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STATE REJECTS KKK APPLICATION FOR ADOPT-A-HIGHWAY PROGRAM

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As illustrated by the *Cuffley* opinion described herein, a public agency can easily run afoul of the Constitution when it discriminates solely on the basis of a group's beliefs in considering applicants for public programs, like Adopt-A-Highway or Adopt-A-Park. As noted by the federal appeals court in *Cuffley*, "viewpoint-based exclusion of any individual or organization from a government program is not a constitutionally permitted means of expressing disapproval of ideas--even very poor ideas--that the government disfavors." In this particular instance, the court reasserted this very basic principle of Constitutional Law, i.e., "the First Amendment protects everyone, even those with viewpoints as thoroughly obnoxious as those of the [Ku Klux] Klan, from viewpoint-based discrimination by the State."

DISQUALIFIED ON THE BASIS OF BELIEFS?

In the case of *Cuffley v. Mickes*, No. 99-2334 (8th Cir. 2000), the Knights of the Ku Klux Klan, Realm of Missouri, and Michael Cuffley in his capacity as its Unit Recruiter (the Klan) challenged the denial of the Klan's application to participate in the State's Adopt-A-Highway program by the Missouri Highway and Transportation Commission (the State)

In the opinion of the federal appeals court, "the undisputed facts conclusively demonstrate[d] that the State unconstitutionally denied the Klan's application based on the Klan's views. Specifically, the court found that "the State treated the Klan differently from the vast majority of applicants... [f]rom the very beginning of this controversy when the Klan first applied to adopt a highway in May 1994." In reaching this conclusion, the court found the following deposition testimony by the statewide coordinator for the Adopt-A-Highway program to be particularly significant:

> Q. . . . Now, somebody at some point must have made a decision that this was the kind of case, this Klan application was the kind of case, that must be referred for special treatment, whether it be by higher-ups or it be by the court to make a decision; right?
> A. Right.
> A. The Adopt-A-Highway coordinator for the district called me. . .
> .
> Q. Now, is it fair to say that his calling you about an individual application to ask your guidance as to what to do is something that's out of the ordinary?
> A. I'd say yes.
>
> Q. It connotes a special situation?
> A. Right.

> Q. And what is it about the Klan application that he considered to be a special situation?
> A. It was just who it was from and what they wanted on the sign.
> Q. It had to do with what he perceived to be their beliefs?
> A. As a group, yes.
>
> Q. And what they were advocating?
> A. Right.
>
> Q. And that the basis for your decision to treat this organization's application for further review was based on your perception of what the group believed and what they advocated?
> A. Right.

In the opinion of the court, this deposition testimony by the State was "remarkable for its candor," in particular the following exchange which included "the surprising admission that the State thinks it has the right to deny an application on the basis of the applicant's beliefs":

> Q. So you believe as part of your job that you should examine a group's beliefs to see if there's something about what they believe in and what they advocate to see if they may be qualified or disqualified from the program?
> A. I think that we have a right to look at what they stand for and what they believe.
>
> Q. And if they don't stand for something that is acceptable to the department, you believe that you can disqualify them from the program; is that correct?
> A. . . . I think the department has the right to deny somebody.
>
> Q. On the basis of their beliefs?
> A. On the basis of their beliefs, yes.

Based on such testimony and "absent a convincing and constitutional reason for the denial," the court found "the evidence leaves us with but one conclusion: that the State denied the Klan's application based on the Klan's beliefs and advocacy." Moreover, the federal appeals court acknowledged that "the Supreme Court has made it clear that such a denial is unconstitutional":

> [E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a

> benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech.
>
> For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to produce a result which it could not command directly. Such interference with constitutional rights is impermissible. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)

In its denial letter to the Klan, the State gave the following reasons for rejecting the Klan's application:

> (1) The Knights of the Ku Klux Klan does not adhere to all state and federal nondiscrimination laws in that it discriminates on the basis of race, religion, color and national origin.
>
> (2) The Knights of the Ku Klux Klan has a history of unlawfully violent and criminal behavior.
>
> (3) Title VI of the Civil Rights Act of 1964 prohibits Missouri Department of Transportation from conferring a benefit to the Knights of the Ku Klux Klan because of the Knights' discriminatory practices, and granting the application would confer such a benefit in contravention of federal law.
>
> (4) Executive Order 94-03 prohibits state agencies from allowing discriminatory practices on state facilities and prohibits contracting with an organization that discriminates, and, therefore, prohibits the Knights of the Ku Klux Klan from participating in this program.

As characterized by the federal appeals court, "[t]he State's first purported reason for denying the Klan's application essentially amounts to the State's contention that the Klan does not satisfy one of the regulations issued by the State shortly after the Klan first submitted its application." This particular regulation provided as follows:

> Applicants must adhere to the restrictions of all state and federal nondiscrimination laws. Specifically, the applicant must not discriminate on the basis of race, religion, color, national origin or disability. Such discrimination disqualifies the applicant from participation in the program. Mo. Code Regs. Ann. tit. 7, § 10-14.030(2)(B).

