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SCHOOL REFUSES TO POST TEN COMMANDMENTS ADVERTISEMENT ON BALLFIELD FENCE

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In the case of *Diloreto v. Downey Unified School District*, No. 98-56762 (9th Cir. 1999), plaintiff Edward DiLoreto sued the superintendent of the Downey Unified School District and two members of the Board of Education (collectively "the District") based on the District's refusal to post an advertisement, paid for by Mr. DiLoreto, on Downey High School's baseball field fence. The advertisement contained the text of the Ten Commandments. The facts of the case were as follows:

In September of 1995, Downey High School's Baseball Booster Club ("Booster Club") raised funds by soliciting ads from local businesses. The ads were to be posted on the school's baseball field fence in exchange for a \$400 donation. Mr. DiLoreto, Chief Executive Officer of Yale Engineering, purchased an ad and submitted a design containing a lengthy message and listing the Ten Commandments. Mr. DiLoreto subsequently revised his proposal to be less wordy. His final ad proposal read as follows:

For Peace in Our Day! Pause & Meditate on These Principles to Live By! 1. I am the Lord your God you shall have no other gods besides me. 2. Take not the name of God in vain. 3. Keep holy the Sabbath Day. 4. Honor your father and your mother. 5. You shall not kill. 6. You shall not commit adultery. 7. You shall not steal. 8. You shall not bear false witness. 9. Do not covet your neighbor's wife. 10. Do not covet your neighbor's goods.

To earn respect for ourselves & our community we must do noble acts for the love of God & concern for our country.

Edward and Jill Di Loreto Family Trust

Mr. Layne, the principal of Downey High School, declined to post the sign, and defendant Edward Sussman, the district superintendent, ratified that decision. The Booster Club refunded Mr. DiLoreto's donation.

On October 3, 1996, the District discontinued the program and removed approximately forty other signs that had been posted on the baseball field fence pursuant to paid advertising arrangements with the Booster Club.

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Mr. DiLoreto contended that “the District's refusal to post the advertisement violated his right to free speech under the First Amendment to the United States Constitution.” In the opinion of the federal district court, “refusing to post the sign did not violate Mr. DiLoreto's free speech rights because the baseball field was a nonpublic forum, and the District's decision not to post the sign was reasonable as well as viewpoint neutral.” The federal district court, therefore, granted summary judgment in favor of the District. DiLoreto appealed.

FORUM ANALYSIS

As characterized by the appeals court, “[t]he validity of the District's conduct turns on the nature of the baseball field fence as a forum for expression.”

The Supreme Court has held that the existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue. The Court employs a forum analysis to evaluate the nature of the property and the corresponding permissible government limitations on expressive activity.

Forum analysis divides government property into three categories: public fora, designated public fora, and nonpublic fora. A traditional public forum, such as a public park or sidewalk, is a place that has traditionally been available for public expression. Regulation of speech in a traditional public forum is permissible only if narrowly drawn to achieve a compelling state interest.

When the government intentionally opens a nontraditional forum for public discourse it creates a designated public forum. Restrictions on expressive activity in designated public fora are subject to the same limitations that govern a traditional public forum.

All remaining public property is classified as nonpublic fora. The government may limit expressive activity in nonpublic fora if the limitation is reasonable and not based on the speaker's viewpoint.

The Supreme Court recently has used the term "limited public forum" to refer to a type of nonpublic forum that the government intentionally has opened to certain groups or to certain topics. In a limited public forum, restrictions that are viewpoint neutral and reasonable in light of the purpose served by the forum are permissible. The relevant forum is defined by the access sought by the speaker.

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In this particular instance, the court found “the relevant forum” was “the advertising space on the Downey High School baseball field fence.” Accordingly, if the fence was a limited public forum, restrictions on expressive activity would be permissible if they were “reasonably related to purpose served by the forum and viewpoint neutral.” The issue before the court was, therefore, “whether the fence was a designated public forum subject to heightened scrutiny or a limited public forum subject to the reasonableness standard.”

