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Balancing Free Speech Interests at Events Held in Public Parks

A case study of litigation over the Twin Cities Pride Festival

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Balancing Free Speech Interests at Events Held in Public Parks

A case study of litigation over the Twin Cities Pride Festival

by Ann E. Walther and Michael J. Salchert

Introduction

Free speech is always a hot topic for litigation, and under the Roberts Court, has been especially prominent. This paper, through an analysis of litigation over the Twin Cities Pride Festival, discusses one aspect of free speech litigation-the balancing act that a governmental entity must engage in to protect the free speech of all people participating in and attending public events held by private entities in public parks.

Standard Legal Analysis of Constitutionality of Prior Restraints of Free Speech

Whenever the government is confronted with potential free speech issues, the government must apply the same analysis as a court in determining how to respond. The courts have set forth a three-step analysis to determine whether a restriction on freedom of speech passes constitutional muster. First, there must be a determination as to whether the speech at issue is protected by the First Amendment. The second step is to identify the nature of the forum at issue. The last step is to determine whether the reasons for the restriction on speech satisfy the appropriate standard. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc*., 473 U.S. 877, 797 (1985); *see also Parks v. City of Columbus*, 395 F.3d 643, 647 (6th Cir. 2005).

In addition, because the government's role in protecting the speech of others is to be neutral, the government must also ensure that in certain government forums diametrically opposed views are permitted to be expressed so long as they do not interfere with the constitutionally protected views of others. *See, e.g. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995).

I. Speech protected by the First Amendment of the United States Constitution

A. The First Amendment protects the expression of oral and written speech. *Hague v. Committee for Industrial Organization, et al*., 307 U.S. 496 (1939).

B. Not all speech is protected. *See, c.f. Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697 (1931)(defamation); *Miller v. California*, 413 U.S. 15 (1973)(obscenity); *Schenck v. United States*, 249 U.S. 47 (1919)(creating panic); *Hess v. Indiana*, 414 U.S. 105 (1973)(inciting violence if it produces lawlessness); *Dennis v. United States*, 341 U.S. 494 (1951)(inciting revolution by force).

C. The First Amendment to the Constitution is applicable to state and local governments through the Fourteenth Amendment. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

II. The nature of the forum where the First Amendment right is being asserted

A. Traditional Public Forum

A traditional public forum is a place that is customarily available for free expression of views. *Hague* at 496. Parks and sidewalks are traditionally considered public forums. *Perry* at 45. Traditional public forums are identified by "objective characteristics of the property." *Parks v. City of Columbus et al*, 395 F.3d 643, 648 (6th Cir. 2005). A key factor in determining whether a property has the characteristics of a public forum is whether it is used for assembly and communication. In particular, a public thoroughfare is often considered a key factor in determining whether a place is a public forum. *Id*. at 649. Generally, whether a place is a traditional public forum is determined on a case by case basis where a number of factors can be considered. *Id*. The fact that a government may, by permit, allow a private party to conduct an event in a public forum does not transform the area into a limited public forum if the activity continues to be open to the community at large. *Id*. at 652.

B. Limited Public Forum or Designated Forum

A limited public forum is public property that is opened for use by the government as a place for expressive activity. *Perry* at 45. The government can keep the forum open indefinitely or close it, but while it is open it is bound by the same standards applied to a traditional public forum. *Id.* at 46.

C. Non-public Forum

A non-public forum is public property that is neither a traditional public forum nor a designated or limited public forum. It is property that is not accessible to the general public even though it is owned by the public. The government has the right to retain property for the use it has "lawfully designated." *Id.*

III. Constitutional restrictions the government may place on speech in a traditional or limited public forum

A. Traditional public forum

1. Content-neutral restrictions

The government may impose reasonable restrictions on the time, place, and manner of constitutionally protected speech as long as:

i. The restrictions are content neutral;

ii. the restrictions are narrowly tailored to serve a significant governmental interest; and

iii. the restrictions leave open ample alternative channels of communication.

