

FESTIVAL POLICY SILENCES ANNOYING PREACHING

James C. Kozlowski, J.D., Ph.D.
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The First Amendment prohibits the suppression of free speech activities by government. Further, when private individuals or groups are involved, there must be a sufficient degree of governmental involvement to establish the necessary "state action" to trigger First Amendment protection. Such constitutional protection for individuals and groups, however, is not absolute. Free speech activities are still subject to reasonable time, place and manner restrictions by government. Moreover, public parks are considered the "quintessential" public fora in which individuals and groups have traditionally engaged in free speech activities.

To be considered a reasonable time, place, and manner restriction, governmental regulation of free speech activities must be content neutral. To be considered content neutral, governmental regulation must not favor or disfavor certain types speech based on its content. In other words, the speech of all speakers and groups are treated and regulated alike, regardless of their point of view or message.

In addition, any governmental regulation of free speech activities must be narrowly tailored to effect a significant governmental interest, e.g., preserving the public health, safety and welfare. In other words, there must be a direct correlation between the degree of governmental restriction on free speech activities and the significant governmental interest to be achieved. Accordingly, governmental restriction on free speech activities must not be broader than necessary to achieve a significant and demonstrable governmental interest in public safety.

As illustrated by the *City of Fairborn* opinion described herein, a policy may be too broad and vague to pass constitutional muster if it effectively suppresses religious speech because some park visitors might be bothered by a speaker's message.

SWEET CORN FESTIVAL

In the case of *Bays v. City of Fairborn*, 2012 U.S. App. LEXIS 2807; 2012 FED App. 0044P (6th Cir. 2/13/2012), plaintiffs Tracy Bays and Kerrigan Skelly claimed the defendant City of Fairborn's solicitation policy in effect at the at the Fairborn Sweet Corn Festival ("Festival") violated the free speech clause of the First Amendment.

The Festival is an annual event held since 1982 at Community Park, a 200-acre public park in Fairborn, Ohio. The Festival takes place in a designated portion of Community Park and involves a sweet corn eating competition, live music, and various booths displaying and selling arts and crafts and other goods.

The Fairborn Parks and Recreation Department had entered into an "Agreement for Facility Use" with the Fairborn Arts Association ("FAA") and the Fairborn Lions Club ("Lions Club") that allowed the use of the park for the Festival. The agreement provided that the "Sweet Corn Festival is the responsibility of the FAA and Lions Club organizations" and that "[p]romotion,

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conduct, registration, fund raising and other festival-related issues are the responsibility of the FAA and Lions Club Organizations."

Fairborn agreed to support the Festival in a number of ways, including raising and lowering Festival banners, providing picnic tables and bleachers, and supplying general labor at a set cost. Community Park remained free and open to the public during the Festival.

The FAA and Lions Club accept applications for booth space for those wishing to sell merchandise, food, or arts and crafts. The application is to be submitted to the FAA prior to the Festival and requires applicants to pay between \$85 and \$135 for a booth. Attached to the application is a set of Terms and Conditions which includes the solicitation policy that provides "[t]here shall be no sales or soliciting of causes outside of the booth space."

Plaintiffs Bays and Skelly are Christians who seek to publicly convey their religious beliefs by speaking, preaching, distributing literature, and displaying signs. They planned to meet at Community Park on August 15, 2009, to express their religious views during the Festival. Bays arrived at the park around 11:00 a.m. and began walking through the Festival speaking and carrying a 2'x 2' sandwich board sign that read "Jesus is the Way, the Truth and the Life. John 14:6" on the front and "Are you born again of the Holy Spirit?" on the back.

Bays was soon approached by a Festival worker who told him to remove his sign or leave the park. After Bays asked if there was a written policy substantiating this request, the Festival worker walked away and Bays followed him to a nearby tent. When Bays repeated his question about the policy, the worker referred to a Festival policy against solicitations. Bays remained convinced of his right to speak and display signs, so he left the tent and began to distribute religious tracts while continuing to wear the sign.