GOVERNMENTAL INTENT

According to the court, “[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.” Moreover, the court noted that “the nature of the property and its compatibility with expressive activity, as well as the policy and practices of the government” would be factors considered by the court in determining whether the government intended to create a designated public forum.

The question is whether these factors indicate an intent to designate a public forum dedicated to expressive activities. Government policies and practices that historically have allowed commercial advertising, but have excluded political and religious expression, indicate an intent not to designate a public forum for all expressive activity, but to reserve it for commercial speech. However, where the government historically has accepted a wide variety of advertising on commercial and non-commercial subjects, courts have found that advertising programs on public property were public fora.

In addition, where the government acts in a proprietary capacity to raise money or to facilitate the conduct of its internal business, the Supreme Court generally has found a nonpublic forum, subject only to the requirements of reasonableness and viewpoint neutrality.

As noted above, courts will “examine the nature of the property and its compatibility with expressive activity to discern the government's intent.” In analyzing this particular forum, the court acknowledged that must “focus on unique attributes of the school environment and recognize broadly articulated purposes for which high school facilities may properly be reserved. ” Moreover, as a general rule, the court noted that “school facilities may be deemed to be public forums only if school authorities have by policy or by practice opened those facilities `for indiscriminate use by the general public. ”

This takes into account the school's "pedagogical concerns, such as respecting audience maturity, disassociating itself from speech inconsistent with its educational mission and avoiding the appearance of endorsing views, no matter who the speaker is."

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Applying these principles to the facts of the case, the court determined that “the District did not intend to designate the baseball field fence as a public forum for expressive activity.

The school sold advertising space on the fence to defray athletic program expenses by raising revenue through the Booster Club... [T]he intent of the school in opening the fence to advertising was to raise funds, not to create a forum for unlimited public expression. To raise funds, the District solicited business advertisements, thereby limiting the content of the forum through its solicitation practices.

District officials excluded certain subjects from the advertising forum as sensitive or too controversial for the forum's high school context. For example, the District rejected advertisements for alcohol or taverns, as well as an ad for Planned Parenthood. School officials also testified that although they did not personally object to the content of Mr. DiLoreto's ad, they were concerned that allowing the ad would indiscriminately open the forum to all advertisements regarding personal beliefs.

LIMITED PUBLIC FORUM

In addition, the court found “the District intended to create a limited public forum closed to certain subjects, such as religion” based upon “the fact that the District screened and rejected the ad.”

The decision of the Government to limit access to the forum is not dispositive in itself; instead, it is relevant for what it suggests about the Government's intent in creating the forum. This type of selective access does not transform government property into a public forum... [In this case,] there is no evidence in the record that any political, religious, or controversial public issue advertising was ever permitted on the Downey High School field fence.

The fact that another high school within the District accepted ads for ESP Psychic Readings and the local Freemason organization does not indicate that the Downey High School fence was a designated public forum open to ads promoting personal religious beliefs. The forum is defined by the access sought by the speaker, and Mr. DiLoreto only sought access to the Downey High School field fence.

The ESP and Freemason signs appeared in a different forum, and nothing in the record demonstrates that the two advertising programs were the same. In addition, ESP Psychic Readings, which advertised its number as 1-800PSYCHIC, is a commercial enterprise and the Freemasons are “an international fraternal and charitable organization.” Neither ad contains a religious, or anti-religious, message, and therefore

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neither is similar to Mr. DiLoreto's sign.

As a result, the court held that “the baseball field fence was a nonpublic forum open for a limited purpose.” Having determined that the fence was a nonpublic forum, the court acknowledged that “the District's conduct need only be reasonable in light of the purpose served by the forum and viewpoint neutral to be permissible.”

In a nonpublic forum opened for a limited purpose, restrictions on access can be based on subject matter . . . so long as the distinctions drawn are reasonable in light of the purpose served by forum" and all the surrounding circumstances. The "reasonableness" analysis focuses on whether the limitation is consistent with preserving the property for the purpose to which it is dedicated.

