

CITY POLICY BAN ON RELIGIOUS FILM IN SENIOR CENTER UNCONSTITUTIONAL

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In the case of *Church on the Rock v. City of Albuquerque*, No. 95-2009, U.S. Court of Appeals, Tenth Circuit (1996), plaintiffs Church on the Rock and Pastor Don Kimbro ("Church on the Rock") brought suit under federal civil rights law (42 U.S.C. § 1983) alleging that "defendants the City of Albuquerque and its agents ('the City') denied Church on the Rock's First Amendment right to free expression at City Senior Centers." The facts of the case were as follows:

The City owns and operates six Senior Centers. The centers are multipurpose facilities that provide forums for lectures, classes, movies, crafts, bingo, dancing, physical exercise, and other activities. To become a member of a Senior Center, one need only fill out an application.

The sole requirement for membership is that a person be at least fifty-five years old or be married to a member who is at least fifty-five years old. People who use the Senior Centers do not reside there, and all of the programs are voluntary.

Many of the programs at the Senior Centers are organized and sponsored by private individuals or organizations. Senior center policies permit non-member groups to use the centers for classes and other activities if the subject matter is "of interest to senior citizens."

Alternatively, groups may use the Senior Centers without regard to this subject matter requirement if they are composed of seventy-five percent or more senior citizens. Nonmembers or persons under fifty-five years of age may conduct classes, and people who deliver lectures or teach classes are also permitted to distribute literature.

The range of subjects that qualify as being "of interest to senior citizens" is quite broad. The Senior Centers' activities catalogs list many of the programs that meet this requirement, such as Amateur Radio, Ceramics, Chinese, Choral Group, Economics, El Abuelo--The Clown of Spanish Culture, Fishing, Medicare/Health Insurance Counseling, Myth of the Hanging Tree, and Plants and People of New Mexico. The catalogs also include a number of classes and presentations in which religion or religious matters are the primary focus: Bible as Literature, Myths and Stories About the Millennium, Theosophy, and A Passover Commemoration (an oratorio). The catalogs encourage "ideas for new classes and programs" as well.

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On March 24, 1994, Pastor Kimbro, a citizen over the age of fifty-five, requested permission from Kathleen Stark, the supervisor of the Bear Canyon Senior Center, to show a two-hour film entitled "Jesus." The film recounts the life of Jesus Christ as described in the Gospel of Luke. At the conclusion of the story, a voice-over narrator makes affirming statements such as, "Jesus is exactly who he claimed to be--the Son of the Lord, the Savior of all mankind." The narrator then invites viewers to adopt the Christian religion and to join him in a short prayer. Kimbro also requested permission to give away giant-print New Testaments to persons attending the film.

On May 18, 1994, after reviewing the film, Mark Sanchez, the City's Deputy Director of Family and Community Services, denied Kimbro's requests. Sanchez stated that City policy prohibited the use of Senior Centers "for sectarian instruction or as a place for religious worship."

The City adopted this policy to conform with the terms of the Older Americans Act. The Older Americans Act provides federal funding to the states for multipurpose senior centers, but requires, as a condition for receiving such funding, that the "facility will not be used and is not intended to be used for sectarian instruction or as a place for religious worship." 42 U.S.C.A. § 3027(a)(14)(A)(iv).

In keeping with this directive, Senior Center personnel screen programs for sectarian instruction or religious worship before allowing them at the Senior Centers. Senior Center employees also monitor presentations for religious content by sitting in on classes and entertaining objections from Senior Center members who call attention to expression falling into one of these forbidden categories. When Senior Center employees determine that presentations are too religious in nature, they intervene to stop the presentations. There are no official criteria or written standards to assist them in deciding whether or not expression constitutes "sectarian instruction" or "religious worship."

Church on the Rock filed suit seeking a court order declaring the city's policy unconstitutional and an injunction prohibiting its enforcement. Specifically, the Church on the Rock claimed that "the City's policy prohibiting 'sectarian instruction and religious worship' at City Senior Centers violates the First Amendment." The federal district court granted summary judgment in favor of the City. The Church of the Rock appealed.

SECTARIAN INSTRUCTION - PROTECTED SPEECH?

According to the appeals court, "the speech in question is entitled to First Amendment protection." The City, however, argued on appeal that "the proselytizing religious speech in the film 'Jesus' enjoys a lesser degree of First Amendment protection than does religious speech that is not intended to recruit new believers." As described by the appeals court, the federal district court had agreed with the City had held

that sectarian instruction was not protected by the First Amendment.

