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.

Orange County, California has rules for its Board of Supervisor meetings and Speaker Guidelines for those that want to participate in public meetings. Rule of Procedure 46 and Speaker Guidelines proscribe certain remarks – "personal, impertinent, slanderous or profane remarks" - and the disruption of public meetings.

William Fitzgerald was speaking at a public meeting when some members of the Board cut him off and a police officer approached him in an allegedly threatening manner. Fitzgerald challenged the rules as unconstitutional under the First Amendment, both as applied to him and facially. The District Court dismissed Fitzgerald's facial challenge for lack of standing, and then granted Orange County's motion for summary judgment on his as- applied challenge. Fitzgerald appealed both holdings.

HELD: The Ninth Circuit affirmed. It disagreed with the District Court's standing analysis, but after reaching the merits, held that Fitzgerald's as-applied and facial challenges failed.

DISCUSSION: The Court noted that First Amendment cases raise unique issues that tilt the balance, generally, in favor of standing. Pre-enforcement challenges are permitted when there is "an actual and well-founded fear that the challenged statute will be enforced," a standard evaluated by examining "(1) whether the plaintiffs have articulated a concrete plan to violate the law in question; (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings; and (3) the history of past prosecution or enforcement under the challenged statute."

Under these factors, the Court ruled Fitzgerald had standing because he had a plan to violate the rules (he was vigorously debating a redistricting plan) and because he sufficiently established a threat of enforcement. The Board had told Fitzgerald that his comments went beyond the bounds of free speech and acceptable behavior. Moreover, a deputy walked over and told him to "stand down," indicating he could no longer speak.

Instead of remanding the case the Court exercised its discretion to decide on the merits because "the issue presented [wa]s purely one of law and . . . the pertinent record ha[d] been fully developed." Circuit precedent established that public meetings are "limited public forums," meaning the government can only place reasonable time, place, and manner restrictions on the speech, or regulate the content of speech utilizing viewpoint-neutral rules. The Court noted that although the rule in question could be interpreted as a violation of the Constitution, the county attorney had stated that the county would only limit speech in the forum when it disturbed or impeded the meeting. Therefore, it found the rule to be constitutional. In doing so it relied on *Frisby v. Schultz*, 487 U.S. 474 (1988), where the "Supreme Court relied on the representations of the town's counsel as to the town's interpretation of the statute."

So interpreted, the rules were held not to be a facial violation of the Constitution – which only left the as-applied question. Because Fitzgerald left the speaker podium of his own accord, he suffered no injury as a result of the Board's interruption of his speech.

http://law.justia.com/cases/federal/appellate-courts/ca9/12-56773/12-56773-2014-04-17.html (last accessed May 1, 2014).