

ETHNIC GROUP DENIED PERMIT
TO ERECT STATUE OF POLITICAL FIGURE IN PARK

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The *El Comite* decision described herein addresses alleged violations of the First Amendment when a city park district board denied an ethnic group permission to erect a statue in a city park. In this particular instance, there was evidence that the park district board may have rejected the statute because of its political message. As noted by the federal court in *El Comite*, reasonable time, place, and manner restrictions imposed on protected speech activity in a public park must be content neutral to be constitutional. In determining content neutrality, the court will consider "whether the government has adopted a regulation of speech because of disagreement with the message it conveys."

LIKE A ROCK

In the case of *COMITE PRO-CELEBRACION v. CLAYPOOL*, 863 F.Supp. 682 (N.D. Ill. 1994), El Comite Pro-Celebracion Del Centenario Del Dr. Pedro Albizu Campos ("El Comite") and its members have brought this suit against the Board of Commissioners of the Chicago Park District, alleging that the Board violated the First Amendment when it refused to grant El Comite permission to erect a statue of Dr. Pedro Albizu Campos in Humboldt Park. The facts of the case were as follows:

El Comite is a committee established to celebrate the centennial of the birth of Dr. Pedro Albizu Campos, and is comprised largely of Puerto Rican residents of the City of Chicago. Dr. Campos was a Puerto Rican man who lead the Nationalist Party, a political group that advocated Puerto Rican independence. He has been acknowledged and praised by many Latin Americans for his contributions to political and intellectual thought. According to the plaintiffs, Dr. Campos is "one of the most significant and internationally acclaimed Puerto Rican political figures of the 20th Century."

In August of 1992, El Comite started making plans to erect a six-foot tall statue of Dr. Campos in Humboldt Park, which is located in a predominantly Puerto Rican neighborhood. In order to do so, the plaintiffs had to obtain permission from the Board. The Park District has established written guidelines for determining which statues and monuments it will accept. The Board has delegated the responsibility for screening public donations to the Public Art Advisory Committee ("Advisory Committee"). Apparently, if the Advisory Committee decides to accept a statue, Board approval is "a mere formality."

On November 13, 1992, El Comite presented their plan to the Advisory Committee. As part of their proposal, plaintiffs agreed to pay the expenses of maintaining the statue.

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The Advisory Committee approved the concept and artistic merit of the statue, and agreed to recommend acceptance if the statue was cast in bronze. Because plaintiffs believed that approval by the Advisory Committee was tantamount to approval by the Board, El Comite raised \$35,000 and proceeded to have the statue cast.

On or about July 2, 1993, former Park District Superintendent, Robert Penn, signed the recommendation for approval of the statue. However, the proposal was not passed on for several meetings, until eventually it was decided that the Board should hear speakers for and against erecting the statue. On or about July 27, 1993, the new Superintendent, Forrest Claypool, reportedly said that he opposed the plan because he disagreed with Dr. Campos's political beliefs and actions. On August 10, 1993, the Board officially refused to accept the statue.

There are no statues of Puerto Ricans in the Chicago Park District parks, or anywhere else in the City of Chicago. However, the Park District has accepted and erected approximately 16 monuments donated by Italian, German, Norwegian, Danish, Polish, Swedish, Bohemian, and Czechoslovakian organizations.

El Comite claims that the Park District "violated their First Amendment right to freedom of expression...when it refused to erect the statue." In response, the Chicago Park District insisted that "the Constitution does not protect the right to erect statues." Specifically, the District argued that "no tradition or constitutional right can be claimed by the general public to erect permanent statues on public property."

As noted by the federal district court, "[u]nder the First Amendment, applied to the states through the Fourteenth Amendment, the states shall make no law abridging freedom of speech."

