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DID CITY BALLFIELD PERMITS FAVOR RELIGIOUS SCHOOLS?

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In the case of *Rogers v. Mulholland*, C.A. No. 09-493 ML, 2012 U.S. Dist. LEXIS 62437 (Dist. R.I. 5/4/2012), plaintiffs claimed the City of Pawtucket, Rhode Island violated the separation of Church and State required by the Establishment Clause of the First Amendment by "preferentially allocating permits for the use of publicly owned and maintained athletic fields to private religious schools." Plaintiffs included City residents and parents of children who attended City public schools.

FACTS

Public and private schools in the City of Pawtucket (City), including a number of Catholic and public charter schools did not have athletic fields on their school grounds. As a result, public and private school athletic teams shared City-owned and maintained fields. In so doing, some school athletes had to travel several miles to get to City assigned fields for their "home" games and practices. The City did not generally provide transportation to home games or practices for public school students.

This particular controversy arose out of the policy used by the City to issue permits for football and soccer fields. Several months before the fall athletic season, athletic directors would submit requests to the City for permits to use particular fields, including specific days and times for football and soccer games and practices.

Until 2010, the City did not have written policies governing the field permitting process. Instead, the City's superintendent of parks and recreation made permitting decisions on a "case-by-case basis." These decisions were largely governed by "grandfather rights," i.e., a school's historic use of a field. In so doing, the superintendent also considered the proximity of a field to a school, the general condition of the field, whether the school assigned the permit in the past took appropriate care of the field, and the general adaptability of a field to the particular sport.

In assigning fields, public schools were given first preference for games, but no preference for assignment of fields for practices. In the event two or more schools requested the same field at the same time, the parks and recreation superintendent would seek the guidance of his supervisor, the City director of public works.

In the spring of 2010, the City adopted written policies governing the field permitting process, but the parks and recreation superintendent continued to issue permits in the same manner he did prior to the adoption of the policies. In so doing, however, the superintendent testified that he believed the written policies, for the most part, "codified the unwritten policies that had been in effect prior to 2010." Under this policy, several athletic directors claimed a "number" of public school soccer practices had to be cancelled because "no field was available or because a team chose not to travel to an available field" which was "far away."

In 2010, the City began using a computer program that streamlined the permitting process and made it more detailed and accurate. Under the City's written policy, a June 15 deadline was set for the submission of permit requests for the 2011 fall season. The public schools met the June 15 deadline, but one Catholic high school did not submit a request until July 1. Another Catholic high school (SRA) had sent an e-mail requesting fields, but had not submitted the official permit applications by the June 15 deadline. The assistant superintendent informed SRA that it needed to submit the official applications. SRA, however, did not submit the official applications on a timely basis.

As of September 6, the assistant superintendent was holding fields for SRA even though one of the public schools had filed timely permit requests for some of the same fields. The assistant superintendent admitted it was an oversight on his part that he "did not realize that SRA had not forwarded him timely official permit applications." Some time after June 15, SRA finally submitted official permit applications. For the 2011 season, the City granted all *timely* filed permit requests.

After those permits were issued, permits were issued to SRA and another Catholic high school (Keough) for the fields that remained available. All schools, both public and private, had adequate field space for games and practices during the 2011 season.

STANDING TO SUE

As a preliminary procedural matter, a plaintiff must establish a legal basis for bringing a lawsuit, i.e., standing to sue. To establish standing, a plaintiff must be the proper party to bring a particular case to court based upon a personal stake in a controversy involving actual injury to a legally protected interest. According to the federal district court, the plaintiffs in this case had "standing" to bring their lawsuit because they all paid municipal property taxes to the City which used tax revenues to administer the field permitting process and maintain City athletic facilities. As a result, for standing purposes, the court found a sufficient connection between the City's permitting policies and the purported injury, here the alleged misuse of public funds. The plaintiffs, therefore, had standing to pursue a court order to "end the City's allegedly discretionary pro-sectarian field permitting policies."