Bays was then approached by Peter Bales, the Fairborn Parks and Recreation Department Superintendent, who told Bays he could not display a sign or distribute literature in the park. After Bales walked away from Bays, Bays found Skelly in the park. While the two were talking, they were approached by Bales and three Fairborn police officers, including Mark Stannard and Rodney Myers.

Bays and Skelly invoked their First Amendment rights, but the officials again stated that they could not display signs or hand out literature and that they would be arrested for criminal trespassing if they did not stop those activities. Officer Myers also informed them that they would need a "permit," presumably for a booth, if they wanted to stand and preach stationary, but that they could still talk to other people as long as "people [do not] indicate to us that you are bothering them... If we start getting approached by people who say, hey these two guys are approaching me and bothering me and talking about stuff I don't want to hear, then you're going to have a problem." After a lengthy discussion, Bays and Skelly decided to avoid arrest and leave the Festival at Community Park.

STATE ACTION?

The federal district court denied plaintiff's request for a preliminary injunction. In so doing, the

district court held “the solicitation policy and its enforcement were not state action, and the policy, even if it was attributable to Fairborn, was a reasonable time, place, and manner restriction on speech.” Plaintiffs appealed.

As noted by the federal appeals court, “First Amendment protections are triggered only in the presence of state action and that a private entity acting on its own cannot deprive a citizen of First Amendment rights.”

On appeal, Fairborn argued that there was “no state action in this case because the solicitation policy found in the Terms and Conditions attached to the booth application is attributable to the FAA and Lions Club, the private groups that organize the Festival, and not to Fairborn.” Further, Fairborn contended that “the enforcement of the policy by Fairborn officials does not transform the private policy into state action.” The federal appeals court disagreed.

In the opinion of the appeals court, “Fairborn officials engaged in state action by supporting and actively enforcing the solicitation policy in place at the Festival.” According to the court, a “presumption of state action” was created when “the Fairborn officers in this case were dressed in their official police uniforms, identified themselves as officers, and threatened arrest.” The federal appeals court, therefore, held that “an active role of police officers or government officials in the enforcement of festival policy is sufficient to establish state action.”

PROTECTED SPEECH

As noted by the appeals court, there was no dispute that “Bays's and Skelly's conduct is protected speech.” In so doing, the court acknowledged that “Displaying signs, orally disseminating religious beliefs, and distributing religious tracts all fall under the purview of the First Amendment.”

The federal appeals court then identified “the nature of the forum,” whether public or nonpublic, to determine “the extent to which the Government may limit access.” According to the court, public parks like Community Park are “quintessential public forums” because such properties have been traditionally “devoted to assembly and debate.” Further, the appeals court found “[t]he City cannot claim that one's constitutionally protected rights disappear because a private party is hosting an event that remained free and open to the public.”

For a “traditional public forum” like Community Park, the federal appeals court would, apply the following “appropriate standard to Fairborn's speech restriction”:

Because Bays and Skelly wish to engage in protected speech in a traditional public forum, the applicable principle in this case is that reasonable time, place, and manner restrictions may be enforced . . . so long as they are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

CONTENT NEUTRAL?

As noted by the federal appeals court, "[a] major criterion for a valid time, place and manner restriction is that the restriction may not be based upon either the content or subject matter of speech."

Government regulations of speech are content neutral if they are justified without reference to the content or viewpoint of the regulated speech. The government's purpose is the controlling consideration, and a restriction is content-based if it was adopted because of disagreement with the message the speech conveys.

In this particular instance, Bays and Skelly argued that "the solicitation policy is content-based because its purpose is to target and silence religious expression." The federal appeals court rejected this argument. In the opinion of the court, the Festival solicitation policy was "a content neutral regulation" because the policy "applies evenhandedly to all who wish to solicit causes" by requiring "all expression take place from a stationary location":

No person or organization, whether commercial or charitable, is permitted to engage in such activities except from a booth rented for those purposes.

