1991
Sekulow

REPORT: Legal Issues and Decisions Affecting Jewish Ministries and the Messianic Movement

Legal Issues and Decisions Affecting Jewish Ministries
and the Messianic Movement
by: Jay Sekulow[1]

Introduction

It goes without saying that the Jewish community is often very offended at the gospel. Realistically, it is the message that is deemed "offensive," not necessarily the messenger. The Jewish community's offense appears to be increased when the group propagating the gospel consists of Jews who have accepted Jesus. It is as if the First Amendment does not protect Jewish Believers. In spite of the severe attacks, victories have been won.

Much like the apostles and Christians of the first church, Jewish believers face ostracism from their families, their friends, and their religious community. More than in the conversion of a Gentile, a Jew must face an unavoidable confrontation with the religious beliefs of his family.

Historically, the Jewish people have suffered pain for their identity. Pain from outsiders has only served to make the bonds among the Jewish people stronger. As is true of any community, the Jewish community was forced to stand together for survival.

With these things in mind, it should not be surprising that some of the greatest opposition to Jewish believers propagating the Gospel has come from the Jewish community.

Board of Airport Commissioners v. Jews for Jesus

The Los Angeles International Airport sought to close its central terminals to persons distributing literature. The United States Supreme Court voted 9-0 to allow the distribution of religious literature in the central terminals.

The Court discussed the three types of fora for expressive activity: the traditional public forum, the public forum created by government designation, and the nonpublic forum. In Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 45 (1983), the Court held that "[f]or the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end....The State may also enforce regulations of the time, place, and manner of expression

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[1] *I would be remiss if I did not mention the invaluable help of Joel Thornton in the writing of this paper. Joel is a law clerk for C.A.S.E.*

which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."

The Jews for Jesus Court held that "the resolution is facially unconstitutional under the First Amendment overbreadth doctrine...we need not decide whether LAX is indeed a public forum, or whether the Perry standard is applicable when access to a nonpublic forum is not restricted." Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. , (1987), 96 L.Ed. 2d 500, 507.

In other words, the airport officials had overstepped their authority regardless of the type of forum. The officials were attempting to prohibit all protected expression through the creation of a virtual "First Amendment Free Zone" at LAX. Id. Even in an area of limited space, like an enclosed airport terminal, government officials cannot close off an area that has a nature that is compatible with First Amendment freedoms.

While ignoring the "public forum" analysis, the Court held that Jews for Jesus had the right to distribute literature in the central terminal of LAX. Thus, literature distribution remains protected speech without the benefit of public forum analysis.

Literature distribution is an important part of Christian outreach. Therefore, this case is important to the gospel. Many people are reached for Christ through the use of gospel tracts. Jewish believers use tracts that are designed to minister to Jews about the Messiah. Often these tracts have the Star of David or some other Jewish symbol on them. Jewish leaders have claimed an exclusive right to utilize Jewish symbols. They claim that it is a deceptive practice for Jewish believers to incorporate the symbol in outreach. According to the American Jewish Congress, the practice of using symbols that are associated with Judaism deceives people into believing that Christians are Jewish. In one case, the Union of Orthodox Congregations threatened to file suit against Jews for Jesus and others who utilized the Kosher symbol. We countered with a statement showing our willingness to go to court. They never filed the threatened suit.

Trademarks

Another example of the fight to hassle Jewish Believers is in a group of copyright cases. Complaints were made about the right to use "Mastercard" and "Bart for Jesus" as a tract. We immediately intervened. Never has a complaint been filed in court concerning this matter. In fact, once we became involved the complaints were stopped.

Yet, Mastercard, Merv Griffin Enterprises and others have threatened to file copyright action. We have always "welcomed" the suit and the legal proceedings never have occurred.

Advisory Opinion Cases

In the first week of February 1991, the Second Circuit Court of Appeals held that an airport could not prohibit the distribution of literature. Solicitation was held by the majority not to be speech permitted in airport terminals. This decision followed the plurality opinion of the Supreme Court in Kokinda. In a separate case the Second Circuit held that public

arenas are also an appropriate forum for First Amendment activity. "In many cities and suburban environs like Long Island, the municipal stadium has replaced the town meeting hall and the public square as a gathering place for large segments of the population to engage in meaningful discourse. If free public discussion is to maintain its vitality in our national life, we must remain vigilant against unnecessary restraints on our liberties, particularly those arbitrarily imposed by government fiat." It would, therefore, be inappropriate to refuse permission to distribute literature at public arenas.