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). The government is required to have a stated significant interest that is reasonably related to the restriction it is imposing, and any restrictions must not leave governmental officials "unbridled discretion" to arbitrarily or discriminatorily restrict speech. In other words, there must be well defined criteria to guide the governmental official's decision of whether or not to impose a restriction. *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). Moreover, the stated interest must be more than "speculative." *Association of Community Organizations for Reform Now a/ka/ ACORN v. St. Louis County*, 930 F.2d 591, 595 (8th Cir. 1991); *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1228 (9th Cir. 1990).

i. Content neutral

The determining factor in whether a restriction is content-neutral is if the government has "adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has some incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). Moreover, "government regulation of expressive activity is content neutral so long as it is "*justified*" without reference to the content of the regulated speech." *Id. citing Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

ii. Narrowly tailored to serve a significant government interest

To meet the narrowly tailored requirement, a restriction on speech must not "burden substantially more speech than is necessary to further the government's legitimate interest." *Ward*, at 799. It is not necessary to employ the least restrictive limits to achieve its interest. *Hill v. Colorado*, 530 U.S. 703, 726 (2000).

iii. Leaving open ample alternative channels of communication

The government is not required to provide perfect substitutes for those channels denied to the plaintiff by regulation, just "ample" alternatives. *Mastrovincenzo v. City of New York*, 435 F.3d 78, 101 (2nd Cir. 2006).

2. Content-based restrictions

Content-based restrictions on speech are subject to strict scrutiny, which requires the government to prove that the restriction furthers a compelling state interest and is narrowly tailored to achieve that interest. *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, ___ U.S. ___, 131 S.Ct. 2806 (2011). Content-based restrictions on speech are presumed invalid and the government bears the burden of showing their constitutionality. *United States v. Alvarez*, ___ U.S. ___ 132 S.Ct. 2537 (2012).

B. Limited public forum

The analysis for a traditional public forum is applicable; however, "control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP*, 473 U.S. 788 (1985).

VI. Balancing competing free speech rights

When individuals or groups expressing opposing viewpoints wish to express those views in a traditional public forum, the government must remain neutral and ensure that those viewpoints can be expressed without interfering with the other message. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) held that the City of Boston could not require the South Boston Allied War Veterans Council, which conducts the annual St. Patrick's Day Parade in Boston, "to include among the marchers a group imparting a message the organizers do not wish to convey" because the marchers were "participants" in the parade, and the presence of persons expressing contrary views would likely be perceived as being a message was worthy of presentation and quite possibly of support as well.

After *Hurley*, several groups attempted to expand the narrow ruling to allow a permittee of a traditional public forum to require the government to limit the free speech of another individual simply because the permit holder did not agree with the speech. This position has been rejected. *See Startzell v. City of Philadelphia*, 533 F.3d 183 (3rd Cir. 2008), *Gathright v. City of Portland, Oregon*, 439 F.3d 573 (9th Cir. 2006). Thus, where a speaker in a public forum seeks only to be heard, not to have his speech included or possibly confused with another's, *Hurley* does not provide a basis to exclude opposing speech.

However, because *Hurley* was grounded in whether a person's opposing views could be mistaken for those of a permittee, the government must take into account whether the opposing speech *may* elevate the speaker(s) to de facto participant status or interfere with the permittee's freedom of speech and analyze the constitutionality restrictions on speech

accordingly. That determination, like all free speech constitutional determinations, must be made on a case by case basis based on the specific facts confronting the governmental entity.

Twin Cities Pride Festival Litigation

The Minneapolis Park and Recreation Board (MPRB) is a semi-autonomous department of the City of Minneapolis with its own elected board of commissioners. The MPRB owns and operates all park land in the City of Minneapolis as well as some park land located in adjacent cities. The MPRB owns 182 park properties, including local and regional parks, playgrounds, golf courses, gardens, picnic areas, biking and walking paths, nature sanctuaries and the 55-mile Grand Rounds National Scenic Byway**.** Together, these properties total nearly 6,732 acres of land and water.