ESTABLISHMENT CLAUSE

As cited by the federal district court, the Establishment Clause in the First Amendment, in pertinent part, provides: "Congress shall make no law respecting an establishment of religion." While the First Amendment refers to the federal government, the court noted "the Establishment Clause was incorporated to apply to the states by the Fourteenth Amendment." As described by the court, the "defining principle of the First Amendment is that it mandates government neutrality between religion and religion, and between religion and non-religion":

> When the government acts with the ostensible and predominant purpose of advancing religion, it violates the central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides.

The federal district court, however, acknowledged "[t]otal separation between Church and State, however, is not possible in the strict or absolute sense, nor is it required by the Constitution":

> Recognizing that this Nation's history has not been one of entirely sanitized separation between Church and State, the Supreme Court has noted that it has never been thought either possible or desirable to enforce a regime of total separation. Thus, the principle is fixed that a government program or law which in some manner aids an institution with a religious affiliation does not, for that reason alone, violate the Establishment Clause.
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> The line, however, between neutrality and permissible accommodation, on the one hand, and improper sponsorship or interference, on the other, must be delicately drawn to prohibit the establishment of religion. The Establishment Clause serves not as a closed door, but as a judicious chaperone; it permits a certain degree of impartial and friendly dialogue, but is swift to step in once that dialogue turns stigmatic or coercive.

According to the federal district court, Establishment Clause concerns "arise not when religion is allowed by government to exist or even flourish, but when government sets a religious agenda or becomes actively involved in religious activity." In reviewing an Establishment Clause challenge to governmental conduct, the court indicated it would "determine whether, in reality, it establishes a religion or religious faith, or tends to do so." In so doing, the court acknowledged that the Supreme Court had not "set forth a one-size-fits-all test to determine whether or not governmental conduct runs afoul of the Establishment Clause." Instead, the federal district court found the Supreme Court had "espoused several methods of analysis to determine whether government conduct offends the Establishment Clause."

LEMON TEST

As described by the court, one such method articulated by the Supreme Court to determine whether governmental conduct violates the Establishment Clause is the "Lemon test," which refers to a 1971 opinion in the case of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745:

> To determine whether government conduct violates the Establishment Clause under *Lemon*, courts consider (1) whether the conduct has a secular purpose, (2) whether the conduct's principal or primary effect is one that neither advances nor inhibits religion, and (3) whether the conduct fosters an excessive government entanglement with religion.

SECULAR PURPOSE

In applying the first prong of the three-part *Lemon* test, the secular purpose prong, the court would have to "determine whether the predominant purpose of the practice in question is secular." In this particular instance, plaintiffs claimed the City had violated the Establishment Clause by "preferentially allocating permits to religious schools." Specifically, plaintiffs

contended "the manner in which the City permits fields has both the purpose and effect of impermissibly aiding religious schools." The federal district court rejected plaintiffs' argument. In so doing, the court found plaintiffs had failed to bear the burden of proving that the defendants have violated the Establishment Clause.

In the opinion of the court, the record did not support plaintiffs' claim of "preferential allocation." On the contrary, the court found "the City's permitting policies give first preference to the scheduling of public school games." As a result, the court found "both public high school and junior high school games are permitted first and take precedence over the permitting of private school games."

In the opinion of the court, "the City's permitting policies implement the clearly secular purpose of allocating limited game and practice field space to all junior high and high school students within the City." As a result, the federal district court held "the City's permitting policies have a predominant secular purpose" and, thus, satisfied the first prong of the *Lemon* test.

ENDORSING RELIGION

Under the second prong of *Lemon*, the federal district court acknowledged that the government's conduct can not have the "principal or primary effect of endorsing" religion. Specifically, for government conduct "to have forbidden effects under *Lemon*," the court found "it must be fair to say that the government itself has advanced religion through its own activities and influence." Further, in determining whether governmental conduct endorsed or advanced religion, the court would "consider the context and circumstances of the conduct."

In this particular instance, plaintiffs argued "the City's athletic field "permitting policies impermissibly aided Catholic schools." The federal district court disagreed. In the opinion of the court, [t]he athletic events at the core of this matter, mainly football and soccer games and practices, are wholly secular in nature and convey no religious message." Moreover, the court found "no evidence that the fields are used for anything other than a purely secular purpose."