These two Second Circuit decisions will allow missionaries the freedom to proclaim their message in vital public areas.

While the Supreme Court has not held that airport terminals are a public forum, the Court has held that First Amendment rights can be practiced in central airport terminals regardless of the type of forum that existed.

Thus, literature distribution is constitutional in airport terminals and around public arenas. The courts appear to be shifting to a case-by-case analysis of fora. This is troublesome to missionaries in the United States. It could mean that literature distribution becomes more tightly controlled. Mission organizations could spend considerably more time in court litigating the proclamation of the gospel in public places. For example, in Boston the Massachusetts Bay Transportation Authority has attempted to close portions of the subway system to Jews for Jesus missionaries who want to distribute literature. Currently, the Federal District Court in Boston is deciding whether to allow the distribution. Unfortunately, gospel organizations must worry about their First Amendment rights.

To date, these cases are favorable to the proclamation of the gospel. The next few years are crucial to the gospel. Will the apparent hostility be dissolved? Or will it increase? Most assuredly the American Jewish Congress will continue to apply pressure on the legal system to "protect" their religious rights by infringing on the religious rights of Christians around the country.

Beresford Case

The Israeli Supreme Court has continued the persecution of Jews who accept Jesus. They have denied the right of Jewish born people to become citizens of Israel if they have professed belief in Jesus Christ as the Messiah. In the case of the Beresfords, they have pronounced belief that Jesus is the Messiah. At the same time, they expressed a desire to worship through the tenets of Judaism. The Beresfords consider themselves to be Jews who believe in Jesus as the Messiah.

Despite the Beresfords desire to be viewed as Jews who believe in the Messiah, the State of Israel denied them entrance into citizenship of the state. The Israeli Supreme Court upheld their residency but not their citizenship. Citizenship carries with it medical insurance and other privileges. The government has, in effect, treated the Beresfords as second-class citizens. This is done in spite of the Law of Return, which allows Jews to return to Israel and find the nation open to them. The irony of the situation is that there is no denial of citizenship to Jews who do not practice Judaism, only those who believe that Jesus is the Messiah.

Were this attitude isolated it might be harmless. Unfortunately, the attitude expressed by the Israeli Supreme Court is also expressed by Jewish leaders in the United States. As shall be seen, the American Jewish Congress and others, are equally hostile to Jews who are proclaiming Jesus as the Messiah.

Recently, the government of Israel sent a rabbi to the Soviet Union to assist in the immigration of Russian Jews to Israel. The Jews of the Soviet Union are seeking to leave the Soviet Union due to the persecution of Jews in that nation. The persecution of Jews, as the Beresfords stated, transgresses the lines of doctrine. Jews who are strictly Orthodox, Reform, or Conservative are persecuted, as well as Jews who profess to believe in Jesus as the Messiah. Yet, the Israeli rabbi is in the Soviet Union to determine the fitness of the Jews seeking to immigrate. A Jew wishing to immigrate must be found to be strictly Jewish. According to USA Network News, the purpose of the rabbi is to prevent the immigration of Jewish believers to Israel.

High School Resistance--American Jewish Congress

One of the areas of greatest resistance from the American Jewish Congress has been in our public schools. The Jewish faith fears the proclamation of the gospel in the high school setting. Time and again, the American Jewish Congress has organized protests outside high schools where activities were taking place. A separation of church and state has been demanded by these protesters.

Christianity is a belief whose foundation demands that its members share their faith. This means that Christianity is viewed as a threat to all religious beliefs when it is not controlled by the government in public high schools. The American Jewish Congress sees Christian students as a threat to Judaism. Christianity does not, by its very doctrine, accept other religious beliefs. In our homogenous world this is not a popular ideology.

Public high schools are a particularly open field for student evangelism. American culture has thrown students into an uproar. From the viewpoint of the American Jewish Congress, high schools are a very upsetting forum for the expression of religious beliefs. Jewish leaders are fighting to keep their youth from being completely assimilated into American culture. Thus, they fight the opening of high schools for free speech rights.

