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Introduction

The United States Constitution and interpretive Supreme Court decisions establish that religious expression in a public forum is generally protected as free speech. Specifically, the First Amendment states that the government may not prohibit the free exercise of religion, nor may it make a law “abridging the freedom of speech.” U.S. CONST. amend. I. The First Amendment applies to state and local governments through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938). Generally, a restriction on speech based solely on the viewpoint it espouses is unconstitutional. For other restrictions on free speech, the level of scrutiny applied to government interference depends on the type of forum in which the speech occurs. Even if speech is protected by the Constitution, governments may still impose reasonable time, place, and manner restrictions to preserve the peace.

I. VIEWPOINT-BASED DISCRIMINATION IS UNCONSTITUTIONAL.

The Supreme Court has 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 Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). This means that, even if the government may restrict the subjects that may be discussed, it cannot allow one viewpoint on that subject while disallowing another. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995); *Carey v. Brown*, 447 U.S. 455, 463 (1980). For example, if a forum is generally available for discussions about abortion, the government cannot forbid any particular viewpoint on the issue.

II. THE CONSTITUTIONALITY OF A SPEECH RESTRICTION DEPENDS ON THE FORUM IN WHICH THE SPEECH OCCURS.

The standard by which restrictions on free speech must be evaluated depends on the choice of forum. The three major fora are the traditional public forum, the limited public forum,

and the non-public forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983).

A. Traditional Public Forum

Most public witnessing occurs in public fora—which includes streets, sidewalks, and public parks, etc. where the freedom of speech is strongly protected. Traditional public fora are places that “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); *United States v. Grace*, 461 U.S. 171, 180 (1983) (holding that the sidewalks around the Supreme Court are protected as a public forum). In a traditional public forum, general content-based restrictions will be upheld only if the government has a compelling interest and the restriction is narrowly tailored to advance that interest. *Perry*, 460 U.S. at 45; *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009). The Supreme Court has defined “narrowly tailored” to mean that the regulation “targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy.” *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (citation omitted).

Distribution of religious literature is also considered a form of “speech” for the purpose of First Amendment constitutional protections. *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *Lovell*, 303 U.S. at 450. According to *Murdock v. Pennsylvania*, 319 U.S. 105, 109 (1943), the distribution of religious literature “occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits.” Therefore, there is substantial constitutional protection for witnessing and distributing pamphlets in public fora, although neutral time, place and manner restrictions are permissible.

B. Limited Public Forum

A limited public forum is “public property which the state has opened for use by the public as a place for expressive activity.” *Perry*, 460 U.S. at 45. The government must intentionally create a limited public forum: “the government does not create a public forum by . . . permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.” *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (plurality opinion) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) (emphasis added)). In a limited public forum, content-based discrimination may be permissible, which means that the government may open a limited forum for the discussion of some topics, but not others. The restriction on content must be “reasonable in light of the purpose served by the forum.” *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001) (quoting *Cornelius*, 473 U.S. at 806). Thus, witnessing may be prohibited in a limited public forum if the purpose of the forum is limited to a narrow subject area, such as global warming or patent law. This does not mean, however that religious viewpoints on the subjects can be excluded. As stated earlier, viewpoint discrimination is unconstitutional. Thus, for example, in *Good News Club*, the Supreme Court held that a limited public forum created for the purpose of promoting morals and character in children cannot exclude religious groups from presenting a religious perspective on the issue. *Id.* at 111–12.

C. Non-Public Forum

In a government-owned forum that is neither traditionally public nor made public, the government may restrict expression provided the restriction is content-neutral and reasonable. *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 131 n.7 (1981).

III. GOVERNMENT MAY IMPOSE VALID TIME, PLACE, AND MANNER RESTRICTIONS, REGARDLESS OF THE TYPE OF FORUM.

The right to freedom of speech “is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.” *Hague*, 307 U.S. at 516. As stated earlier, the government can therefore impose valid time, place, and manner restrictions on speech, which are permissible if they are “content-neutral,” “narrowly tailored to serve a significant government interest,” and if they “leave[s] open ample alternative channels of communication.” *Perry*, 460 U.S. at 45. In *Frisby v. Schultz*, for example, the Supreme Court upheld a regulation banning picketing in front of private residences. The Court acknowledged that while the picketers (abortion protestors) were on public streets, a traditional public forum, the regulation was nonetheless a valid time, place or manner restriction because “[o]ne important aspect of residential privacy is protection of the unwilling listener,” and individuals are not required to receive unwelcome speech into their own homes. 487 U.S. at 484-85.

Another example of a permissible “manner” restriction would be a noise ordinance regulating the type of sound equipment that street speakers, including preachers, can use. Similarly, a permissible “place” ordinance may require leafleting to be done near public trash receptacles to minimize littering.

Solicitation laws banning the in-person solicitation of money also qualify as valid time, place and manner restrictions. See *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 693 (1992) (concurring opinion of Kennedy, Blackmun, Stevens, and Souter), *concurring opinion aff’d*, *Lee v. Int’l Soc’y for Krishna Consciousness, Inc.*, 505 U.S. 830, 831 (1992) (per curiam). The presence of a financial imposition seems to be the distinguishing factor. One must go beyond merely passing out brochures in order to constitute solicitation. *Kokinda*, 497 U.S. at 734 (plurality opinion). A person “need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone’s hand, but one must listen, comprehend, decide and act in order to respond to a solicitation.” *Id.* Thus, a person witnessing his faith must avoid violation of any solicitation laws.

Conclusion

Before witnessing or distributing tracts in any public fora, it is advisable to consult with a local attorney to ensure compliance with local time, place and manner ordinances that may apply.