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ESTABLISHMENT CLAUSE VIOLATION PERSISTS DESPITE SALE OF PARK STATUE

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The Establishment Clause of the First Amendment to the United States Constitution states that "Congress shall make no law respecting the establishment of religion." The Establishment Clause prevents the *government* from promoting or affiliating with any religious doctrine or organization. Accordingly, an Establishment Clause violation must be based upon government action of some sort.

In the case of *Freedom From Religion Foundation, Inc. v. City of Marshfield*, 203 F.3d 487 (7th Cir. 2000), the primary issue was whether the City's sale to a private group of a site containing a religious statute in a public park effectively ended any government action which could be construed as an endorsement of religion in violation of the Establishment Clause.

Under the circumstances of this particular case, the federal appeals court found that the proximity of the religious statue to City property and the lack of visual definition between City and private property "created a perception of improper endorsement of religion by the City" in violation of the Establishment Clause. Accordingly, despite the sale of the statute site to a private party, the City still had a legal obligation "to take steps to avoid being perceived as supporting or endorsing a private religious message." The facts of the case were as follows:

In 1959, the City of Marshfield, Wisconsin ("City"), accepted a gift of a statue of Jesus Christ from the John Eisen Assembly, Fourth Degree Knights of Columbus. The City placed the statue in what was then known as Wildwood Park--undeveloped property owned by the City.

The white marble statue rises fifteen feet in height. It depicts Christ, arms open in prayer, standing atop a large sphere, which in turn rests atop a base bearing the inscription in twelve-inch block letters, "Christ Guide Us On Our Way."

The statue faces State Highway 13 (Roddis Ave.), the main thoroughfare into Marshfield from the south, and is clearly visible to travelers from the road. In 1964, Henry Praschak, a member of the Knights of Columbus, offered to construct a comfort station at the site where the statue was located, adding signs, picnic tables and outdoor grills. In response, the City specifically reserved the area for city park purposes and agreed to build the infrastructure necessary to support a public park. The City also agreed to provide electrical service and to maintain the park. In recognition of

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Praschak's contribution, the Wildwood Park area was renamed Praschak Wayside Park.

Thirty-nine years later a Marshfield businessman, Clarence Reinders, objected to the presence of the statue on public property. Reinders, a member of the Freedom From Religion Foundation, Inc. ("FFRF"), stated that he avoids using the park because of the statue's presence. In addition, Reinders claimed to take alternate travel routes to avoid viewing the statue of Christ from Highway 13. In March 1998, FFRF asked that the City move the statue to private property. The City did not act on that request, so on April 15, 1998, Reinders and FFRF filed suit in federal court..

Soon after the lawsuit was filed, the City erected a disclaimer that states, in part, "[t]he location of this statue . . . does not reflect an endorsement of a religious sect or belief by the city of Marshfield." Also, a newly-formed organization of Marshfield citizens, the Henry Praschak Memorial Fund, Inc. ("Fund"), offered to purchase the statue and the section of the park on which the statue stands. The City accepted the Fund's offer and sold 0.15 acres of land, a portion of which accesses a public road. The Fund paid the City \$21,560 (\$3.30 per square foot), which is the highest price per square foot that the City has received for a sale of its land. The bid process met all Wisconsin statutory requirements for the sale of public land. In addition, the City separated the electrical service required to light the statue from the street lighting system that serves the park. The Fund's warranty deed, dated July 2, 1998, includes a covenant running with the land that restricts the use of the parcel to public park purposes...

Presently, the statue remains on Fund property, but this 0.15 acres is not visibly differentiated from the city park. The statue and property are maintained by the Fund, and the Fund pays for the electrical service required to light the statue. The disclaimer erected by the City remains in front of the statue on Fund property.

The federal district court found that the sale of land to the Fund effectively ended any governmental endorsement of religion in violation of the Establishment Clause. As a result, the district court granted summary judgment in favor of the City. FFRF appealed, contending "the continued presence of the statue in proximity to a public park may still reasonably be perceived as the City's endorsement of religion" in violation of the Establishment Clause.

