

BIBLE DISTRIBUTION REGULATED AT GAY PRIDE FESTIVAL

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At the recent 2012 NRPA Congress, I met one of my former graduate students from the University of Maryland, Jayne Miller. Jayne is the Superintendent of the Minneapolis Park and Recreation Board (MPRB) and quite familiar with the case described herein. When asked, Jayne thought a review of this particular federal court opinion might be of general interest, providing an informative and practical case study in an aspect of constitutional law which is becoming more commonplace. This particular opinion illustrates MPRB's ongoing First Amendment challenge to accommodate an individual and a private group with contrary viewpoints at a private festival open to the public in a public park.

TWIN CITIES PRIDE FESTIVAL

In the case of *Johnson v. Minneapolis Park and Recreation Board*, 2012 U.S. Dist. LEXIS 80148 (Dist. Minn. 6/11/2012), defendant Minneapolis Park and Recreation Board ("MPRB") regulated the distribution of materials at the Twin Cities Pride Festival. The Festival is an annual celebration organized by Twin Cities Pride and held in an MPRB park, Loring Park, a 42 acre park on the southwest corner of downtown Minneapolis.

The Twin Cities Pride Festival ("Festival"), which is free and open to the public, has been held in Loring Park for 34 of the past 39 years. The Festival, traditionally held in late June, hosts concerts and other entertainment and features booths occupied by sponsors, exhibitors, and vendors which line the walkways in Loring Park.

Several YouTube public videos (search terms: Twin Cities Pride, Festival, Loring Park) provide visuals of the Festival, e.g., <http://www.youtube.com/watch?v=LdPGOsUxrg0>

Twin Cities Pride is a nonprofit organization dedicated to "creating experiences that bring the greater GLBT [gay, lesbian, bisexual and transgender] community together to commemorate our diverse heritage, fostering inclusion, educating and creating awareness of issues, and celebrating achievements in equality."

Plaintiff Brian Johnson is an evangelical Christian who seeks to spread his religious beliefs by telling people about Jesus and distributing free Bibles. From 1998 until 2008, Johnson rented a booth from which he handed out Bibles to willing Festival attendees. In 2009, after an exchange of emails between Johnson and Twin Cities Pride, Johnson's application for a booth at the Festival was denied.

Johnson intended to distribute Bibles at the 2009 Festival, but was prevented from doing so by MPRB. When he refused to leave the Festival, Johnson was arrested for trespass, but the charge was later dropped.

In anticipation of the 2010 Festival, Johnson's attorney sent MPRB a letter in which Johnson demanded that he be permitted to "enter into Loring Park and onto the perimeter sidewalks around the Park to distribute literature, display signs, and speak during the time of the festival." MPRB responded on April 26, 2010, assuring Johnson that it would not prevent him from engaging in such activities. However, shortly before the 2010 Festival, Twin Cities Pride petitioned the federal court to issue a temporary restraining order requiring MPRB to "prohibit any person or organization from distributing written materials or tangible objects outside of an authorized exhibitor or vendor booth" and to "prohibit all signage not authorized by Twin Cities Pride."

Acknowledging that the case involved a balancing of the First Amendment interests of both Twin Cities Pride and Johnson, the federal district court permitted Johnson to join the lawsuit. Johnson asked the court to issue an order blocking any material distribution regulation by MPRB which would prevent him from hand distributing Bibles inside Loring Park and outside of a booth during the Festival. The regulation at issue required "all individuals and groups that wish to distribute materials in Loring Park during the Festival must do so from a booth." Booths were available from both Twin Cities Pride and from MPRB.

As noted by the federal district court, "[t]he right to free expression in a public forum is a core liberty which must be guarded with vigilance." In so doing, however, the court acknowledged that "the right to speak is not absolute; it must sometimes be balanced with the rights and interests of others, as well as legitimate governmental concerns." Specifically, "when the government seeks to regulate the time, place, or manner of speech in a public forum," it must do so "in a content neutral manner" for its actions to be constitutional. Moreover, to pass constitutional muster, governmental regulation of speech must be "narrowly tailored to serve a significant interest and allow ample alternative channels of communication."

INCONSISTENT PRIVATE VIEWS

In a 2010 opinion addressing these competing First Amendment interests, the federal district court held Twin Cities Pride had "no duty to include as participants in the Festival individuals or groups which did not share its mission or beliefs." See: *Gay-Lesbian-Bisexual-Transgender Pride/Twin Cities v. Minneapolis Park and Recreation Board*, 721 F. Supp. 2d 866, 870 (Dist. Minn. 6/25/2010)

In this particular opinion, the federal district court adopted the reasoning of the United States Supreme Court in the case of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995). In *Hurley*, the Supreme Court had concluded that "the government could not compel a private organization to change the content of its expressive activity by requiring it to admit participants seeking to express contrary views, even where a state public accommodation law seemed to require their inclusion."

