

RELIGIOUS MESSAGE EXCLUDED FROM CHRISTMAS DISPLAYS IN PARK

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In the case of *Calvary Chapel Church, Inc. v. Broward County*, 299 F.Supp.2d 1295 (So. Dist Fla. 2003), the County excluded “all overtly religious, overtly political and overtly commercial subject matter” from lighted displays erected in a public park for the annual “Holiday Fantasy of Lights” (HFL). In the opinion of the County, to allow such displays on these topics would have “the potential to cause controversy or distract from the fun, lighthearted and fanciful themes of the HFL.” In this particular case, the issue before the federal district court was whether the County’s rejection of a proposed holiday display sponsored by a religious organization with the message “Jesus is the Reason for the Season” constituted viewpoint discrimination in violation of the First Amendment Free Speech Clause.

FACTS OF THE CASE

The Holiday Fantasy of Lights (“HFL”) is an annual event presented by the Broward County, Florida, Board of County Commissioners (“County”) to celebrate the winter holiday season. The event originated in 1993, when the County’s director of parks and recreation developed the idea of presenting a show to entertain the community and generate revenues by recognizing the various holidays that occur during the winter months. The HFL is held in Tradewinds Park, and runs approximately from immediately before Thanksgiving Day in November until just after New Year’s Day in early January. The Park is normally closed at sundown, but during these months a designated area in the northern part of the Park is reopened after dark for the purpose of presenting the event. Roughly 250,000 people visit the show each year.

The HFL consists of lighted displays measuring up to twenty-four (24) feet wide and fifteen (15) feet high. The displays are set up on a two-mile path through the park and visitors drive through the display area. Additionally, the County broadcasts music over a low wattage radio station which visitors may play over their car radios.

Each year, a list of the lighted displays to be included in the HFL is selected by a committee of the parks and recreation division. The ultimate discretion for selection of displays, however, rests with the parks and recreation director. The County’s intent in selecting displays is to provide entertainment through “fanciful, lighthearted or whimsical, but non-serious depictions related to the entire winter holiday season.”

The County has two primary means of generating revenue through the HFL. The first is through ticket purchases of people wishing to see the show. The second source of revenue is through the sponsorship of the light displays. Individuals and companies who sponsor displays are recognized at the HFL by a sign which identifies the sponsor in name and logo. The sign is displayed next to the sponsor’s chosen display. Sponsors are also entitled to have their name and logo included in printed materials promoting the event.

The County maintains a stated policy of not designing or accepting religious displays for exhibition in the HFL. According to the written policy, the Committee chooses displays which are "fanciful" and "based on a logical connection to the event's limited purpose of maximizing a light-hearted entertainment experience for people of all ages, but most particularly for children." The written policy further states: "Selected displays are consistent in scale and are compatible in theme and illumination with the event's purpose of a fun-filled, family-oriented entertainment experience."

In 2002, Calvary Chapel Church, Inc. applied to sponsor the HFL and submitted a proposed display to the County composed of a Christmas star and the words, "Remember Him - Presented by Calvary Chapel Ft. Lauderdale." Citing the display's overtly religious message, the County declined to include it in the show. Calvary Chapel and the County eventually came to an agreement that a display would be included in the show, sponsored by Calvary Chapel, with the Christmas star and the words, "God Bless America." According to parks and recreation director, the County accepted the display for the show because they did not want to lose a sponsor, and because the display had a patriotic theme.

On April 8, 2003, Calvary Chapel again submitted a proposed display to the County for inclusion in the HFL. The proposed display depicted a cross and the words, "Jesus is the Reason for the Season." Again objecting to the religious nature of its design, the County declined Calvary Chapel's proposed display. The parties discussed alternative designs, including ones not previously approved by the Committee, but ultimately were not able to reach agreement.

Calvary Chapel alleged that its application to participate in the County's 2003 HFL was wrongfully denied and petitioned the federal district court to issue an order requiring the County to permit Calvary Chapel to sponsor a display in the 2003 HFL. Calvary Chapel's proposed display would consist of a cross and the words, "Jesus is the Reason for the Season - Calvary Chapel Fort Lauderdale."