CONTINUING ENDORSEMENT OF RELIGION?

On appeal, FFRF argued that "a violation of the Establishment Clause persists because the layout of the

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park and the location and orientation of the statue would cause a reasonable observer to perceive that the statue was still a part of the city park and thus continues to constitute government endorsement of religion.”

As cited by the appeals court, the U.S. Supreme Court, in the case of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), had established the following three-part “Lemon” test to determine whether government action constitutes an endorsement of religion:

[G]overnment action does not violate the Establishment Clause if (1) the action has a secular purpose; (2) the principal or primary effect of the action neither advances nor inhibits religion; and (3) the action does not foster excessive government entanglement with religion.

Applying the first prong of this test to the facts of the case, the appeals court found “the statue serves no secular purpose.” In so doing, the court rejected the City’s argument that “the duration of the statue’s stay in the park has made it a non-sectarian landmark.” While recognizing that “secular circumstances may serve to neutralize the religious message of an unattended monument,” the court found City’s position “would allow a violation of the Establishment Clause to become permissible merely by remaining in violation of the clause without complaint.”

In this particular instance, the court noted that “[t]he City does not contend, nor could it reasonably do so, that the statue serves any secular purpose other than to ‘beautify’ the park.” On the contrary, given the large letters at the statute’s base with the words, “Christ Guide Us On Our Way,” the appeals court found “no doubt as to the obvious religious message imparted by the statue.”

Having found no secular purpose for the government’s action, the court then considered the second prong of the Lemon test, i.e., whether the statute had “the effect of advancing religion” in violation of the Establishment Clause. As described by the federal appeals court, “the effect prong of this test has been analyzed under the ‘perception of endorsement’ test”:

Under this test, the effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. When we find that a reasonable person could perceive that a government action conveys the message that religion or a particular religious belief is favored or preferred, the Establishment Clause has been violated...

[T]he government has not violated the Establishment Clause by providing a public forum where religious speech is conducted by purely private parties, so long as the forum is

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open to all on equal terms... [On the other hand,] every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.

The varying factual backgrounds of government actions potentially constituting an endorsement require a broad rule that could capture even private speech which reasonably may be understood to constitute a public endorsement of religion.

Moreover, in conducting this “perception of endorsement” test, the appeals court acknowledged that it “must consider the site of the government's alleged endorsement.” In so doing, the court noted that “public fora have immemorially been held in trust for the use of the public... for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” In such public fora, the court found the Constitution restricts the government's ability to limit speech, including religious speech, absent a compelling state interest.

TRADITIONAL PUBLIC FORUM?

In determining the existence of a public forum, the court acknowledged the significance of the historical use of the property for public expression. Under the facts of this particular case, the court held that “Praschak Wayside Park is a city park and a traditional public forum.” Moreover, the court found that the sale of a section of this park to a private organization had not changed the nature of the park. On the contrary, the court found that “the Fund property constitutes a part of this public forum” despite the sale of park land to a private body.

We acknowledge that there is no clear precedent on the matter whether private property can be considered a public forum, but we base our finding on three factors: the historical association of the Fund property with a public forum; the dedication of the property to public use; and the physical location of the 0.15 acre Fund site in relation to the public park and the location and orientation of the statue of Christ within it...

Until the time of the sale, the property now owned by the Fund had been used for public park purposes and was a part of an acknowledged public forum. In addition, the restrictive covenant in the warranty deed dedicated the Fund property to public use, and land dedicated to public use remains a part of a traditional public forum.

Finally, the Fund's 0.15 acre site is not physically differentiated from the surrounding public park, and no visual boundaries currently exist that would inform the reasonable but unknowledgeable observer that the Fund property should be distinguished from the

public park. In addition to the fact that no barrier exists between the City's park and the Fund property, the statue's positioning and orientation combine with the other physical features to convey the impression that the statue is on city park property. To complicate matters further, although the City has erected a disclaimer, it is placed on Fund property, increasing the risk of confusion over whether it still controls this land.

