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Speech: Requirement That Christian Proselytizers Refrain From Speaking Out at Arab Festival Is Upheld Against Constitutional Challenge

Bible Believers v. Wayne County, No. 2:12-cv-14236 (Aug. 27, 2014).

In a decision which is already sparking discord among First Amendment devotees, the Sixth Circuit yesterday upheld the actions of Wayne County, Michigan police in preventing Christian advocates from proselytizing at an Arab Festival in Dearborn, finding that the County's interest in maintaining public safety outweighed the individuals' First Amendment and Fourteenth Amendment rights.

Dearborn has hosted the three-day Arab International Festival since 2005, attracting upwards of 250,000 attendees and numerous vendors informational tables—including Christian evangelists. Bible Believers, a Christian evangelical group, attended the event in 2011, moving through the crowd, preaching, displaying Christian messages and quoting scripture. Their interactions with other attendees, many of whom were Muslim, resulted in confrontation. One Bible Believer member was arrested and later released without charge.

In anticipation of the 2012 Festival, the attorney for Bible Believers wrote to the County Sheriff, notifying him that the group would to attend the Festival and expected to be protected by the County police against hostile audiences. The County responded that it could not act as a private security force for a specific group of Festival attendees.

The Bible Believers did attend the 2012 event, arriving around 5 pm on June 12. They wore t-shirts with messages like "Fear God," "Only Jesus Can Save You From Sin and Hell," and "Islam Is A Religion of Blood and Murder." One Believer carried a severed pig's head on a stick; another castigated the crowd for following a "pedophile" prophet, and another began preaching

Christian messages via a small megaphone. Some attendees became hostile, throwing bottles of water and other debris at the Believers, who asked police to escort them to a free speech zone. However, the local chamber of commerce had opted not to provide such an area for the 2012 event.

Eventually, police escorted the Believers out of the pavilion, explaining that law enforcement could not guarantee their safely and that they were inciting disorderly behavior. No Bible Believers were cited or arrested.

The Believers nevertheless filed suit against the County and various officers under 42 U.S.C. § 1983, asserting violation of the First Amendment free speech and free expression rights and violation of the Equal Protection Clause under the Fourteenth Amendment. The County responded that the individual defendants had qualified immunity and that the restrictions on the Believers' speech had been content-neutral. The District Court found for the County.

HELD: On appeal, the Sixth Circuit affirmed.

DISCUSSION: The Circuit Court applied a traditional three-step analysis: is the speech protected; what is nature of the forum; and does the justification for exclusion from the forum satisfy the requisite standard. Here, there was little disagreement that the speech was protected and the Festival was a public forum. The issue was whether the County's response was justified—if it had acted in a content-neutral fashion, the County merely needed to provide reasonable time, manner and place restrictions that were narrowly tailored to serve a significant governmental interest and allowed ample alternative means of communication. If, however, the restrictions were content-based, the government's asserted interested had to be compelling and there must be no less restrictive means available.

The relevant question was whether the government was regulating the speech because it disagreed with it. (*Ward v. Rock Against Racism*, 491 U.S. 781 (1989). The Sixth Circuit found nothing in the County's plan for keeping the peace at the Festival that revealed any animus towards the Believers' message—the County's sole intent was to keep the peace. However, the Believers argued that the implementation of the plan essentially resulted in a "heckler's veto." "The heckler's veto principle recognizes that '[l]isteners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992). The Circuit Court devoted substantial time to a review of the relevant heckler's veto precedents and concluded that the imminence of great disorder engendered by the Believer's behavior justified the County's protective action. Indeed one Believer's face had already been cut open by a flying object and another had been pushed to the ground. The court recognized that the County had allowed the Believers to enter the Festival, rather than foreclosing them from the outset, and had waited until the threat of "violent retaliation and physical injury" became clear before taking action. As such, the officers' threats to cite the Believers for disorderly conduct unless they left the premises "do not amount to effectuating a heckler's veto. Appellees' conduct was objectively necessary under the circumstances."

The Believers' Equal Protection claim was similarly unsuccessful. They could not show that they had been treated differently than others similarly situated. In fact, members of the crowd (who the Believers characterized as "counter protestors") were detained, cited and arrested for refusing to leave the premises. And given that there were no constitutional violations, the Section 1983 action against the County and various officers could not lie.

DISSENT: Circuit Judge Clay disagreed. He saw clear evidence of a heckler's veto at work, given that the video of the incident shows a police officer telling the Believers they must leave the Festival because "what you are saying to them [the crowd], and what they are saying back to you is creating danger." He found no support for the proposition that one may not deliver an unpopular message in a public forum if the backlash would be violent—the only exceptions the law would countenance would be for actual incitement or "fighting words" intentionally used to induce violence. In order to be actionable, the speech must be "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." (citation omitted).

Here, the County had conceded that the speech was protected—in other words, it was not in a category of "fighting words" or "incitement" (intended by the speaker "to produce imminent lawlessness"), for which there is no First Amendment protection. Nevertheless, according to the dissent, the majority selectively extracted facts from the record to produce the impression that the Believers' words were intended to incite violence.

For the dissent, the majority opinion will not only fail to protect legitimate speech, it will essentially reward those who dislike the speech---the rowdier the listeners become, the more likely police will step in to silence the speaker.

http://www.ca6.uscourts.gov/opinions.pdf/14a0208p-06.pdf (last accessed August 28, 2014).