In a First Amendment case involving an alleged abridgement of free speech, the court conducts a three-part inquiry: (1) it decides if the proposed speech is protected under the Constitution; (2) it determines the nature of the forum, because the extent to which the state can limit speech varies depending upon whether the forum is public or non-public; and (3) it evaluates whether the state's proffered justifications for restricting speech are sufficient to satisfy the standards applicable in that particular forum.

Under the circumstances of this case, both Comite and the District assumed that "the statue of Dr. Albizu Campos is expressive." Accordingly, the specific issue was, therefore, whether a statue is entitled to First Amendment protection. As described by the federal court, "a constitutional right to erect a statue could exist under some circumstances."

[N]umerous courts have treated statues as expressive structures. Therefore, the court is not persuaded that the First Amendment offers no protection for El Comite's statue... First Amendment jurisprudence certainly does mandate that if the government opens a

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public forum to allow some groups to erect communicative structures, it cannot deny equal access to others...

We are not cognizant of any private constitutional right to erect a structure on public property. If there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures. Public parks are certainly quintessential public forums where free speech is protected, but the Constitution neither provides, nor has it ever been construed to mandate, that any person or group be allowed to erect structures at will.

However, under the circumstances of this case, the federal district court found "some evidence that the defendants understood the sculpture to express a political message." Specifically, the court noted that "Superintendent Claypool stated that he opposed the plan to erect the statue because he disagreed with Dr. Campos's political beliefs." As a result, the court determined that "the statue could be protected speech." Having done so, the court addressed "the critical issue of whether Humboldt Park is a public forum." In so doing, the court acknowledged that there are "two types of public forums: traditional or designated" which it described as follows:

Traditional public forums are those places whose use is "inextricably linked with expressive activities." Parks, streets, and sidewalks are quintessential, traditional public forums... [If Humboldt Park is a public forum,] the Board's ability to restrict expression is limited. If it is not, the state has considerable discretion to decide how citizens may use the property--or whether they may use it at all...

Public property that is not considered a traditional public forum may become a public forum if the state affirmatively opens the property to the public for the exercise of expressive activity. A place that the state opens and dedicates for expressive activity is a designated public forum. Humboldt Park falls into the former category; it is a traditional public forum. As the Supreme Court has repeatedly explained, "streets, sidewalks, and parks, are considered, without more, to be 'public forums'."

The Chicago Park District contended that it had "not designated the government-controlled parks as forums for the general public to erect permanent structures." Specifically, the Park District had "not intentionally opened a nontraditional forum for public discourse...by merely accepting sporadic donations of structures." The federal district court rejected this argument. In particular, the court found the Park District's argument "misperceives the nature of Humboldt Park, which is a traditional public forum-- not a designated public forum."

A quintessential, traditional public forum is open for speech regardless of what the government does or intends. Since Humboldt Park is a traditional public forum, it is irrelevant whether the Park District has designated parks as public forums for erecting

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statues... Public property that has been designated as a public forum is treated a little differently than a traditional public forum. The state may open a dedicated public forum for limited purposes only and may decide to close the forum later.

The Park District makes much of the fact that a statue is a permanent structure, insisting that the parks have never been a public forum for erection of permanent structures... The Board's argument erroneously assumes that the classification of a forum depends upon the type of speech. On the contrary, a traditional public forum retains its status as a public forum no matter what type of speech is involved...

Certainly, the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired, and a proposal to erect a permanent structure presents unique problems. However, such concerns may be addressed by implementing appropriate time, place, manner restrictions--not by carving out exceptions to the general rule that parks are public forums for all types of speech.

"Since Humboldt Park is a traditional public forum," the federal district court found that "the Board's ability to restrict speech is limited" under the circumstances of this case.

A content-based restriction of speech in a public forum is invalid unless it is necessary to serve a compelling state interest and narrowly drawn to achieve that end. The overriding concept in First Amendment jurisprudence is content-neutrality. Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content... The central inquiry with respect to content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.

Applying these principles to the facts of the case, the federal district court found that "El Comite has alleged sufficient facts from which the court could decide that the Board's decision was content-based" and, therefore, "the complaint states a claim under the First Amendment."