Having found the private Fund property constituted part of a "traditional public forum," the court also acknowledged that "the expression made by the statue is now private religious speech." As a result, the court found itself confronted by a convoluted case of "private religious speech made at a traditional public forum."

PREFERENTIAL ACCESS?

Because the park is a traditional public forum," the court stated that "the park must remain open to all on equal terms" to avoid an Establishment Clause violation. Conversely, government condonation and endorsement private religious speech in violation of the Establishment Clause could arise where the traditional public forum is not open equally to "a multiplicity of groups, both secular and religious, [who] engage in expressive conduct" under circumstances "where all private parties were all allowed to make protected expression on the same terms."

In the absence of such equal access to a traditional public forum, the court noted that "the government's condonation [of private religious expression] may be government action endorsing religion, even if the government makes no overt act in furtherance of religion."

[G]iving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate both the Establishment Clause and the Free Exercise Clause, because by so doing, the government exercises favoritism of one sect or religion over another based on the content of the expression.

Applying these principles to the facts of the case, the court found "citizens who wish to endorse other religions or sects on 'equal terms' would find it exceedingly difficult to erect an object of equal expressive power or to maintain it on government property." Moreover, the court found that "the Fund cannot be compelled to limit its expression in the way that another group wishing to express itself in the park could.

Although the sale of the land to the Fund ended any direct government action that would constitute endorsement, the sale has given this sectarian message preferential access to Prashak Wayside Park, a public forum. The statue is an unattended object fifteen feet

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in height and made of marble... In this case, the statue, which serves no secular purpose and portrays a figure of particular importance to one religious group, undisputedly expresses a sectarian religious message ("Christ Guide Us On Our Way")...

In addition, the sale of a parcel of land where the statue permanently resides, previously within the bounds of the park, provides the Fund with a preferential location from which they may express their message.

Given the "unique facts and circumstances" of the case, the court further found "the present layout of the park invites a perception of a government endorsement of religion." Specifically, the court found "the presence of the statue would create the perception of government endorsement in a reasonable observer."

Under the endorsement test, we look to the unique facts and circumstances before us to determine whether a reasonable person would perceive the existence of the statue to promote or disfavor religion or a particular religious belief... In this regard, the history of Prashak Wayside Park differs dramatically from other public fora. Since its creation in 1964, the park has expressed only one message, which is the religious message conveyed by the statue. The park was created to display the statue, and the City presents no evidence that other groups have ever used the park to present alternative messages.

For this reason, a reasonable observer familiar with the history of the park would have no reason to be aware of non-sectarian reasons for the government's endorsement of religion. The current physical state of the park also leads a reasonable person to conclude that the statue is a part of the public park and that the government, rather than a private entity, endorses religion. As we have noted, Fund land is visually indistinguishable from City land, especially when viewed from Highway 13...

In addition, the disclaimer is insufficient as currently constructed to dispel this perception. For these reasons, we believe that a reasonable observer, without regard to a reasonable observer's degree of understanding, would perceive the statue to constitute a City endorsement of religion.

As a result, the federal appeals court held that the City had violated the Establishment Clause by "failing to distinguish the Fund's land from the remainder of the park" and granting the Fund "preferential access to a public forum." In reaching this conclusion, the court noted that the City could have "ended its Establishment Clause troubles" by conducting "the sale of the parcel "in such a manner as to remove the

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impression that the statue remained part of the public forum.”

In order to remedy the existing Establishment Clause violation, the federal appeals court noted that “this perceived endorsement of religion can be alleviated without recourse to removal of the statue from Fund-owned property.” Accordingly, the appeals court remanded (i.e., sent back) this case to the federal district court to “explore”, in concert with the parties, a way to “differentiate between property owned by the Fund and property owned by the City.” In so doing, the appeals court noted that the City could construct “some defining structure, such as a permanent gated fence or wall to separate City property from Fund property” along with “a clearly visible disclaimer, on City property.” Given such remedial measures, the federal appeals court opined that a reasonable person would not confuse private religious speech made on Fund property with an unconstitutional endorsement of such religious expression on the part of the City.