell in Sandy Springs as obscene:

(c) Any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section. However, nothing in this subsection shall be construed to include a device primarily intended to prevent pregnancy or the spread of sexually transmitted diseases.

19.

Neither Davenport nor Henry can purchase the desired devices under Sandy Springs Ordinance § 38-120(d):

(d) It is an affirmative defense under this section that selling, renting, or leasing the material was done for a bona fide medical, scientific, educational, legislative, judicial, or law enforcement purpose.

Not only does this sub-section not implicate Plaintiffs' actions— Plaintiffs do not use the devices for a “medical purpose” (or any other of the other listed purposes) - but this is a mere affirmative defense. Accordingly, even if the sub-section somehow applied, the Ordinance still exposes Plaintiffs to prosecution and prohibits Plaintiffs' selling the devices or stores selling the devices to them.

### CAUSES OF ACTION

FIRST CAUSE OF ACTION  
Violation of Fourteenth Amendment to the United States Constitution  
(Due Process Clause)

20.

Plaintiffs incorporate and re-allege, as is fully set forth herein, all allegations in this Complaint.

21.

The Due Process Clause of the Fourteenth Amendment grants an interest in and a right to privacy and to liberty.

22.

The Sandy Springs Ordinance significantly, substantially, and needlessly infringes on Plaintiffs' interests in and rights to privacy and liberty.

23.

Plaintiffs have a right to be free from governmental intrusion regarding the most private human conduct: their consensual sexual behavior in the privacy of their own homes.

24.

Because the Sandy Springs Ordinance impinges – greatly – on this right for Plaintiffs, the Ordinance violates their Due Process rights.

25.



The City's Ordinance is not supported by a compelling state interest. To the extent there is a compelling state interest, the Ordinance is not narrowly tailored to serve that interest.

26.

Nor is the City's Ordinance supported by a legitimate interest. Moreover, to the extent any such interest exists, the Ordinance is not rationally related to that interest.

SECOND CAUSE OF ACTION  
Violation of the First Amendment to the United States Constitution  
(Freedom of Speech and Artistic Expression)

27.

Plaintiffs incorporate and re-allege, as is fully set forth herein, all allegations in this Complaint.

28.

Mr. Henry possesses a First Amendment right to create and sell his artwork, as well as a First Amendment right to purchase items that he will use in his artwork.

29.

Some of Mr. Henry's art contains objects that are prohibited by the Sandy Springs Ordinance. These objects are not obscene. Nor, taken as a whole, does this art appeal to the prurient interest in sex, and it does not

portray in a patently offensive way sexual conduct. Rather, this art has serious literary, artistic, political, and scientific value.

30.

Mr. Henry would like to purchase the prohibited objects for his art in Sandy Springs and to sell such art in Sandy Springs. However, he is prohibited from doing so by the Ordinance. The threat of enforcement of the Ordinance prevents Mr. Henry from exercising his First Amendment rights. The ordinance significantly burdens Mr. Henry's right to free speech and artistic expression.

31.

The City does not have a compelling interest to justify these content-based restrictions on Mr. Henry's First Amendment rights. To the extent it could, however, those interests are not narrowly tailored to effectuate those interests.

32.

Moreover, Mr. Henry's speech is lawful and is not misleading. Meanwhile, the government does not have a substantial interest in regulating his speech, and the Ordinance is far more extensive than necessary (if at all) to serve any such interest.

THIRD CAUSE OF ACTION

Violation of the First Amendment to the United States Constitution  
(Overbreadth)

33.

Plaintiffs incorporate and re-allege, as is fully set forth herein, all allegations in this Complaint.

34.

The Sandy Springs Ordinance is also unconstitutional on its face on grounds of overbreadth.

35.

The Ordinance unconstitutionally sweeps within its scope a substantial amount of protected activity.

36.

There is a real danger that the ordinance significantly compromises recognized First Amendment protections, not only of Mr. Henry, but of a significant number of people not before the Court. The threat of enforcement of the Ordinance prevents these individuals from exercising their First Amendment rights.

37.

Mr. Henry and others want to – and have a right to – purchase items for and to sell art that includes objects deemed by the Ordinance to be unlawfully “obscene.” In fact, these objects are not

at all “obscene.” These objects, much like the art in which they are used, do not appeal to the prurient interest in sex and do not portray in a patently offensive way sexual conduct. Rather, these objects and this art have serious literary, artistic, political, and scientific value.

38.

The government has an insufficient interest in preventing such a substantial amount of First Amendment-protected activity. Moreover, the means chosen to proscribe such activity is insufficiently related to any, if any, such interest.

FOURTH CAUSE OF ACTION  
Violation of Fourteenth Amendment to the United States Constitution  
(Equal Protection and Due Process Clause)

39.

Plaintiffs incorporate and re-allege, as is fully set forth herein, all allegations in this Complaint.

40.

The Sandy Springs Ordinance imposes restrictions on people who want to use during sexual activity objects that are intended to stimulate human genital organs.

41.

There is no valid reason to treat this group of people differently from those who choose not to use such objects during sexual activity. The government lacks a legitimate purpose in creating this distinction. Moreover, to the extent there is any such legitimate purpose, the Ordinance is not rationally related to the purpose.

FIFTH CAUSE OF ACTION  
Violation of the Georgia Constitution, Art. I, § 1, ¶ 1  
(Right to Privacy)

42.

Plaintiffs incorporate and re-allege, as is fully set forth herein, all allegations in this Complaint.

43.

Plaintiffs have a liberty of privacy guaranteed by the Georgia Constitution that includes private, intimate, consensual sexual activity between consenting adults. This right to privacy is a fundamental constitutional right.

44.

This state constitutional right to privacy is even more extensive and protective of the state's citizens than its federal analog.

45.

Any infringement of this constitutional right merits careful scrutiny by the judiciary. An infringement will be upheld, if at all, only for the most compelling of reasons.

46.

The Sandy Springs Ordinance violates Plaintiffs' fundamental right to privacy. The Ordinance invades Plaintiffs' right to be free from governmental intrusion regarding the most private human conduct: their consensual sexual behavior in the privacy of their homes.

47.

The government has an insufficient purpose to abridge this right to privacy.

#### **PRAYER FOR RELIEF**

WHEREFORE, on the basis of the foregoing, Plaintiffs prays that this Court:

- (1) Declare that Sandy Spring Ordinance § 38-120(c) is unconstitutional and/or otherwise illegal;
- (2) Enter an award of nominal damages against Defendant;
- (3) Enter a preliminary and permanent injunction against Defendant, its officers, agents, successors, employees, attorneys, and those acting in concert with Defendant, from any future enforcement of Sandy Spring Ordinance § 38-120(c);

- (4) Award Plaintiffs the costs of this action and reasonable attorneys' fees, as provided by 42 U.S.C. § 1988 and federal and state law; and
- (5) Grant any and all additional relief as this Court deems proper and just.

DATED: This 16<sup>th</sup> day of April, 2014.

Respectfully submitted,

/s/ Gerald Weber

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