



MEMORANDUM

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Government Censoring Christian Speech

The First Amendment to the Constitution provides that “Congress shall make no law . . . abridging the freedom of speech.” While the right to free speech is seemingly sacrosanct in our society, the right of religious speech, especially for Christians, is often unconstitutionally distorted. The ACLJ continues to defend the right to religious speech against government censorship.

The First Amendment to the United States Constitution prohibits the government from “abridging the freedom of speech.” U.S. Const., amend. I. This prohibition applies to state and local governments through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Lovell v. Griffin*, 303 U.S. 444, 450 (1938). The government may not suppress or exclude the speech of private parties for the sole reason that the speech is religious. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Lamb’s Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). As the Supreme Court has explained:

[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. . . . Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Pinette, 515 U.S. at 760. Furthermore, the Court has also stated that “the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.” *Lamb’s Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993) (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

The First Amendment’s prohibition on viewpoint discrimination applies to government facilities and funds as well as to laws and ordinances. For example, the Supreme Court held that the First Amendment prohibits the government from denying religious groups access to its facilities for expressive purposes due to the content of the group’s message. *Lamb’s Chapel*, 508 U.S. 384. The Court noted that “the government violates the First Amendment when it denies access to a speaker *solely to suppress the point of view* he espouses” *Id.* at 394 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985)) (emphasis added).

Similarly, in *Rosenberger*, the Court held that the government may not deny funding to a religious group solely due to the viewpoint of its message. *Rosenberger*, 515 U.S. at 837. The Court noted that “[d]iscrimination against speech because of its message is presumed to be unconstitutional.” *Id.* at 828. The Court also added, “the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression.” *Id.* The Court clearly stated that “ideologically driven attempts to *suppress a particular point of view are presumptively unconstitutional in funding*, as in other contexts.” *Id.* at 830 (emphasis added). Moreover, the Court added, that the scarcity of public money “cannot justify [government] viewpoint discrimination among private speakers.” *Id.* at 835.

The ability of the state to censor expressive activity in a traditional public forum-streets, sidewalks, and public parks is “sharply circumscribed.” *Perry Educ. Ass’n v. Perry Local Educator’s Ass’n*, 460 U.S. 37, 45 (1983). The Supreme Court has said that streets, sidewalks and parks “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). Thus, when a man gives away Gospel tracts in a traditional public forum he enjoys constitutional protection. The Supreme Court has said that, unlike other activities such as oral solicitations for money or business, the distribution of tracts is an unobtrusive form of communication. *United States v. Kokinda*, 497 U.S. 720, 733–34 (1990).

However, the government can restrict speech in a traditional public forum, if the restriction is reasonable as to the time, place, and manner of the speech. A three part test governs this inquiry:

[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided that the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

For example, a city may enforce a rule against obstructing passage on a public sidewalk or against excessive noise. The Supreme Court has said that the right to engage in expressive activities in public places is not an absolute right and that it “must be exercised in . . . peace and good order.” *Hague* at 516. Thus, even though Christians are free to witness and distribute Gospel tracts in public streets and parks, permits may sometimes be required for large crowd generating entertainment activities or where amplification is used.

However, because rights to freedom of speech, press, and assembly are supremely precious, even such laws as those barring obstructions or excessive noise are closely reviewed by courts to ensure that “in the guise of regulation” the government does not seek to “abridge or deny” such rights. *Id.* A restriction will be considered narrowly tailored only if it has “target[ed] and eliminate[d] no more than the exact source of the ‘evil’ it [sought] to remedy.” *Frisby v. Schultz*, 487 U.S. 485 (1988). In other words, regulations must further a “substantial government interest that would be achieved less effectively absent the regulation,” but it cannot “burden substantially more speech than is necessary to further the government’s legitimate interests.” *Ward*, 491 U.S. at 799.

Finally, the Establishment Clause imposes no affirmative duty upon the government to suppress private religious expression. The Constitution “requires the state to be a neutral in its relations with groups of religious believers and non-believers; *it does not require the state to be their adversary.*” *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (emphasis added). The Supreme Court has repeatedly held that the Establishment Clause neither requires nor allows government hostility toward religion. *Rosenberger*, 515 U.S. at 819; *Lamb’s Chapel*, 508 U.S. at 395; *Widmar*, 454 U.S. at 263. The Constitution “affirmatively mandates accommodation, not

merely tolerance, of all religions, and forbids hostility toward any.” *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

In sum, witnessing activities, such as preaching, singing, etc. in traditional public forums, and Gospel tract distribution are protected First Amendment activities. Any restrictions on these activities must be reasonable as to the time, place and manner. Furthermore, the Constitution demands that government accommodate religion and forbids government from being its adversary.

Religious speech is often given second class status in the name of avoiding an Establishment Clause violation. Unfortunately, there are many who would extend greater First Amendment protection to those who engage in pornographic speech than to those who engage in religious speech. The ACLJ is in the vanguard of the fight against these distortions of one of our most precious freedoms. ACLJ attorneys work constantly to ensure that the right to free speech remains secure even when the speech concerns currently disfavored viewpoints on subjects like religion, abortion, and homosexual rights.