As noted by the court, there was "no question that the Klan discriminates in membership on the basis of race, religion, color, and national origin." According to the court, the issue, however, was not discrimination by the Klan, but "whether any state or federal nondiscrimination law applies to the

Klan." In this particular instance, the court noted that the State had not pointed to any "specific nondiscrimination law that the Klan is violating." Moreover, "[e]ven assuming the existence of such a law," the court found the "direct application [of such a law] to the Klan in this case would violate the Klan's freedom of political association."

> There seems little question that requiring the Klan to accept non-"Aryans" would significantly interfere with the Klan's message of racial superiority and segregation... [In other words, the Klan would] be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same [views]... Requiring the Klan essentially to alter its message of racial superiority and segregation by accepting individuals of other races, religions, colors, and national origins in order to adopt a highway would censor its message and inhibit its constitutionally protected conduct.

Furthermore, the court rejected the State's contention that it would "enter into some kind of 'prohibited' relationship with the Klan... by allowing the Klan to adopt a highway." As characterized by the court, the State had claimed that "discrimination by a group associated with the State is, in effect, discrimination by the State." The State, however, had acknowledged that "subject to safety restrictions, anyone can pick up trash along Missouri highways, including highways adopted by others." Accordingly, the court found that no discriminatory state action because "the Klan's adoption of a highway does not in any way prohibit others from cleaning along that portion of the highway."

As a result, the court determined that the State had conditioned "participation in its highway adoption program on the manner in which a group exercises its constitutionally protected freedom of association." In so doing, the court concluded that the State's regulatory requirement that the applicant must not discriminate on the basis of race constituted "an unconstitutional condition on the Klan's participation in the Adopt-A-Highway program" based upon the group's beliefs.

PRETEXT FOR DISCRIMINATION?

The federal appeals court then considered the State's second purported basis for denying the Klan's participation in the Adopt-A-Highway program, i.e., "the Klan has a history of unlawfully violent and criminal behavior" within the context of the following regulation:

> Applicants with a history of unlawfully violent or criminal behavior will be prohibited from participation in the program." Mo. Code Regs. Ann. tit. 7, § 10-14.030(2)(C).

In the opinion of the court, "a]ll of the evidence... support[ed] the Klan's contention that this reason is pretextual."

> As we read the regulation, anyone who has ever committed any criminal act, from murder and mayhem to joyriding and jaywalking, is ineligible to participate in the program. Were the State actually to enforce this regulation with any regularity, we have little doubt the Adopt-A-Highway program would soon have few adopters.

Moreover, based upon the following deposition testimony from a State highway official, the court concluded that "the State is not really sure how the regulation should be applied," given the broad scope and vague language of this regulation:

> Q. All right. Well, tell me what criminal behavior is?
> A. Criminal behavior is behavior that violates the law.
>
> Q. Any law?
> A. I would say that is what it would intend.
>
> Q. Have you ever gotten a ticket for speeding?
> A. No, I haven't, but I wouldn't call that a history.
>
> Q. Well, it says--all right. If you've got 10 tickets for speeding, would that be a history?
> A. It would depend on the time frame.
>
> Q. Okay. Drunk driving? DWI?...
> A. I'm not sure that would. It could.
>
> Q. It could. Depending on?
> A. I can't give you a criteria.
>
> Q. How about antitrust? Archer Daniels Midland pleaded guilty to criminal antitrust violations, federal criminal antitrust violations. Are they excluded from adopting a highway?
> A. I would say if there was any question, I would seek legal counsel on it.

The court also found it was "not surprising" that "the State does not know how the regulation applies in practice to the Adopt-A-Highway program... because the State has never applied the regulation to anyone other than the Klan."

> Even though the regulation became effective in July 1995, barely a year after the Klan filed its application, the State has never asked an applicant a single question about criminal history, has never done a single investigation of criminal history, and has no idea whether any of the participants in the program have such a history.

> At oral argument, the State backed further away from the incredible breadth of the regulation, arguing that it was intended to address violent criminal behavior such as that committed by the Klan in the past.

Based upon such testimony, the court concluded that this particular regulation "was intended to target only the Klan and its views."

PERSONS EXCLUDED FROM PARTICIPATION?

As noted above, in its letter denying the Klan's application, the State had claimed that "allowing the Klan to participate in the Adopt-A-Highway program would violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994), and could cause the State to lose federal highway funding. In pertinent part, Title VI provides that: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

As cited by the court, "program or activity" within the context of this federal statute included "all operations of State government departments." Moreover, the court noted that this statute authorized "termination of federal funding for programs that violate Title VI." However, under the circumstances of this particular case, the court found that "Title VI clearly does not apply directly to prohibit the Klan's discriminatory membership criteria."

> The Klan is not a direct recipient of federal funds nor are federal funds earmarked for the Klan. There is not even an allegation here that the State pays for the Adopt-A-Highway program with earmarked federal funds. The Klan thus is not subject to Title VI.