The classic example of this fight is Westside Community Schools v. Mergens. As shall be shown, the American Jewish Congress did not sit passively by while this battle was fought in the Supreme Court of the United States.

Mergens Attacks Funded by the American Jewish Congress

The Mergens Court held that the Equal Access Act required that public funded secondary schools who allowed noncirriculum clubs to meet on their campuses must allow religious and political student groups to meet on campus. This ruling has opened up American secondary schools for Bible Clubs, Prayer Groups and student evangelism.

Needless to say, the American Jewish Congress and other Jewish groups have not viewed this decision favorably. Instead, they view the Mergens decision as an offensive

reversal of the privileges they have enjoyed for the last forty years.

The offense of the Mergens decision is further increased by the funding of the Supreme Court case by the American Jewish Congress. Supreme Court litigation is expensive. Public school districts are funded by taxes. Therefore, the school boards around the country operate on a very limited budget. In these days of budget cuts, education has not remained unscathed. Many battles that are being brought in the courts are being resolved by arbitration simply because the school board cannot afford the cost of federal litigation. When a person is found guilty of violating the civil rights of an individual or group, they must pay that individual or group's attorney's fees. In other words, when the school board is sued for a violation of First Amendment rights they must pay the fees of their attorney(s). If the school board loses the court case the school board must then pay the fees of the attorney(s) who was hired to bring the action against the school board.

Attorneys are expensive. Were the school board left to their budgetary requirements for hiring attorneys they could seldom afford to take an action to court. This is where the American Jewish Congress has stepped in. They helped fund the appeals process for the school board. The American Jewish Congress felt that the decision of the Supreme Court in Mergens was important enough to their interest to justify the expenditure of significant amounts of time and money. Thus, Jewish leaders believed that the separation of Church and State must be upheld at all costs.

Not content to sit on the sidelines, the American Jewish Congress financed the Mergens appeal. They were willing to deny equal access to religious and political ideas in public schools. Any attempt to enter the schools is offensive to the American Jewish Congress. The offering of finances is a small price to pay to stop equal access.

At all costs the American Jewish Congress wants to deny Christians the rights of speech and association in public schools. They protest the teaching of Christian beliefs. They object to the right of students to gather together for a Bible Club.

Without groups like the American Jewish Congress, the schools could not afford to consider religious discrimination. The American Jewish Congress and the American Civil Liberties Union and other such groups give the school systems the financial support they need to continue to discriminate against Christianity. Each legal victory creates a climate that is slightly more tolerant of true, pure religious freedom. Each victory makes the next battle more important.

The encouragement is, that the Jewish leadership sees Christianity as a threat to their youth. They do not see humanism as a threat. They see Jesus as a threat. The harder they fight, the more encouraged the Christian community should be. The power of the Gospel increases when religious freedom reigns. When religious freedom does not exist the proclamation of the Gospel suffers.

After Mergens the battlefield changes. The Supreme Court has ruled. Now the battle moves to the local school board. The local school board has options for avoiding Mergens. The option the Court left open was for the school board to close down the forum completely. In other words, the school board could stop all noncurriculum clubs from meeting on campus. For the school boards to avoid Mergens they would have to change more than policies. Local communities of Jews and other "libertarians" will now begin to

finance local battles. Some school districts have been hesitant to accept the Bible Clubs without resistance. Local administrators are so ingrained in the doctrine of the separation of church and state that they are resistant to the Supreme Court ruling in Mergens. Students around the country are still being forced to resort to legal action to start Bible Clubs. In some instances they are allowed to start a Bible Club, but are not being given all the rights of the other clubs. Students have been told that Bible Clubs cannot advertise, collect funds, be in the yearbook, or meet during lunch periods with other groups. When the school board has refused students' rights we have sent letters demanding that the school board reverse their position. In each occasion, we have had complete success. Thus far, all of our demands have been met.

As long as these attitudes exist locally, the work of Mergens is not complete. Attitudes like these give the Jewish leaders inroads to the administration. Local protests and political pressure can keep school boards from implementing the full rights granted by the Equal Access Act under Mergens. Those same political pressures can insure that the Mergens decision is implemented.