In its decision, the court assumed without deciding that the Senior Center is a designated limited public forum. The court stated that the purpose of the Senior Center does not include sectarian instruction, and that the primary purpose of the film "Jesus" is to proselytize. The court concluded that the film constitutes sectarian instruction and that the City may therefore exclude the film on the ground that its subject matter is not within the purpose of the Senior Centers. The court also held that the City's restriction is not viewpoint-based because the City does not permit sectarian instruction from any religious perspective.

The appeals court noted, however, that the U.S. Supreme Court had "rejected the notion that speech about religion, religious speech designed to win converts, and religious worship by persons already converted should be treated differently under the First Amendment:

[It is] well established that religious worship and discussion are forms of speech and association protected by the First Amendment....[T]he fear that proselytizing by a "radical" church might cause unrest [is] difficult to defend as a reason to deny the presentation of a religious point of view about a subject the government] otherwise makes open to discussion on [public] property.

Applying this principle to the facts of the case, the appeals court found the City's policy "restricts speech that is entitled full protection under the First Amendment."

NATURE OF THE FORUM

In First Amendment cases, the appeals court noted that "[t]he government's ability to restrict protected speech by private persons on government property depends, in part, on the nature of the forum":

The three types of forums that may exist on government property are traditional public forums, designated public forums, and non-public forums... A non-public forum is government property that is not by tradition or designation a forum for public communication...

Traditional public forums are places such as streets and parks that by long tradition have been devoted to assembly and debate. Designated public forums are those created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects... Thus, designated public forums may be limited in terms of participants and in terms of subject matter. For example, University facilities opened for meetings of registered student organizations qualify as a designated public forum, as do public school classrooms that are available to the general public outside of school hours for limited purposes.

Applying these principles to the facts of the case, the appeals court found “[t]he Bear Canyon Senior Center is a designated public forum”:

It may not be classified as a traditional public forum because it is not a traditional location of public debate or assembly. It is, however, a place that has been opened to the public for discussive purposes. The City has permitted lectures and classes on a broad range of subjects by both members and non-members at its Senior Centers.

The City limits this designated public forum in two ways. First, the City imposes an age requirement for participation, although this limitation is rather flexible where groups or spouses are involved. Second, the City limits the subject matter of presentations to topics "of interest to senior citizens." The subject matter limitation has also been extremely flexible in practice, as evidenced by the long list of diverse topics that have been presented in the past.

Having “classified the type of forum involved,” the appeals court then examined “the type of restriction that the City has imposed” on protected speech in this particular instance. In so doing, the appeals court noted that “[t]he government bears a particularly heavy burden in justifying viewpoint-based restrictions in designated public forums”:

Viewpoint discrimination is "an egregious form of content discrimination." Content-based restrictions are subject to strict scrutiny. Viewpoint-based restrictions receive even more critical judicial treatment.

On the other hand, the appeals court acknowledged that “[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics”:

[I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, [the U.S. Supreme Court has] observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

Applying these principles to the facts of the case, the appeals court found “the City's policy is properly analyzed as a viewpoint-based restriction on speech” because “[t]he prohibited perspective, not the general subject matter” triggered the decision to bar the private expression.”

As described by the appeals court, the City maintained that “this policy is a restriction based upon content,

not viewpoint, because it disallows all sectarian instruction and religious worship in its Senior Centers, regardless of the particular religion involved.” Specifically, the City asserted the “Senior Center Policies and Procedures Manual” from the City's Office of Senior Affairs included the following directive: “It is prohibited to use any OSA facility for sectarian instruction or as a place for religious worship.” The appeals court, however, found the Supreme Court “has rejected similar arguments.” According to Supreme Court precedent cited by the appeals, “the mere fact that a regulation categorically treats all religions alike does not answer the critical question of whether viewpoint discrimination exists between religious and non-religious expression”:

Any prohibition of sectarian instruction where other instruction is permitted is inherently non-neutral with respect to viewpoint. Instruction becomes "sectarian" when it manifests a preference for a set of religious beliefs. Because there is no nonreligious sectarian instruction (and indeed the concept is a contradiction in terms), a restriction prohibiting sectarian instruction intrinsically favors secularism at the expense of religion.

Accordingly, under the circumstances of this case, the appeals court concluded that “the City's policy constitutes viewpoint discrimination” against the Church of the Rock. Moreover, the appeals court found the City's policy “would still amount to viewpoint discrimination... even if the City had not previously opened the Senior Centers to presentations on religious subjects.”

