

SEPTEMBER 2000 LAW REVIEW

CIVIC EVENT FUND DISCRIMINATED AGAINST PRAYER DAY EVENT IN CITY PARK

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The *Gentala* opinion described herein illustrates the difficult and delicate balancing act which public entities must follow to avoid running afoul of the First Amendment. As noted by the federal appeals court in *Gentala*, the First Amendment requires the government to “juggle conflicting obligations toward its citizens”:

On the one hand, the Establishment Clause obligates government to inspect vigilantly its practices and policies to ensure that they do not create the impression that government is endorsing or favoring religion or any form of religious expression.

On the other hand, the Free Speech and Free Exercise Clauses require the government to monitor carefully its policies and practices to ensure that they do not unnecessarily trammel on individuals' opportunities to engage in expressive conduct, especially expressive conduct which stems from religious faith and belief.

In *Gentala*, despite the good faith efforts on the part of the City, the federal appeals court found that the City had “engaged in viewpoint discrimination in violation the First Amendment” when it rejected an application from a religious organization for in-kind funding otherwise available to individuals and groups conducting certain types of civic events.

IN-KIND FUNDS FOR PARK USE COSTS

In the case of *Gentala v. City of Tucson*, No. 97-17062 (9th Cir. 2000), the City of Tucson rejected “Patricia and Robert Gentalas' application to the City's Civic Events Fund for the coverage of costs for city services for local observances of the National Day of Prayer held in one of the City's public parks.” The facts of the case were as follows:

The City established the Fund to encourage civic events and provide a budgetary mechanism for accounting for the costs of in-kind services provided by the City for certain civic events. The Fund provides support for events "that celebrate and commemorate the historical, cultural and ethnic heritage of the City and the nation, or increase the community's knowledge and understanding of critical issues, with the purpose of improving citizens' quality of life; generate broad community appeal and participation . . . ; [or] instill civic pride in the City, state or nation." In-kind services

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provided by the City include use of the parks' event equipment, refuse containers and street sweeping.

As the organizers of the local observance of the National Day of Prayer, the Gentalas applied to the Fund for coverage of the costs of city services. The event organized by the Gentalas was part of the annual observance of the National Day of Prayer. This event was established by a joint resolution of Congress in 1952. Since 1952, each President has marked the Day with a presidential proclamation. For the year in question, President Clinton and the City's mayor issued a proclamation concerning the event. The Mayor's proclamation "clearly state[d] how prayer and especially the observance of a national day of prayer is part of the historical and cultural heritage of" the City and the nation. United States Air Force personnel, pastors from nine of the City's congregations, and almost one hundred people attended the event.

The Gentalas' application stated that the participants would be led in prayer for various concerns: improved relationships between different segments of society; political leaders; law enforcement and emergency services personnel; youth, families, neighborhoods and the homeless; educators and schools. The application also stated that the event would include patriotic decorations and music. Thus, while the event had a strong sectarian character, as a civic event capable of increasing the community's knowledge and understanding of critical issues as well as generating broad community interest, support and civic pride, the event fell within the scope of events for which the Fund had been created.

Prior to holding their event, the Gentalas submitted an application for reimbursement of costs from the Fund to the subcommittee which administers the Fund. According to the Gentalas' application to the Fund, the services for which they sought coverage amounted to less than \$500.

After the event had been mounted, the City Council reviewed the subcommittee's rejection and upheld it. Both groups cited only the Fund's explicit policy statement that "events held in direct support of religious organizations" are not eligible for the provision of services and concerns about how the Constitution regulates church-state relations in support of the rejection of the Gentalas' application.

The Gentalas subsequently filed suit alleging "the Fund's exception for 'events held in direct support of religious organizations' violated the Free Speech, Free Exercise and Establishment Clauses of the First Amendment." The Gentalas sought an order from the court prohibiting "the City from excluding

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plaintiffs and other religious groups from eligibility for coverage of costs under the Fund.” The federal district court refused. In the opinion of the district court, “the City’s actions did not violate the Gentalas’ free speech rights and that funding the National Day of Prayer activities would have violated the Establishment Clause.” The Gentalas appealed.

On appeal, the Gentalas contended that “the City’s rejection of their application for coverage of the cost of city services under the Civic Events Fund violated their free-speech rights guaranteed by the First Amendment.” In response, the City argued that “there was not a free-speech violation and that even if the Gentalas’ free-speech rights were infringed, this was justified by the City’s compelling interest in avoiding an Establishment Clause violation.”

VIEWPOINT DISCRIMINATION?

Quoting the U.S. Supreme Court, the federal appeals court noted that “the principal evil from the government against which the Free Speech Clause protects the citizenry is *discrimination on the basis of viewpoint* when regulating expressive activities.” (Emphasis added.) Moreover, the appeals court acknowledged that “[t]his prohibition on viewpoint discrimination retains its vitality even when government has created the forum in which expressive activities occur.”