LEGITIMATE CONCERNS

In this particular instance, the court found “the special nature and function of public secondary schools [was] relevant to evaluating the limits the school may impose on expressive activity... even though the actual forum in this case is the advertising space on the fence.” Moreover, the court noted that the District excluded religious advertising from the fence because it “feared controversy and expensive litigation that might arise from community members seeking to remove the sign or from religious or political statements that others might wish to post.”

In the opinion of the federal appeals court, “concerns regarding disruption and potential controversy are legitimate reasons for restricting the content of the ads, given the purpose of the forum and the surrounding circumstances of the public secondary school.”

The Government need not wait until havoc is wreaked to restrict access to a nonpublic forum... [A] public high school's decision not to promote or sponsor speech which might place it on one side of a controversial issue, is a judgment call which reposes in the discretion of school officials and which is afforded substantial deference... [A] public secondary school has legitimate concerns such as respecting audience maturity, disassociating itself from speech inconsistent with its educational mission, and avoiding the appearance of endorsing views" that render a school's restriction on advertising reasonable.

Further, the court found “a public secondary school could restrict advertising of controversial topics in programs for high school athletic events, even where the school has created a limited public forum for other advertisements.”

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The Supreme Court also has recognized that content-based restrictions may be reasonable "in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience."

Applying these principles to the facts of the case, the court found the District's prohibition on religious advertising was based on a "concern that posting Mr. DiLoreto's ad would force the District to open the forum to all expressions of personal beliefs."

The school used the athletic field for physical education classes and for school-sponsored sporting events. The District reasonably could have believed that the controversy and distraction created by political and religious messages raised the potential for disruption of these classes and school-sponsored events, particularly as students at these activities would be a captive audience to the ads. In addition, the District reasonably could have been concerned that the school would be associated with any controversial views expressed in the advertisements on the fence.

Accordingly, the federal appeals court held that "the District's decision to exclude ads on certain subjects, including religion, was reasonable given the District's concerns regarding disruption and controversy."

VIEWPOINT DISCRIMINATION?

While finding "the District's decision not to post the ad was reasonable in light of the purpose served by the forum," the court recognized that the District "may still violate the First Amendment if it discriminates on the basis of viewpoint, rather than content."

Permissible content-based restrictions exclude speech based on topic, such as politics or religion, regardless of the particular stand the speaker takes on the topic. In contrast, impermissible viewpoint discrimination is a form of content discrimination in which the government "targets not subject matter, but particular views taken by speakers on a subject..."

[I]mplicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purposes of the property.

In this particular instance, the court found no evidence which indicated that "the District opened the

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forum to the subject of religion.” As a result, the court concludes that “the District’s decision not to post Mr. DiLoreto’s sign was pursuant to a permissible, content-based limitation on the forum, and not viewpoint discrimination.”

Unlike the other signs that were posted on the fence, Mr. DiLoreto’s sign does not advertise, or even mention, a business. Mr. DiLoreto’s ad was not a statement addressing otherwise-permissible subjects from a religious perspective; it sets forth the Ten Commandments, which are “undeniably a sacred text in the Jewish and Christian faiths, and concern the religious duties of believers..

In so doing, the federal appeals court rejected the argument that “the Constitution prohibited the school from closing the forum in response to DiLoreto’s ad.” On the contrary, the court found that “[t]he government has an inherent right to control its property, which includes the right to close a previously open forum.”

Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Closing the forum is a constitutionally permissible solution to the dilemma caused by concerns about providing equal access while avoiding the appearance of government endorsement of religion.

Accordingly, the fact that the District chose to close the forum rather than post Mr. DiLoreto’s advertisement and risk further disruption or litigation does not constitute viewpoint discrimination.

Having found “the baseball field fence was a forum limited to certain subjects and not open for indiscriminate use by the general public,” the federal appeals court determined that “the District could exclude subjects from the nonpublic forum that would be disruptive to the educational purpose of the school.” In so doing, the court held that “neither the District’s refusal to post the sign nor the District’s later decision to close the forum to all advertising constituted viewpoint discrimination.” As a result, the federal appeals court affirmed the district court’s grant of summary judgment to the District.