SEE: "Gay Pride message Not Accommodated in City Parade Organized by Private Association," September 1995 Law Review in *Parks & Recreation*
<http://classweb.gmu.edu/jkcozlow/lawarts/09SEP95.pdf>

Similarly, in this case, the federal district court found Twin Cities Pride was “entitled to exclude exhibitors who did not share its goals or beliefs”:

[I]t is plain enough that Twin Cities Pride is entitled to create a Festival in which each participant "contributes something to a common theme" and, therefore, may pick and choose Festival participants who share in its mission and beliefs. Plaintiff [Johnson] cannot succeed on a claim that Twin Cities Pride must include him in the Festival by granting him a booth.

The court, therefore, concluded “Twin Cities Pride was entitled to deny Johnson's application for a booth.” While recognizing “Twin Cities Pride's power to exclude Johnson as a participant,” the federal district court cautioned that Twin Cities Pride did not have “carte blanche power to prevent Johnson from expressing his views as a member of the public during the Festival.” On the contrary, applying the “traditional test for a content neutral time, place, or manner regulation in a public forum,” the federal district court concluded that MPRB restrictions sought by Twin Cities Pride “were not narrowly tailored to serve a significant government interest.”

Twin Cities Pride would have had MPRB issue regulations “preventing Johnson from distributing literature, wearing signage conveying his message, and taking surveys on the Pride Festival grounds.” While MPRB could not impose an absolute ban on Johnson’s First Amendment activity at the Festival, the federal district court acknowledged MPRB was not foreclosed from “restricting the exercise of First Amendment rights that may be disruptive or pose a threat to crowd safety.”

SETTLEMENT AGREEMENT

Johnson attended the 2010 Festival and proceeded to distribute Bibles. Shortly before the 2011 Festival, Twin Cities Pride and MPRB reached a settlement agreement, prompting the federal district court to dismiss the 2010 lawsuit. The agreement stipulated that MPRB would designate and manage an area within Loring Park where booth-seekers excluded from the Festival could rent booths from MPRB and distribute literature (the "MPRB Area"). The MPRB was not within the Festival's designated boundaries. Further, the agreement also established a material "drop zone" within the Festival area where "anyone may place noncommercial literature for consumption by Festival goers.”

Twin Cities Pride and MPRB further agreed to limit "all distribution of materials in Loring Park during the Pride Festival, except from a Pride-sponsored booth or the material drop area designated by Twin Cities Pride within the permitted area, or from a Park Board-sponsored booth within the nonpermitted area." Accordingly, any member of the public who did not qualify for a Festival booth could distribute literature by “using the drop zone or by handing out literature from a booth in the MPRB Area.”

In the 2012 Festival, Twin Cities Pride and MPRB planned to follow the terms set out in their 2011 settlement agreement. A map related to the 2012 Festival set out an MPRB Area in Loring Park for exhibitors unable to secure booths within the Festival, along with a drop zone for literature distribution within the Festival. Moreover, members of the public were “free to walk

throughout the park with signs and to convey their messages to willing listeners.”

Johnson alleged the MPRB material distribution regulation violated his right to free speech under the First Amendment. In so doing, Johnson claimed “he did not distribute Bibles during the 2011 Festival because he feared arrest.” Accordingly, Johnson sought a court order whereby MPRB could not limit his Bible distribution to the MPRB Area. During the 2012 Festival, Johnson wanted to be allowed “to distribute Bibles freely within the interior boundaries of Loring Park,” which included “walkways lined with booths, food concession stands, and stages” outside the MPRB area.

Based on its 2010 opinion, the federal district court determined that Twin Cities Pride could deny Johnson a booth within the 2012 Festival without violating Johnson’s First Amendment rights. Accordingly, the remaining issue before the court was “whether Twin Cities Pride and MPRB may restrict the expressive activity of members of the public by limiting the distribution of literature within Loring Park to Festival and MPRB-Area booths and the drop zone.” In particular, did the material distribution regulation unduly restrict Johnson’s First Amendment speech rights?

PUBLIC PROPERTY SPEECH REGULATIONS

As noted by the court, all parties agreed that the restricted conduct (i.e., conveying a religious message by distributing Bibles) was protected First Amendment speech:

The hand distribution of religious tracts is an age-old form of missionary evangelism which occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits.