Accordingly, the initial issue before the appeals court was “whether the National Day of Prayer event amounted to expressive conduct protected by the First Amendment’s Free Speech Clause.” In this particular instance, the court found that the Gentalas’ application stated that “they were inviting people to gather in the park for a time of praise and worship with singing and prayer.” In the opinion of the court, “[s]uch activity is speech within the meaning of the First Amendment.”

Having found that “the Gentalas were engaging in speech within the meaning of the First Amendment,” the federal appeals court then had to “define the forum in question” to which the Gentalas sought access.

In so doing, the court characterized Gentalas seeking access to the Fund as a “forum” within the context of First Amendment protection.

The relevant forum is defined by the access sought by the speaker... Although the Fund is not a forum for speech in the physical sense, as a government-created source of funding to cover costs associated with engaging in behavior deserving First Amendment protection, the Fund is a forum within the meaning of the First Amendment.

Under the circumstances of this case, the appeals court found the forum which the Gentalas sought to access to be a “limited public forum.” Specifically, the court found that the Fund was “a limited public forum that has been opened to support the expressive activities of certain groups speaking about certain

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topics.” As defined by the court, a “limited public forum” is “a forum opened by the government to certain speakers or topics.” Moreover, the court found that content-based discrimination “is permissible in fora opened for more limited purposes to preserve the nature of the forum.”

On the other hand, the appeals court acknowledged that “governmental discretion in managing the more selective forum is bounded by the same considerations - reasonableness in light of the forum's purpose and viewpoint neutrality.” Accordingly, the court noted that “the City's decisions to exclude speakers must be reasonable in light of the Fund's purposes.”

In maintaining the boundaries and integrity of the Fund, the City will, of necessity, engage in discrimination on the basis of the content of applicants' speech. In managing this forum, however,...content-based discrimination is legitimate only if conducted consistent with the Fund's purposes, whereas *any discrimination between applicants on the basis of viewpoint is forbidden*. [Emphasis added.]

The specific issue was, therefore, whether the City's exception for “events held in support of religious organizations” discriminated “on the basis of viewpoint on its face or as applied to the Gentalas by the City.” In this particular instance, the court noted that “the record shows -- and the City has never contested -- that the application was denied due to the religious character of the event for which the Gentalas were seeking reimbursement.” Accordingly, the court found that the Gentalas' application had been denied “merely because it would bring a religious perspective to an otherwise permissible conversation.”

The National Day of Prayer event was, in part, a civic gathering drawing the community together to address issues of community-wide concern -- e.g., homelessness, education, law enforcement. The nature of the event fits within the general purposes of the forum...

While the Gentalas' event obviously had sectarian elements, as previously described, it also had a civic character and fits comfortably within the general subject matter of events for which the Fund was created.

The policy explicitly excludes those "events held in direct support of religious organizations" and the City relied upon this exemption when rejecting the Gentalas' application. The Gentalas' application was rejected because of their view that the most relevant manner in which to address these important social concerns was through the expressive acts of worship, singing and prayer. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective resulted in the refusal to provide access to the relevant forum.

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As a result, the federal appeals court concluded that the City's rejection of the Gentalas' application was "impermissible viewpoint discrimination in violation of the Free Speech Clause of the First Amendment."

MAINTAIN NEUTRALITY TOWARDS RELIGION?

The City had also contended on appeal that "its rejection of the Gentalas' application was justified in light of the City's compelling interest in obeying the strictures of the First Amendment's Establishment Clause." As noted by the court, the Establishment Clause has been generally interpreted by the Supreme Court to prohibit laws or government actions which "aid one religion, aid all religions, or prefer one religion over another." At the same time, however, the court also recognized the fact that "the Supreme Court has repeatedly stated that government may acknowledge the role of religion in the life of its citizenry and incorporate some religious expression into public life."

The central lesson of the Supreme Court's Establishment Clause jurisprudence is that governmental programs must maintain "neutrality towards religion." On a number of occasions, the Court has concluded that governmental programs which distribute benefits on religiously neutral grounds do not run afoul of the Establishment Clause merely because they provide incidental benefits to organizations that seek to engage in religious expression.

When determining whether the relationship between religious expression and the government is permissible under or violative of the Establishment Clause, it is useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion.

Applying these principles to the facts of the case, the court found the City's Fund "undeniably serves a secular interest" because it "exists to support and encourage events celebrating the history and culture of the City's residents." Moreover, the court found that the City's Fund "does not have the primary or principal effect of advancing religion."

[E]ven if the City's reimbursement of costs for the National Day of Prayer event provided some support for theism over its opposite, or for Christianity over competing world views, the support provided by the City was neither substantial nor direct enough to amount to advancement of religion under the Supreme Court's Establishment Clause jurisprudence...