In this particular instance, the federal appeals court accepted Fairborn's assurances that "the method for allocating booth space under this policy is a straightforward first-come, first-served system, which allays any concern that the policy has the potential for becoming a means of suppressing a particular point of view." In so doing, however, the appeals court cautioned that the terms of the policy "appear to reserve discretion in the festival organizers to deny permits on the basis of content, and such schemes have long been held unconstitutional":

The Terms and Conditions of the booth application prohibit "[t]he display or sale of any merchandise that is illegal, undesirable, or inappropriate for a family-oriented festival" and state that "[t]he Fairborn Arts Association Committee shall have total control over the renting of all booth space."

Under the circumstances of this case, the federal appeals court found "no evidence that the policy or Fairborn's actions were motivated by disagreement with Bays's and Skelly's religious message or by a desire to silence that message." On the contrary, the court found no evidence that Bays and Skelly "were singled out by the Fairborn officials or that the policy was selectively enforced against them because of their religious message." In addition, the court noted that "Bays and Skelly were not denied a booth" and there was "no evidence that the organizers have ever awarded booths on any basis other than first-come, first-served." As a result, the federal appeals court held "the solicitation policy is content-neutral."

NARROWLY TAILORED?

"To be a "constitutional time, place, and manner restriction," the federal appeals court acknowledged "the solicitation policy must be narrowly tailored to serve a significant government interest."

To be narrowly tailored, a restriction on speech must not burden substantially

more speech than is necessary to further the government's legitimate interests. Although a regulation may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the state's goal, it must not be substantially broader than necessary.

According to the court, “the government may impose regulations in order to assure the safety and convenience of those using public forums.”

As noted by the court, in this particular instance, Fairborn discussed “several purposes of the solicitation policy that are undoubtedly legitimate government interests in certain contexts: ensuring smooth pedestrian traffic flow, increasing public safety, and relieving congestion and overcrowding.” Specifically, Fairborn contended that “a booth requirement for the sale or distribution of any materials served the significant government interest of alleviating congestion and maintaining the orderly movement of the crowd.”

Accordingly, as characterized by the court, the issue was whether these stated crowd control interests were “significant in the context of the Festival at Community Park,” and, “if they are significant, whether the solicitation policy is narrowly tailored to serve those interests.”

In determining “the constitutionality of a regulation,” the appeals court would consider “a forum’s special attributes” and assess “the significance of the government interest “in light of the characteristic nature and function of the particular forum involved.” In this particular instance, the federal appeals court concluded “[t]he solicitation policy does not meet this standard.” In so doing, the court found “Fairborn has not pointed to any specific space or crowd concerns at the Festival”:

Here, there is no fence surrounding the Festival at Community Park and no admission fee to enter. And Fairborn does little to demonstrate the significance of crowd control at the Festival. Although it consistently argues reduced congestion and smooth traffic flow as the purposes behind the solicitation policy, Fairborn must do more than assert interests that are important in the abstract.

As a result, in the opinion of the federal appeals court, “the interests espoused by Fairborn may not be significant enough to justify these speech restrictions in this particular forum.”

“Even assuming Fairborn does have a significant interest in crowd control and smooth traffic flow,” the federal appeals court held “the solicitation policy is unconstitutional because it is not narrowly tailored to further those interests.” Specifically, the court found the “scope of the Festival solicitation policy, which prohibits sales or soliciting of causes outside of booth space, is ‘substantially broader than necessary’.”

On its face, the policy prohibits any solicitation of causes, including displaying signs, distributing literature or leafletting, and one-on-one conversations, if those conversations are motivated by a desire to solicit certain causes, such as the plaintiffs' religious message.

Moreover, the federal appeals court found the “incident between the plaintiffs and Fairborn officials at the Festival” indicated the policy was broader than necessary because it included the prohibition of one-on-one conversations.”