The parties further agreed that “Loring Park is a traditional public forum and that it remains so during the Festival.” As noted by the federal district court, public parks are considered “quintessential public fora” for exercising one’s First Amendment rights. Moreover, the court noted that public parks “retain that status where, as here, a private actor assumes non-exclusive control of an area to hold an event to which the public has free and open access.”

Since all parties agreed that Johnson’s activity was protected speech in a public forum, the court had to determine whether the MPRB material distribution regulation was an unconstitutional “content-based restriction” targeted to religious messages, or a reasonable “content-neutral restriction” on the time, place and manner of material distribution, treating all messages alike. According to the court, a content neutral regulation could place reasonable time, place, and manner restrictions on Johnson’s free speech activities as long as the regulation was “narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication.”

As noted by the court, “requiring that all literature be distributed from a stationary location is a content-neutral regulation.” In this particular instance, citing the expressed language of the regulation, the court further found restrictions on “the distribution ‘any material’ is clearly content neutral and does not give MPRB discretion to target materials based on their content,”

religious or otherwise:

Sales, sampling, or distribution of any material within Loring Park outside of an authorized MPRB booth or an authorized Twin Cities Pride [booth] is not permitted. (MPRB 2011 Rules for Exhibitor/Vendor Booth at Loring Park June 25 and 26)

CROWD CONTROL & PUBLIC SAFETY

Having found that the regulation as issue was content neutral, the federal district court then considered whether the challenged regulation served a significant government interest. Johnson contended that MPRB had “not presented a legitimate interest which is advanced by the regulation and that the regulation is not narrowly tailored.” In response, MPRB contended “the regulation, coupled with the provision of the drop zone and MPRB-Area booths, is narrowly tailored to serve a significant government interest,” viz. crowd control and public safety. Johnson, however, countered that MPRB had not shown that distribution of literature outside of booths and throughout Loring Park would cause significant crowd control and public safety concerns.”

As noted by the federal district court, as general matter, it was “clear that a State's interest in protecting the safety and convenience of persons using a public forum is a valid governmental objective.” However, in “showing that its interests are in need of protection, the government must show that the recited harms are real, not merely conjectural.” Further, the government must show that “the regulation will in fact alleviate these harms in a direct and material way.”

In this particular instance, MPRB claimed the purpose of the material distribution regulation was to protect public safety “by maintaining the orderly flow of people, providing access for security and emergency vehicles, and facilitating the activities of the participants at the Festival.” In support of its position, MPRB cited the following declaration from the executive director of Twin Cities Pride:

In past festivals, distribution of literature from outside a booth has caused traffic congestion, security problems, complaints from participants, and has disrupted the message of participants who pay to have a booth... [E]very year, Twin Cities Pride's management and security receives complaints about the traffic congestion caused by non-participants handing out literature and materials from outside a booth...

[For example,] at the 2010 Festival by animal rights activists who distributed leaflets outside of booths. Those activists handed out pamphlets and flyers with graphic images of cruelty to animals from outside a booth, prompting Twin Cities Pride's management and security to receive many complaints from participants because of the traffic congestion caused by these non-participants handing out literature from outside of a booth while the participants themselves were required to remain in their booths when handing out literature or materials... [T]he next year, the activists utilized the material drop zone and, as a result, there were no

complaints.

MPRB also submitted evidence to show the scale of the crowds present in Loring Park during the Festival. Consistent with observed attendance in previous years, Twin Cities Pride expected over 250,000 Festival attendees during the two-day event in 2012. This expected attendance level, along with Loring Park's 42-acre footprint, lead to a projected crowd density of nearly 3,000 people per acre, nearly three times the crowd density at the Minnesota State Fair.

In the opinion of the federal district court, “MPRB's interest in crowd control and safety is a significant government interest.” That being said, the court would still consider whether MPRB had sufficiently shown that the proposed communicative activity, literature distribution, “endangers” its significant interest in crowd control.

According to the court, it would be difficult to assert that MPRB's interest is endangered were it to focus only on Johnson’s proposed activity, i.e., several individuals handing out Bibles. The court, however, found it must focus its analysis beyond Johnson to include “all other organizations that would be entitled to distribute materials outside of booths if the rule were not enforced.”