Loring Park is located just south of downtown Minneapolis. The park consists of 42 acres of land and includes a lake, a bandstand, public gardens, tennis and basketball courts, horseshoe pits, a wading pool, tot lot, community arts center and bike/walking paths throughout the park.

The Twin Cities Pride Festival is one of the largest LGBT celebrations in the country. For the past 35 years, it has been held in Loring Park. The Pride Festival is operated by Gay-Lesbian-Bisexual-Transgender Pride/Twin Cities d/b/a Twin Cities Pride (TCP), a non-profit organization. TCP obtains a permit from the MPRB each year to hold the Festival. TCP determines who can "participate" in the Festival, including who can obtain a booth to distribute materials, and has its own internal rules governing participants. However, the Pride Festival itself is free and open to the public. Moreover, although the Festival takes up the bulk of Loring Park, the park remains open to patrons who are not attending the Festival.

Gay-Lesbian-Bisexual-Transgender Pride/Twin Cities d/b/a Twin Cities Pride v. Minneapolis Park and Recreation Board (Pride I)

Brian Johnson is a self-described evangelical Christian who claims he is "called" to minister to the LGBT community. He believes that homosexuality is a sin. For more than a decade, Johnson was granted a booth by TCP from which he would preach and hand out free Bibles to Festival attendees. TCP's internal rules required booth holders to affirm that they do not discriminate in hiring, employment, participation or services rendered based protected class status, including sexual orientation. Each year, Johnson agreed to abide by TCP's internal rules. However, in 2009, TCP additionally required Johnson to affirm that he did not believe homosexuality to be a sin. Johnson advised TCP that he believed that the Bible proclaimed that homosexuality was a sin. TCP then denied Johnson a booth. Johnson appeared at the 2009 Pride Festival and began walking through the park, offering free Bibles and ministry to the Festival attendees. TCP personnel asked Johnson to leave, and when he refused, Minneapolis city police[1] arrested

[1] The MPRB has its own police department separate from the City of Minneapolis' police department.

Johnson for trespass. Johnson's citation was eventually dismissed by the Minneapolis City Attorney's office.

In anticipation of a problem attending the 2010 Pride Festival, Johnson's attorneys contacted the MPRB asking that the MPRB affirm Johnson's right to attend the Festival and walk throughout Loring Park preaching and passing out Bibles. When the MPRB agreed, TCP filed a lawsuit and sought a temporary restraining order to force the MPRB to restrain Johnson from entering Loring Park during the Festival. Relying on *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), TCP argued that it had exclusive use of Loring Park during the Pride Festival, and it had a First Amendment right to exclude Johnson's message from interfering with its message.

The MPRB and Intervenor Johnson opposed TCP's motion, arguing that *Hurley* did not apply because there was no chance that Johnson's message could be misconstrued as being embraced by TCP. U.S. District Court Judge John Tunheim agreed with the MPRB. The court held that while TCP had a right under *Hurley* to decide who was a "participant" in Pride Festival, Johnson sought only to be an "attendee" and that Johnson's message was not in danger of being mistaken for the message of TCP. *Gay-Lesbian-Bisexual-Transgender Pride/Twin Cities v. Minneapolis Park and Recreation Board*, 721 F. Supp.2d 866 (D. Minn. 2010). In a footnote, the court wrote

> At the close of the hearing, Twin Cities Pride requested guidance from the Court in the event that the Court denied the motion for a temporary restraining order. Although not raised by the parties in briefing or at oral argument, a compromise may be available. In theory, Twin Cities Pride could designate "free speech zones" on Pride Festival grounds in which anyone who wishes to distribute literature or display signage may do so.