In Bays's account, which has not been disputed by Fairborn, officer Myers stated that the plaintiffs were "probably ok" to talk to other people as long as "people [do not] indicate to us that you are bothering them If we start getting approached by people who say, hey these two guys are approaching me and bothering me and talking about stuff I don't want to hear, then you're going to have a problem."

According to Fairborn, prohibiting one-on-one discussions in the solicitation policy was necessary because "such discussions will effectively slow the foot-traffic among the patrons, thereby causing increased levels of congestion at the Festival." Further, Fairborn claimed that “the solicitation policy does not prohibit ‘one-on-one discussions’ outside of booths, but instead only restricts sign display, leafletting, and "stationary preaching." The appeals court rejected this argument.

This interpretation is inconsistent with the plain language of the policy, which does not distinguish between solicitation by conversation and solicitation by "stationary preaching," and inconsistent with Fairborn's previous position.

As noted by the court, Fairborn officials had claimed that “one-on-one conversations may be acceptable, so long as the plaintiffs did not bother anyone or talk about things festival goers did not want to hear (such as a religious message).”

In the opinion of the federal appeals court, “sanctioning one-on-one conversations” at the Festival that might bother someone indicated Bays and Skelly were effectively “prohibited from engaging in their religious discussions.” As cited by the federal appeals court, the U.S. Supreme Court has held that “an individual's speech is protected even if it does not meet standards of acceptability from the potential audience's view”:

We cannot countenance the view that individuals who choose to enter parks, for whatever reason, are to be protected from speech and ideas those individuals find disagreeable, uncomfortable, or annoying.

In addition, the federal appeals court noted that “Fairborn does not explain how the solicitation policy is necessary to serve their interests in crowd control.” According to the court, "mere speculation about danger is not an adequate basis on which to justify a restriction of speech." On the contrary, the appeals court found governments are required to "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”

In so doing, the federal appeals court acknowledged that “the Festival does offer booths for those wishing to distribute literature and display signs, so in that sense the solicitation policy is not a total ban on those activities.” Despite the fact that “potential speakers could obtain a booth and

information table in another area, nonetheless, the federal appeals court found “Fairborn's policy is substantially broader and includes sign display and any other solicitation of causes.” In the opinion of the court, the “overbreadth of the solicitation policy is clear” because Fairborn’s policy “prohibits all ‘solicitation of causes’ outside of booths, including sign display, leafletting, and discussions, without regard to whether that speaking is designed to gather crowds.”

Accordingly, “even if Fairborn could demonstrate significant interests served by the policy,” the federal appeals court found “the solicitation policy fails to meet the requirements for a reasonable time, place, and manner restriction because it is not narrowly tailored to serve those interests.” As a result, the federal appeals court held the “solicitation policy is unconstitutional because it is not narrowly tailored to serve a significant government interest.” In so doing, the appeals court acknowledged that the “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” According to the court, “it is always in the public interest to prevent violation of a party's constitutional rights.”

CONCLUSION

The federal appeals court, therefore, ordered the federal district court to grant a preliminary injunction in favor of plaintiffs. As a result, pending further trial proceedings, Fairborn would be prohibited from enforcing the unconstitutional solicitation policy. At trial, Fairborn would have an opportunity to explain how the regulation of free speech would alleviate real harm associated with crowd control in a direct and material way.

In addition, or in the alternative, Fairborn could certainly attempt to revise the solicitation policy in an attempt to achieve a constitutional regulation of speech that would be “narrowly tailored to serve a significant government interest.”

James C. Kozlowski, J.D., Ph.D. is an attorney and associate professor in the School of Recreation, Health, and Tourism at George Mason University in Manassas, Virginia. E Mail: jkozlows@gmu.edu Webpage with link to law review articles archive (1982 to present): <http://mason.gmu.edu/~jkozlows>