Are Jewish Believers a Legitimate Class to Be Protect by the Civil Rights Act? Jews for Jesus v. JCRC

The Jewish Community Relations Council successfully persuaded owners and operators of places of public accommodations from renting facilities to Jews for Jesus. Jews for Jesus filed a suit against JCRC alleging a violation of civil rights through conspiracy. The JCRC is offended at the claims of Jews for Jesus that Jesus is the Messiah. The prominence of Jews for Jesus causes JCRC to fear their presence. Thus, JCRC conspires to have public accommodations closed to Jews for Jesus.

The court has recently asked for a letter brief. The question to be addressed is whether Jews for Jesus as a Messianic movement is a protected class. The answer the court arrives at on this question will determine whether Jews for Jesus and the Messianic movement are legitimate. In a sense, the right of Jews for Jesus and the Messianic movement to exist is at stake. The court has the power to say that JCRC can or cannot persecute Jews for Jesus. Jesus did say that we would have persecution while we were in this world. The question here is deeper than mere persecution. The issue here is whether the state will endorse or tolerate persecution of people simply because of their stated beliefs concerning religion. Is the state going to endorse or tolerate the use of political and religious influence to determine who is allowed to freely practice their religion in public places?

This case is a battle for the rights of any individual to choose how to believe in God. It will decide who decides what is an appropriate doctrine for people to believe. This is the same battle fought by the founders of this country. Will we tolerate religious intolerance for any reason? Will Jews be allowed to tell Jewish believers what is acceptable? The Jewish Community Relations Council is promulgating the very ideas they despise. They fear the erosion of Judaism. To stop this erosion they are willing to erode the rights of Jews for

Jesus to practice and promulgate their beliefs. Any time First Amendment rights are compromised there is loss to everyone. Christianity in particular has proven susceptible to the loss of First Amendment rights once the First Amendment is compromised.

The cost of peace which the American Jewish Congress calls for is a compromise in our witness for Jesus. The legal system of the United States was designed to offer protection to every religious belief, including the religious minority and the dissenter. We must utilize the system to achieve our rights. We must utilize our rights or we will lose them. In 1990 the Supreme Court even upheld the rights of religious and politically motivated students to meet in order to exchange their ideas. The students have the right to use the bulletin boards, school newspapers, P.A. system, etc. to inform other students that their meetings are taking place. In short, the Court has upheld the rights of Christians.

The American Jewish Congress is not going to stand idly by while the right of Christians to share the gospel is strengthened. We must prepare for the battle. For the past forty years Christians have allowed themselves to be treated like second-class citizens. The rights of Christians have been narrowed considerably. Now, in the 1990s the legal system of the United States appears to be giving Christians a second chance. There is no guarantee that we will get a third chance. If we do not act now we may never get the chance to act again.

Undoubtedly, the American Jewish Congress and others will not allow this change of the times to continue unabated without a fight. Are we prepared to defend the rights that have been handed to us?

These are the kinds of cases that we are litigating at the present time. They are representative of cases that we have handled in the past and ones that we will pursue in the future.

ACTIVE CASES

1. Hirsh v. City of Atlanta:

An injunction was issued in the City of Atlanta prohibiting prayer, evangelism or peaceful protest in front of every abortion clinic in the city of Atlanta. I argued the case before the Georgia Supreme Court on October 10, 1990. We are still awaiting the decision.

2. Cannon v. Denver:

I will be arguing the appeal before the Tenth Circuit on March 4, 1991. The issue is the immunity doctrine under 42 U.S.C. §1983.

3. Jews for Jesus v. Jewish Community Relations Council:

This civil rights lawsuit was filed in U.S. District Court in New York. Specifically, the JCRC successfully persuaded owners and operators of places of public accommadations from renting facilities to Jews for Jesus. We alleged that these actions violated 42 U.S.C. §1985(3) conspiracy to deny civil rights and various state claims. The Motions for Summary Judgment were argued in December. On February 11, 1991, the Court issued an order for a brief on the issue of whether Jews for Jesus is a protected class under 1985(3).