Initially, the Board (through the Advisory Committee) found that the statue met all relevant criteria for acceptance. In fact, the out-going superintendent signed the recommendation for approval. The statue was rejected only after the new superintendent, Forrest Claypool, stated that he would oppose the plan because he disagreed with Dr. Campos's political beliefs. From these facts, the court could conclude that the Board rejected the statue because of its political message.

Under the circumstances of this case, the Park District argued that the Board had properly "rejected the statue in order to avoid the controversy represented by Dr. Campos." The federal district court disagreed.

That the Board wishes to avoid the entire controversy of Puerto Rican independence does not insulate its actions from First Amendment scrutiny. On the contrary, the First Amendment's hostility to content-based restrictions in public forums extends to prohibitions on public discussion of entire topics for the simple reason that if the government was permitted to select the permissible subject matter of public discussion, the government could control the search for political truth.

Further, the federal court rejected the Board's argument that "it can refuse to erect the statue in order to avoid endorsing Dr. Pedro Albizu Campos's political views."

The First Amendment was designed to protect the voice of the people, not of the government. As such, Government officials are not permitted to restrict access to a public forum merely because they disagree with the views to be expressed.

While finding that "Humboldt Park is a public forum," the federal district court rejected the notion that "any infringement on the right to erect an expressive statue would be unconstitutional."

The First Amendment does not provide absolute protection to all speech under all circumstances. The Board may regulate the time, place and manner in which expressive activities take place. Such restrictions must be content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels for communication.

Courts have recognized several significant government interests which could support restrictions on speech: preserving the aesthetic environment; maintaining security on public grounds; ensuring that public art has substantial artistic and cultural significance; and ensuring that public art is compatible with the use of the property. The court's decision today does not preclude the Board from coming forward with any evidence showing that its rejection of El Comite's statue was narrowly tailored to serve such a significant government interest.

Accordingly, the federal district court found that "the Board may come forth with facts supporting its argument that rejecting El Comite's statue furthered its interest in preventing parks from becoming overcrowded." However, based upon the evidence in this case, the federal district court found that "the Board's arguments to this effect were premature because they could not be supported with facts." Further, the federal district court found the Park District "may have violated the First Amendment...[i]f the Board applied ostensibly neutral criteria in a discriminatory manner."

Even if the Board's decision was not based upon the message the statue conveys and even if the Board has properly adopted content-neutral criteria for rejecting proposed

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statues, there are facts from which the court could conclude that the Board violated the First Amendment. Facially neutral restrictions on speech will be struck down when they suffer from the more covert forms of discrimination that may result when arbitrary discretion is vested in some governmental authority...

Here, it appears that the Board has adopted regulations and objective criteria which notify the public of its legitimate concerns regarding permanent structures in public parks. For instance, before granting approval, the Advisory Committee considers the statue's potential impact upon historic buildings, recreational facilities, landscape, and other features of the park. In addition, the Advisory Committee takes into account potential liability and maintenance problems. Nevertheless, the allegations suggest that the Board did not adhere to these guidelines in this instance; rather, the Board rejected El Comite's statue even though it met all relevant criteria.

The Park District had also argued that "there is no right to force a gift upon the government." The federal district court, however, rejected the Park District's contention that "the government has an unfettered right to refuse to display artwork in spite of the First Amendment."

[The government has considerably less discretion to regulate speech in those cases, as here,] where a quintessential public forum is involved... In this case, there are facts suggesting that the Board's decision was based upon the message the statue conveys--not upon its value. In light of these distinctions, the court holds that, although the government has a right to reject donations, it must exercise that right consistently with the First Amendment.

Accordingly, the federal district court denied the Park District's motion to dismiss with respect to Comite's to the First Amendment claim. Having denied the Park District's motion to dismiss Comite's First Amendment claim, the federal district court would conduct further proceedings to fully consider Comite's allegations against the Park District.