Here, the City had already opened the doors of its Senior Centers to presentations about religion, such as “The Bible as Literature” and “Myths and Stories About the Millennium.” The City allowed speakers at Senior Centers to discuss the Bible from a "strictly historical" perspective and to address religion as long as such presentations could be characterized as "a literature discussion or a philosophical discussion."

The film “Jesus” dealt with subject matter similar to that which would be included in a class on the Bible as literature. The film ran afoul of City policy, however, by advocating the adoption of the Christian faith. In contrast, a film about Jesus's life that ended on a skeptical note and urged agnosticism or atheism would not have contravened the City's policy.

ESTABLISHMENT CLAUSE

On appeal, the City had contended that its policy prohibiting sectarian instruction was justified because it “ensures conformity with the First Amendment's prohibition against state establishment of religion.” Under limited circumstances, the appeals court acknowledged that “the necessity of complying with another clause of the Constitution--the Establishment Clause--would excuse a viewpoint-based restriction on speech.” On the other hand, the appeals court found “[t]he Supreme Court has made it abundantly clear that providing equal access to a designated public forum for citizens engaging in religious expression and citizens engaging in secular expression does not violate the Establishment Clause.” Further, the appeals court noted as follows that “courts must examine viewpoint-based restrictions with an especially critical review of the government's

asserted justifications for those restrictions.”

Applying these principles to the facts of the case, the appeals court held that “the Establishment Clause does not compel the City to bar sectarian instruction and religious worship from its Senior Centers.”

At a minimum, to survive strict scrutiny, the City's policy must be narrowly drawn to effectuate a compelling state interest... While adherence to the Establishment Clause is a compelling government interest that may justify restrictions on speech in designated public forums, the City's restriction is not necessary to serve this interest...

The government need only remain neutral, preferring neither religious nor secular expression over the other. Where the state does not sponsor the religious expression, the expression is made on government property that has been opened to the public for speech purposes, and permission is obtained through the same application process and on the same terms as secular groups, there is no violation of the Establishment Clause. It is no violation for government to enact neutral policies that happen to benefit religion.”

The appeals court also rejected the City's contention that “its policy is necessary to protect the senior citizens who use its centers.” The City argues that the senior citizens who use the Senior Centers are members of a "captive audience" who are "vulnerable" to "religious proselytizing and coercion." The appeals court found the City's claim “best tenuous, and at worst insulting to senior citizens”:

People in this age group are not in need of special insulation from invitations to adopt a religious faith; nor are they, as a class, more likely than other citizens to be intimidated by such invitations. Moreover, the showing of the Jesus film and the distribution of giant-print New Testaments can hardly be construed as intimidating or coercive.

People who choose to attend presentations at the Senior Centers do not become part of a captive audience: attendance at such programs is purely voluntary, and people are free to come and go as they please. Nor is there any implicit coercion to attend. This is not a situation akin to the school graduation ceremony at issue in *Lee v. Weisman*, where those who chose to absent themselves paid the price of missing "one of life's most significant occasions. Shielding senior citizens from religious speech, then, is also an inadequate justification for the City's policy.

Accordingly, the appeals court concluded that “the City of Albuquerque has failed to show a compelling interest that justifies its policy prohibiting sectarian instruction and religious worship at its Senior Centers.”

OLDER AMERICANS ACT COMPLIANCE

The appeals court also addressed the City argument that “its policy is necessary to remain in compliance with

the Older Americans Act. “ Specifically, the City contended that “the policy mirrors the language of the Older Americans Act, which requires as a condition for receiving federal funding assurances that a ‘facility will not be used and is not intended to be used for sectarian instruction or as a place for religious worship,’ 42 U.S.C. § 3027(a)(14)(A)(iv).” The appeals court rejected this argument.

The fact that the City's policy is designed to conform with federal statutory requirements, however, does not shelter it from constitutional scrutiny. A city or state's desire for federal funds is not a compelling government interest. Thus, compliance with the Older Americans Act does not justify this viewpoint-based restriction on expression. In the context presented here, no government entity may permissibly control the viewpoint being expressed... [W]here the government expends public funds to convey its own message, it may say what it wishes; where private speech is concerned, the government may not restrict expression on the basis of viewpoint.

Having determined that the City's policy was an “unconstitutional restriction on expression,” the appeals court reversed the judgment of the district court and issued an injunction prohibiting “the City from barring the showing of the film ‘Jesus’ and the distribution of New Testaments at its Senior Centers.” As the prevailing party in a civil rights suits, the appeals court also awarded reasonable attorney's fees to the Church of the Rock “as provided under 42 U.S.C. § 1988.”