While plaintiffs conceded "the athletic activities at the heart of this matter are purely secular" and did not promote a religious message, they argued "the City has granted religious schools field space at the expense of public schools, thus assisting and endorsing the Catholic religion." Once again, the federal district court disagreed. In so doing, the court noted "the Supreme Court has consistently rejected the premise that conduct which in some manner aids an institution with a religious affiliation violates the Establishment Clause.

> Some benefit flowing from the government to religion is permissible, as not every practice that confers an indirect, remote or incidental benefit upon religion is, for that reason alone, constitutionally invalid.

Applying this principle to the facts of the case, the court held "[t]he City's permitting policies are 'free of religious trappings' and do not have the principal or primary effect of advancing religion." Specifically, the court found "[t]he City's conduct makes City athletic facilities available to all students attending junior high and high schools in the City." Moreover, the court

noted that “[o]wnership of the facilities remains with the City and no funds are furnished to religious schools.”

EXCESSIVE ENTANGLEMENT

As cited by the federal district court, “Lemon's third prong requires that government conduct avoid excessive government entanglement with religion":

> Entanglement must be “excessive” before it runs afoul of the Establishment Clause. To assess entanglement, the United States Supreme Court looks to the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.

In addition, the federal district court would also consider the following factors to determine whether governmental conduct involves excessive entanglement with religion:

> whether the conduct (1) requires pervasive monitoring by public authorities to protect against religious inculcation; (2) requires "administrative cooperation between the government and religious schools; and (3) creates political divisiveness.

The court acknowledged, however, that the “last two considerations,” i.e., administrative cooperation and political divisiveness, were “insufficient by themselves to create excessive entanglement.” Accordingly, the court found “excessive entanglement requires more than mere interaction between church and state.”

Applying these principles to the facts of the case, the federal district court held the “ministerial interaction” between the City and the private schools in issuing permits “certainly is not the excessive entanglement with religion that the Establishment Clause prohibits.

> While it is obvious that the private schools that benefit from the City's permitting policies are sectarian, the nature of the benefit is wholly secular and there is no "relationship" between the City and religious authority. The permitting process requires minimal administrative cooperation between the City and the religious schools. The interaction is limited to the inevitable association necessary to request permits; that is, purely "ministerial or mechanical" tasks wholly removed from religious matters.

ENDORSEMENT ANALYSIS

Under the "endorsement analysis,” the federal district court would further “consider whether the challenged governmental action has the purpose or effect of endorsing, favoring, or promoting religion." As characterized by the court, the Establishment Clause “prohibits government from appearing to take a position on questions of religious belief or making adherence to a religion relevant in any way to a person's standing in the political community."

> A practice in which the state is involved may not send the ancillary message to members of the audience who are non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Moreover, in considering the constitutionality of the City's conduct, the court acknowledged its decision would "not turn on the subjective feelings" of the plaintiffs in this particular instance. On the contrary, in its "endorsement analysis," the court "assumes the viewpoint of an objective observer acquainted with the situation."

> In essence, the analysis is distilled to whether a reasonable observer, undertaking an objective inquiry, would conclude that the City's actions have the effect of endorsing religion. Thus, the Court is not required to ask whether there is any person who could find an endorsement of religion, whether some people may be offended by the conduct, or whether some reasonable person might think the City endorses religion. The Court considers whether a reasonable observer aware of the history and context of the community and forum in which the challenged conduct occurs would understand it to endorse religion or one religion over another.

Applying this "endorsement analysis" to the facts of this particular case, the federal district court would, therefore, "view the City's permitting procedures" from a perspective of a "reasonable and objective observer, fully aware of the background and circumstances." In so doing, the court found "no evidence that the fields are used for anything other than a purely secular purpose." Specifically, the court found" sectarian school students are receiving a benefit available to all junior high and high school students in the City." Moreover, the court noted that "[p]ublic schools receive preferential assignments for all games." Under such circumstances, the federal district concluded that "a reasonable observer aware of the relevant circumstances and context of the City's conduct would not perceive a message of governmental endorsement or sponsorship of religion."

CONCLUSION

Having determined that plaintiffs had "failed to carry their burden of proving that the City has offended Constitutional protections" under the Establishment Clause, the federal district court entered judgment in favor of the City.

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