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[T]he mere provision of services or conferral of benefits to a religious organization under an otherwise neutral policy does not, without more, violate the Establishment Clause... [Rather, the issue is] the nature of subsidy being offered... [Specifically, the issue is] whether the support offered by the state is part of a neutral program available to a large range of speakers or whether it is a program designed and administered to further religious interests in some direct way.

Moreover, the court found that “the City's absorption of costs for in-kind services through the Fund,” was not a case where the City “is making direct money payments to an institution or group that is engaged in religious activity” even though it “clearly provides a benefit to the National Day of Prayer event.”

According to a management analyst from the City's Department of Budget and Research, money from the Fund is never paid directly to the event sponsors -- event sponsors request services from the City; the relevant City departments submit billing statements to the Fund instead of the event sponsors; the costs of the services are charged against the Fund. As its implementing policy states, the Fund is “a budgetary means of detailing the costs City departments incur providing in-kind support to Civic Events.” Moreover, the City maintains control over what services will be covered by the Fund and the amount the Fund will be charged for these services.

As noted by the federal appeals court, “programs of the state which provide benefits to groups on a neutral basis may benefit religious groups or religious perspectives when the relevant group meets the criteria of the program.”

[T]he Establishment Clause is not violated when religious groups happen to benefit from programs which are, by all accounts, neutral as to religion. Only where the programs would provide in-kind or financial benefits which would allow the religious organization to pursue its sectarian goals in an unfettered way on the government's dole or in the government's forum is the Establishment Clause possibly violated...

[W]ith the Fund, the government does not make direct payments to the organization and maintains control over which activities will be subsidized, the government can ensure that only those activities by sectarian groups which have a sufficient secular import will receive government assistance. Allowing religious groups to participate as beneficiaries of otherwise neutral programs fosters the nation's commitment to freedom of expression and to religious liberty without raising the specter of a state-sanctioned or state-funded church, which was the historical inspiration of the Establishment Clause.

GOVERNMENT SPEECH?

As described by the federal appeals court, “a central inquiry under the Establishment Clause” is whether “private religious speech would be mistaken for the speech of the government.” In this particular instance the City had claimed that “the presence of City employees operating lighting and sound equipment to establish that the National Day of Prayer event could be mistakenly interpreted as the speech of the City.” The appeals court rejected this argument.

[G]overnment endorses religious expression in violation of the Establishment Clause only when the government speaks for itself or manages a forum in favor of private religious expression... [I]t is no violation [of the Establishment Clause] for government to enact neutral policies that happen to benefit religion...

[T]he presence of City employees, without more, does not create such an imprimatur. The record also demonstrates, however, that any event having costs covered by the Fund must "acknowledge through event advertising and an announcement during [the] event that the City has contributed services to the event."

Moreover, the appeals court agreed with the district court that “the City’s advertisement requirement was insufficient to demonstrate that the City endorsed the expression of the Gentalas.”

The National Day of Prayer event was not the expression of the City itself and there is no allegation that the Fund was managed in a way that discriminated in favor of religious speech. The City maintained control over the content of the statement in the event's advertisement and could have modified it to decry any endorsement by the City of the event's content.

The appeals court, therefore, concluded that “the City engaged in viewpoint discrimination in violation of the First Amendment when rejecting the Gentalas' application to the Fund.” In so doing, the court further held that “the exception for events which directly support religious organizations is unconstitutional on its face, and that the Establishment Clause does not provide a compelling interest justifying that discrimination.” Further, the court found that “the Gentalas' expressive freedoms were violated as a result of the City's unconstitutional activities.” As a result, the appeals court reversed the lower court’s determination in favor of the City.

In reaching its conclusion, the federal appeals court found that the Supreme Court’s interpretation of the Establishment Clause and the Free Speech clauses of the First Amendment do not “provide local, state

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and national governmental entities with bright lines and simple tests to simplify the task of making decisions in this complex and politically charged area.” The federal appeals court did, however, offer the following “general guidance to the City of Tucson and other governmental decision-makers” to facilitate their attempts to draw the lines between the guarantees of the Free Speech and Establishment Clauses on a case by case basis.

While the idea of the government subsidizing a public prayer service raises obvious Establishment Clause concerns, the idea of excluding religious speakers from neutral government programs because of their identity and their message raises equally compelling Free Speech and Free Exercise questions...

Where the government has created a forum for expressive activities, and a private speaker meets the criteria for access to the forum, the speaker cannot be excluded merely because the speaker's expression addresses religion or adopts a religious perspective on an otherwise permissible topic. In addition, where the governmental forum includes the provision of financial subsidies or in-kind services, as long as those services are provided to all speakers in the forum on a religiously neutral basis, provision of such subsidies or services to a speaker with a religious perspective will not violate the Establishment Clause.