Religion: Prohibition Against Using School Property for Religious Worship Does Not Violate Establishment or Free Expression Clauses

Bronx Household of Faith v. Board of Education, No. 12-2730-cv (2d Cir. Apr. 3, 2014).

The Second Circuit has again upheld a New York City Board of Education rule prohibiting use of school property for religious worship, finding that even if the rule effectively eliminates an inexpensive venue crucial to the religion's communal worship, it is not the duty of the state to finance religion.

In 2007, New York City's Board of Education adopted Regulation I.Q., which prohibited entities using schools after hours to perform religious worship services. The Bronx Household was denied a permit when it applied to use school facilities on Sunday for "Christian worship services." Litigation has been ongoing since then; this appeal is the fifth time the case has gone before the Second Circuit. Previously the District Court granted Bronx Household's request for a permanent injunction, and the Circuit Court reversed, analyzing the case under the Establishment Clause and Free Speech Clause. On remand, Bronx Household moved for another preliminary injunction, arguing that it should win such relief under the Free Exercise Clause. The District Court again granted the injunction. The City appealed, again, to the Second Circuit.

HELD: The Second Circuit reversed the District Court, holding that the Board of Education could, consistent with the Free Exercise Clause and the Establishment Clause, refuse to allow Bronx Household to use school facilities after hours for worship services.

DISCUSSION: The Second Circuit first overruled the District Court's holding that enforcing the regulation would violate Bronx Household's Free Exercise rights since the schools are the only place Bronx Household can afford to congregate. The Free Exercise Clause only bars the government from prohibiting citizen's free exercise, it does not require the government to "finance a subject's exercise of religion."

Next, the Court assessed the District Court's holding that *Lukumi* required that the regulation be subject to strict scrutiny review. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) the Supreme Court had evaluated ordinances from a Florida city that outlawed the unnecessary killing of animals. The Court looked to the legislative record of the city council (which showed hostility toward Santaria religion), the way the laws excepted all unnecessary killing except that of Santaria (which incorporates animal sacrifice in its religious practices), and how the laws only superficially addressed the stated secular goals and held the laws were motivated by a discriminatory animus and singled out a specific religion to suppress. As a result, the *Lukumi* ordinances were subject to strict scrutiny.

The Court found the Bronx Household situation entirely distinguishable. The New York City regulation was not aimed at suppressing any specific religion--there was no evidence of hostility from the Board of Education. The Supreme Court had ruled - in a case very similar to the one before the Second Circuit – that a government may, consistent with both Free Exercise and the Establishment Clauses, "exclude specified causes from receipt of state educational subsidies without subjecting the rule to strict scrutiny."(*Locke v. Davey*, 540 U.S. 712 (2004)). Despite Bronx Household's argument that the regulation discriminated against religions that require

communal worship, the Circuit Court that the rule is a uniform and content-neutral rule because it treats all religions identically.

The District Court had held that the Board of Education's regulation would survive challenge *only if* allowing the services would *actually* violate the First Amendment. The Second Circuit disagreed, again relying on *Locke v. Davey*. There the Court had wrestled with whether Washington State could exclude students seeking theology degrees from a state scholarship program. The Court there "explicitly considered and rejected the argument that establishment concerns could justify the religion-based exclusion only if the reviewing court concluded that granting the subsidy for the excluded religious purpose would in fact violate the Establishment Clause."

The District Court had ruled the Board's act of determining whether the Bronx Household activities were worship services *itself* violated the Establishment Clause, excessively entangling the Board with religion. The Circuit Court noted that the permit application required the applicant entities to self-describe their proposed activities, and Bronx Household had said it would conduct religious services. The Circuit Court also rejected the District Court's assertion that the Supreme Court's recent decision in *Hosanna-Tabor* prohibits the government from making this determination. (That case wrestled whether employment discrimination laws were applicable to ministers because it would require the government to dictate to a church who it may employ as a minister. The constitutional concerns in *Hosanna-Tabor* were not at play in the current case because it was not about dictating to a church who would minister to the congregation).

DISSENT: The dissent took issue with the majority's holding that the Free Exercise Clause "has never been understood to require government to finance a subject's exercise of religion." It countered that simply allowing Bronx Household "to use public school space open to all others on equal terms is hardly the financing of that entity." In his view disallowing the "religious worship services after hours in public schools—limited public fora that are otherwise open to all— violates the Free Exercise Clause because it plainly discriminates against religious belief and cannot be justified by a compelling government interest." He agreed with the District Court that the regulation at issue should have been subject to strict scrutiny.

http://law.justia.com/cases/federal/appellate-courts/ca2/12-2730/12-2730-2014-04-03.html (last accessed May 1, 2014).

Speech: Rules Prohibiting "Slanderous" or "Profane" Remarks at Public Meetings Are Constitutional If Invoked Only Where Actual Disruption Occurs

Fitzgerald v. County of Orange, No. 12-56773 (9th Cir. Apr. 17, 2014).

Where the County Attorney provided guidance that public meeting rules prohibiting slanderous, profane or personal remarks would only be invoked to silence a speaker if meetings were actually disrupted, those rules withstand First Amendment scrutiny, according to the Ninth Circuit.