TYPE OF SPEECH

According to the federal district court, the type of speech being regulated would, in part, determine whether a public entity's regulation of speech violates a speaker's First Amendment free speech rights. In making this determination, the court would first have to identify the type of speech being regulated.

Citing precedent from the opinion of the U.S. Supreme Court in *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760, 132 L. Ed. 2d 650, 115 S. Ct. 2440 (1995), the federal district court acknowledged the "well established" principle that "private religious speech is protected by the First Amendment." (*Pinette* was reported in the November 1995 NRPA Review, "KKK Cross on Capitol Square Not State Endorsement of Religion," *Parks & Recreation*, Vol. 30, Iss. 11; p. 20.)

In *Pinette*, the Supreme Court noted that “private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.” Similarly, the federal district court in this particular instance determined Calvary Chapel's proposed display - a cross with the words "Jesus is the reason for the Season" - was a “private religious expression within the First Amendment's protection.”

NATURE OF PUBLIC FORUM

Having concluded that Calvary Chapel's proposed display constituted private religious expression protected by the First Amendment, the court had to determine whether “the nature of the relevant forum” could limit the scope of permissible speech consistent with the Constitution. In making such a determination, the court noted that government “may not discriminate based on the viewpoint which a speaker seeks to express,” regardless of the nature of the forum.

As a general rule, the court acknowledged that “government ownership of property does not automatically open that property to the public.” Rather, “the access sought by the speaker” will determine whether a particular section of a public park is defined as a traditional public forum, a limited public forum, or a non-public forum.

As described by the court, a traditional public forum is a place, like a public park or street, that has traditionally been available for public expression. In a traditional public forum, any regulation of speech must be narrowly drawn and necessary to achieve a compelling state interest. Similarly, a limited public forum is a public area that the government has opened for use by the public as a place for expressive activity. However, unlike the traditional public forum, a limited public forum is created by the government for a limited purpose such as use by certain groups or for the discussion of certain subjects. In a limited public forum, the government may restrict speech to the groups or topics for which the forum has been created. Any such restriction, however, must be reasonable and may not discriminate on the basis of viewpoint.

In contrast, a non-public forum is one where public property is not by tradition or designation a forum for public communication. As noted by the court, such a forum exists where “the government acts in its position as proprietor to manage its own internal operations, as opposed to using its power as a regulator or lawmaker.” Applying this definition to the facts of the case, the federal district court determined that the HFL was a non-public forum because it was conducted in an otherwise closed area of the park, focusing on limited content (i.e., recognition of the winter holiday season) with the intention of generating revenue. Under such circumstances, for First Amendment purposes, the court

Though it is held in a public park, the HFL occurs after dark in a designated section of the Park which is closed except for the HFL. Moreover, the parties agree that the HFL is not a forum for general discussion, but rather is limited to recognition of the winter holiday

season, including Christmas. Additionally, the testimony of Harbin [the parks and recreation director supports]... a finding that the County established and continues to operate the HFL in its role as a proprietor of land and with the intent of generating revenue...

For First Amendment purposes, the regulation of speech in non-public fora is examined for reasonableness and viewpoint neutrality. Thus, in a non-public forum, the Government may make distinctions based on subject matter and speaker identity, but it may not discriminate based on the speaker's viewpoint.

As a result, any governmental regulation of free speech in this particular non-public forum had to be viewpoint neutral and reasonable in making distinctions based on speaker identity or subject matter.

As noted by the court, there was no allegation that “the County has excluded the church based on its identity” as a religious organization. On the contrary, the court found Calvary Chapel was able to participate in the 2002 HFL in the same manner as commercial entities or any other organization or individual. According to the court, “the only qualification on speakers is their ability to pay.”

VIEWPOINT NEUTRAL?

Calvary Chapel, however, claimed that the County’s policy, as applied to its proposed display, did not make a reasonable distinction based on subject matter. As a result, Calvary Chapel contended that the County’s policy amounted to an unconstitutional regulation of speech “based on content or viewpoint.” Specifically, Calvary Chapel argued that the County had unconstitutionally discriminated against its particular religious viewpoint on the subject matter open for discussion, i.e., the winter holiday season.