The court, however, found it necessary to determine "whether Title VI prohibits the State from allowing the Klan to participate in the Adopt-A-Highway program." In a supplemental brief, the United States had raised this issue, arguing that "the State would violate the [following] regulatory prohibition on any arrangement that bars individuals from participating in a program on the basis of race... in allowing the Klan to adopt a highway":

> Under U.S. Department of Transportation regulations, the State, as a recipient of federal funds, "may not, directly or through contractual or other arrangements, on the grounds of race, color, or national origin . . . [d]eny a person an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program." 49 C.F.R. § 21.5(b)(1)(vi) (1999).

The federal appeals court rejected the notion that allowing the Klan to adopt a portion of highway would deny other people an opportunity to participate in the program," i.e., "pick up litter on that portion of the highway on the same terms as the Klan."

> Once again, we note that the Klan's adoption of a highway does not in any way prohibit others from cleaning along that portion of the highway. But more to the point, we believe the United States interprets the "program" at issue too narrowly.
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> Neither the Klan nor the State would operate a subprogram on the Klan's adopted stretch of highway; instead, the Klan simply would be one of many participants in the overall Adopt-A-Highway program...The Klan, as one of many voluntary participants in the program, is free to determine its own membership... So long as the State does not deny anyone an opportunity to adopt a highway on an improper basis, the State does not violate Title VI.

NO STATE ENDORSEMENT

The federal appeals court then considered whether "the State would violate Article VII of the State's Executive Order 94-03 (Jan. 14, 1994) by allowing the Klan to adopt a highway." As cited by the court, this Order provided as follows:

> Every department shall offer its services to the public without discrimination. No State facility shall be used to promote any discriminatory practice, nor shall any department become a party to any agreement which permits any discriminatory practice prohibited by this order, state or federal law.

In the opinion of the federal appeals court, "Executive Order 94-03 does not prohibit the State from allowing the Klan to adopt a highway." In so doing, the court reiterated its position that "offering a service to a group that discriminates is not equivalent to discrimination in the offering of that service." Moreover, the court noted the absence of "any state or federal law that prohibits the Klan from discriminating in its membership criteria." Further, the court found no indication that the State would endorse the Klan's discriminatory views and practices by allowing the Klan to adopt a highway.

> [T]he State admitted repeatedly in depositions that it does not view the erection of an Adopt-A-Highway sign as an endorsement or promotion of the adopter. In fact, the State's own regulations, conveniently drafted after the Klan applied, provide that "[t]he program is not intended as a means of providing a public forum for the participants to use in promoting name recognition or political causes." Mo. Code Regs. Ann. tit. 7, § 10-14.030(1)

Accordingly, federal appeals court concluded that "the State's discrimination-related reasons" for denying the Klan's application did "not make sense" and were "entirely pretextual."

> The State admitted repeatedly in deposition testimony that it does not ask organizations that apply to the program about their membership criteria nor does it investigate the applicants' membership criteria. Instead, the State claims to rely

> solely on common knowledge. But the State has never denied the application of any other group on the grounds of discriminatory membership.
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> A quick glance down the list of participants in the Adopt-A-Highway program, however, reveals many adopters that have discriminatory membership criteria. For example, it is commonly known that the Knights of Columbus, a venerated service organization that has chapters adopting many stretches of highway across the State, limits its membership to Catholic men. Once again, the State's actions speak louder than its words.
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> The State's purported reasons for denying the Klan's application are so obviously unreasonable and pretextual that, in the end, we are left only with the admitted reason the State was motivated to so carefully scrutinize the Klan's application as an explanation for the denial: that the State disagrees with the Klan's beliefs and advocacy.

OBNOXIOUS VIEWPOINTS PROTECTED

Under the circumstances of this case, the court found such State interference with constitutional rights was "impermissible." In so doing, the federal appeals court acknowledged that "the First Amendment protects everyone, even those with viewpoints as thoroughly obnoxious as those of the Klan, from viewpoint-based discrimination by the State":

> There are better ways of countering the Klan's repellent philosophy than by the State's engaging in viewpoint-based discrimination. In a myriad of constitutionally sound ways, state officials and private citizens alike may oppose the Klan's racially divisive views and express disapproval of those views in the strongest terms. But viewpoint-based exclusion of any individual or organization from a government program is not a constitutionally permitted means of expressing disapproval of ideas--even very poor ideas--that the government disfavors.

In finding the State had engaged in viewpoint discrimination in this particular instance, the federal appeals court distinguished the facts in *Cuffley* from an earlier federal circuit court opinion which had upheld the State's denial of a similar Klan application to adopt a portion of highway.

> In *Texas v. Knights of the Ku Klux Klan*, 58 F.3d 1075 (5th Cir. 1995), the Fifth Circuit did not decide that the Klan had no right to adopt a highway. Instead, that court concluded that the state's reason for denying the Klan's application to adopt a portion of highway outside a public housing project--to prevent the Klan from intimidating residents and frustrating a federal desegregation order--were reasonable and viewpoint neutral.
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> Here, the State does not argue that the Klan's adoption of the highway will have such an effect. And like the Fifth Circuit, we do not decide whether the Klan has the

right to adopt a highway. We only decide that the State may not deny the Klan's application to adopt a highway based on the Klan's views. And it is undisputed that this disparate treatment was based on the State's perception of the Klan's beliefs.