The court cited to a Texas case upholding a college campus's designation of free speech zones and also to *Heffron v. Int'l Soc'y of Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) which upheld the policy of the Minnesota State Fair restricting distribution of materials to a booth.

After the TRO was denied and the 2010 Pride Festival was over, TCP amended its complaint to request that the court create free speech zones for future Festivals for individuals (not just Johnson) whose message was not endorsed by TCP. While MPRB and TCP engaged in discussion to determine whether a compromise could be reached, Intervenor Johnson insisted that any restriction on his right to preach and distribute Bibles during future Pride Festivals would be unconstitutional. Johnson moved for summary judgment and in a surprise move, instead of ruling on his motion, the court *sua sponte* revoked Johnson's intervenor status, holding that the MPRB could adequately represent his interests. *Gay-Lesbian-Bisexual-Transgender Pride/Twin Cities v. Minneapolis Park and Recreation Board*, 2011 WL 1300381 (D. Minn. 2011).

TCP and the MPRB then reached a compromise to settle the case. Rather than create "free speech zones," the MPRB agreed to maintain an area within Loring Park wherein it

would allow anyone who did not qualify for a booth from TCP or who for whatever reason did not wish to purchase a booth from TCP to obtain a permit from MPRB to maintain a booth in the MPRB area. The MPRB implemented for its booth area the already existing TCP rule restricting material distribution by TCP booth holders to the confines of their booths. Thus, material distribution during the Pride Festival was restricted to either a TCP or an MPRB booth, all of which were within the perimeter of the Park. Additionally, TCP agreed to provide an area within its permitted portion of Loring Park where anyone could leave materials for pick up. The restriction on speech applied only to the distribution of materials; persons were free to walk throughout the Festival and speak or carry signs provided that they were not disruptive.

Brian Johnson v. Minneapolis Park and Recreation Board (Pride II)

Johnson did not attempt to purchase a booth from the MPRB for the 2011 Pride Festival. In fact, he did not even attend the 2011 Pride Festival. However, not surprisingly, Johnson did not like even the minor restriction on his speech. Notwithstanding the fact that when he had a TCP booth Johnson had never complained that TCP's rule restricting his distribution of Bibles to his booth restricted his ability to convey his message, Johnson now claimed that having to distribute Bibles from an MPRB booth during the Pride Festival violated his First Amendment rights. Johnson filed suit against the MPRB, asserting that the restriction on material distribution in Loring Park during the Festival is unconstitutional. Johnson moved for a TRO to allow him to distribute Bibles during the 2012 Pride Festival. His TRO was denied by U.S. District Judge Michael Davis. *Johnson v. Minneapolis Park and Recreation Board*, 2012 WL 2119268 (D. Minn. 2012). The court held that the MPRB had demonstrated that the material distribution restriction was content-neutral; that the MPRB had a significant governmental interest in protecting public safety by maintaining the orderly flow of people, providing access for security and emergency vehicles, and facilitating the activities of participants in the Festival; and that the MPRB had demonstrated that unfettered material distribution could threaten that significant interest and that therefore, the material distribution restricted was narrowly tailored to serve these concerns. The court stressed that the litigation was at a very early stage (no discovery had yet been done) and thus the denial of the TRO did not mean that factual discovery might render a different result. Johnson immediately appealed to the 8th Circuit, and requested and was granted without comment an injunction to allow him to distribute Bibles during the 2012 Pride Festival. Oral argument before the 8th Circuit is scheduled for March, 2013.

CONCLUSION

The government faces a virtual free speech land mine when it embarks on permitting traditional public forums to private entities for events free and open to the public. There are a plethora of cases addressing the rights of people with opposing views or even just irritating or unwanted speech to attend such events. In each case, the specific facts determine whether the government can impose restrictions on speech and to what extent. The best advice for the government is to have their counsel help them navigate the First Amendment waters, thereby hopefully avoiding litigation.