In response, the County claimed that is excluded “all overtly religious, overtly political and overtly commercial subject matter because those topics have the potential to cause controversy or distract from the ‘fun’, ‘lighthearted’ and ‘fanciful’ themes of the HFL.” Further, the County argued that “these subject matter exclusions are rationally related to its goals of generating revenue and providing entertainment.” As characterized by the County, “all of the displays including those specified by Calvary Chapel depicting Santa Claus, Christmas trees and a dreidel are secular and are ‘fun,’ ‘lighthearted’ or ‘fanciful’ and thus are within the subject matter of the HFL.”

At the HFL, the subject matter open for expression is the winter holiday season, including Christmas. The County permits the sponsorship of displays regarding the secular viewpoint of Christmas (i.e. Santa Claus with a sleigh pulled by reindeer and Christmas trees), the commercial viewpoint of Christmas (i.e. that the holiday is a time for the giving and receiving of decoratively wrapped gifts) and the fanciful viewpoint of

Christmas (i.e. various animals and figures participating in gift giving and winter time activities).

In the opinion of the County, Calvary Chapel's application was rejected because the proposed display was not within the subject matter of the HFL because it did not present a secular, commercial, or fanciful viewpoint of Christmas. Rather, the County contended that Calvary Chapel's display represented a religious viewpoint of Christmas (i.e. a cross and the words, "Jesus is the reason for the season").

As noted by the court, Christmas in this country has a "secular, as well as a religious, dimension." As a result, the court found that "a display which is overtly religious in nature may also be characterized as reflecting the holiday of Christmas from a religious viewpoint."

In this particular instance, the court found that the County had "created a non-public forum in which sponsors may recognize the winter holiday season, including Christmas." Under such circumstances, the court determined that "the County may exclude other subject matter" from the non-public forum. However, the court concluded that "the County may not exclude alternative viewpoints with respect to the holidays included in the HFL" because they are not secular, commercial, or fanciful. As a result, the federal district court held that it was a violation of Calvary Chapel's First Amendment rights to exclude its religious viewpoint of the holiday of Christmas.

ESTABLISHMENT CLAUSE DEFENSE

The federal district court also considered whether inclusion of Calvary Chapel's proposed display in the HFL would violate the Establishment Clause which provides that "Congress shall make no law respecting an establishment of religion." Under the Establishment Clause, "government may not promote or affiliate itself with any religious doctrine or organization." Further, government may not discriminate among persons on the basis of their religious beliefs and practices." To avoid Establishment Clause problems, the Supreme Court has required governmental entities to meet the following standard:

The challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion.

On the other hand, the Supreme Court has determined that "the government may acknowledge Christmas as a cultural phenomenon" without triggering Establishment Clause concerns.

In this particular instance, the federal district court was concerned that reasonable observers could reasonably believe that the government's approval of Calvary Chapel's application "sends a message of governmental endorsement of religion." Specifically, the court was concerned that "the sponsorship signs which accompany sponsored

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displays are not obvious to the casual observer.” In the opinion of the court, it was thus “possible for the community to view Calvary Chapel's proposed display as an endorsement by the County of the religious message contained therein.” To avoid the possibility that the reasonable observer might construe such a display as “an endorsement by the County of Calvary Chapel's religious viewpoint,” the court imposed the following condition:

It is necessary, therefore, that Calvary Chapel's proposed display be modified to state "Calvary Chapel says - Jesus is the reason for the Season" to avoid the potential for an Establishment Clause violation thru [sic] any argument that the County endorses Calvary Chapel's viewpoint.

With this modification, the court ordered the County to “permit Calvary Chapel to sponsor its proposed display in the 2003 Holiday Fantasy of Light.”

More information on the Holiday Fantasy of Lights in Broward County, Florida can be found on the Broward County, Florida website at the following address:

<http://www.co.broward.fl.us/parks/hfol.htm>