Hundreds of organizations rent booths at the Festival in order to reach the crowds that gather there, and most of them distribute free literature. It stands to reason that many individuals and groups would enjoy and take advantage of an opportunity to perambulate through the crowd, freely distributing literature to the quarter million Festival attendees. Indeed, the limited evidence developed at this stage in the litigation indicates that other individuals and groups have, in fact, attempted to distribute literature to the Festival crowd outside of booths, causing disruptions... [I]t is not difficult to imagine the “widespread disorder” that would arise if hundreds of exhibitors were permitted to leave their booths and distribute their materials on the walkways and amongst the crowds gathered in Loring Park.

As a result, the federal district court agreed with MPRB’s assertion that “unfettered literature distribution in Loring Park during the Festival would threaten its significant interest in crowd control and safety.”

NARROWLY TAILORED?

The federal district court then considered whether the challenged regulation was “narrowly tailored.” Within the context of reasonable time, place, and manner restrictions on speech, “narrow tailoring” requires the regulatory means chosen by MPRB must “not burden substantially more speech than is necessary to further the government's legitimate interests.” Applying this principle to the facts of the case, the federal district court found the challenged regulation was indeed “narrowly tailored to prevent a particular manner of expression from creating undue crowd congestion by requiring that such expression be conducted from a stationary location.”

[T]he regulation is limited to only one form of expressive activity—distribution of

material. All other protected expressive activities are permitted. The regulation is also limited in terms of time; it persists only during the two days of the Festival. The regulation is further limited in terms of place, applying only to certain areas within the boundaries of Loring Park.

The MPRB booths provide an outlet for the distribution of any material—regardless of viewpoint—in Loring Park during the Festival. MPRB booths are located in an area contiguous on two sides with the Festival, with no physical boundaries separating it from the Festival. Materials may also be distributed by placing them in the designated drop zone within the Festival.

ALTERNATIVE COMMUNICATION CHANNELS?

The federal district court also considered “whether the material distribution regulation provides ample alternative channels of communication.” In so doing, the court would determine whether Johnson was “afforded an opportunity to direct his intended message at his intended recipients.”

In this case, the court found Johnson’s intended audience was Festival attendees. Further, given “the narrow scope of the regulation,” the court found Johnson had “many opportunities to spread his message to Festival attendees.” While acknowledging that Johnson’s ability to distribute Bibles was limited, the court noted that it was “far from completely curtailed.” Specifically, the court noted that Johnson could “leave materials in the material drop zone within the Festival and may also hand-distribute materials within Loring Park from an MPRB-Area booth.”

At issue here is not blanket prohibition on speech, it is a regulation of the time and places that one particular manner of speech may be exercised. Apart from the requirement that materials be distributed from a booth, Plaintiff [Johnson] is free to engage in all other forms of non-disruptive expressive activity throughout Loring Park. He is free to wear clothing expressing his beliefs, to hold signs, to approach attendees and converse with those willing to engage with him, and to direct attendees to areas where they may receive a free Bible should they desire one.

As a result, the federal district court concluded that “the material distribution regulation provides Plaintiff [Johnson] with ample alternative channels of communication to present his message to his intended audience.”

CONCLUSION

As characterized by the federal district court, MPRB and Twin Cities Pride had negotiated a plan which provided fewer restrictions on Johnson’s activities than those sought by Twin Cities Pride and expanded Johnson’s opportunities to spread his message to Festival attendees. In so doing, the court found MPRB had successfully met the “challenge of attempting to reconcile Twin Cities Pride’s and Johnson’s competing First Amendment rights.” Accordingly, the federal district court held “the material distribution regulation is a content neutral time, place, and manner restriction which is narrowly tailored to serve a significant government interest and

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which provides ample alternative channels of communication.” The federal district court, therefore, denied Johnson’s request for a court order blocking MPRB’s material regulation for the Festival.

POST-SCRIPT

On June 21, 2012, the United States Court of Appeals for the Eighth Circuit granted Johnson’s “motion for injunction pending appeal” of the decision of the federal district court described above. As a result, pending appeal, MPRB was blocked from enforcing the challenged material distribution regulation at the 2012 Festival. Accordingly, on June 22, 2012, MPRB Superintendent, Jayne Miller, issued the following notice to Twin Cities Pride:

Based upon the decision of the Eighth Circuit to enjoin the MPRB’s ban on material distribution during the 2012 Pride Festival, the MPRB will not enforce the ban as to anyone who seeks to distribute non-commercial materials during the 2012 Pride Festival. We have instructed our employees to allow non-commercial speech during the 2012 Pride Festival unless the speech rises to the level of a violation of law.

As of October 2012, the federal appeals court for the Eighth Circuit had yet to rule on Johnson’s appeal.

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