4. Thomason v. Jernigan:

This cause of action involved a Temporary Restraining Order which we filed against a city who closed off a public sidewalk for peaceful protest against abortion. A TRO was successfully obtained. We expect a hearing on the Preliminary Injunction in April.

5. Hemry v. Colorado Springs School District:

We are in Federal Court in Denver regarding a school policy prohibiting the distribution of Christian literature by students on campus. The trial was on February 7, 1991.

6. Black v. City of Atlanta:

A damage suit is being prepared against the City of Atlanta

for arresting twenty-four people while they silently prayed in front of an abortion clinic. There was no blocking of access.

7. NOW v. Operation Rescue, et al:

This is a civil action for RICO against Operation Rescue.

8. Silverstein v. Massachusetts Bay Transportation Authority (MBTA)

This action was tried in August, 1990, and we are awaiting the decision of Judge Zobel. Because of continued violations of the Agreed Interim Order, we have prepared and filed contempt papers.

The MBTA refused to allow Christians to hand out Gospel tracts at the subway stations. They allowed, of course, all different types of commercial activity. We have already obtained interim relief pending the final decision. Currently, evangelism can take place at the MBTA stations.

9. Jews for Jesus, Robert Mendelsohn, and others v. Union Station Redevelopment Corporation and others:

Union Station in Washington, D.C. refuses to allow any evangelism inside or outside of the station. This matter has not yet been filed. Freedom of Information Act requests have been submitted to the Department of Transportation and to the Washington Metropolitan Police in order to uncover essential factual information for the drafting of the pleadings.

10. David Henderson, Donald Kahn, et al. v. National Park Service:

This matter involves distribution of free religious literature in the vicinity of the Washington Monument, and on a public sidewalk in the vicinity of the Vietnam Veterans' Memorial. As a result of correspondence with counsel for the National Park Service, our clients now have access to a significant portion of the area surrounding the base of the Washington Monument. Further developments are pending on the portion of this matter involving the sidewalk near the Vietnam Veterans' Memorial.

11. Overcomer's Fellowship v. Town of Point Pleasant Beach:

This matter concerns access to a town's beach boardwalk. We have been advised by town counsel that the town will revise its boardwalk ordinance to delete all references to leafletting and pamphleteering that does not involve solicitations for donations. Thus, evangelism will be allowed. The Kokinda case which Jay argued in the Supreme Court was the precedent we relied upon.

12. Zauber v. Stone Mountain Memorial Park:

Stone Mountain refuses to allow evangelism inside the Park. Stone Mountain is a primary venue for the 1996 Summer Olympic Games

to be held in Atlanta.

Model pleadings have been reviewed. I have researched the status of the Park Association as an entity subject to suit. have met with Zauber to visit the Park and examine the areas where he wants access. This action will be filed in Superior Court.

13. Rice v. Tulsa Public School District:

This matter concerns high school student distribution of free religious literature to fellow students in the Tulsa, Oklahoma area. We have corresponded with the Superintendent, the School Board, and the School Board attorney. On January 30, 1991, the School Board agreed with our demands and the policies are being rewritten. Over 8000 Christian newspapers were distributed in just two days.

14. Life Issues Inc. v. Internal Revenue Service:

We are now nearly finished with this matter. We have forwarded to our client the appropriate forms and information for the revision of the Articles of Incorporation. (Revision was required by the Internal Revenue Service).

The I.R.S. refused to grant tax exemption to a pro-life newspaper. We appealled the denial to the Exemption Branch in Washington, D.C. The Exemption Branch reversed the adverse determination and ruled in favor of our clients.

15. NOW v. Operation Rescue

This three-phase litigation is nearly completed. In Maryland and the District of Columbia, we are awaiting the Courts' decisions on the question of attorneys fees. We have timely notified all Defendants that we will not be participating in appeals of either Judge Northrup's or Judge Oberdorfer's decisions. In the Virginia phase, the petition for certiorari was submitted on December 18, 1990. Opposing counsel will file their opposition to certiorari on January 22, 1991. According to the Supreme Court Clerk's Office, our petition for certiorari is scheduled for conference on February 15, 1991.

16. Wertheim v. Board of Trustees (Pierce College):

This case involves a group of Jews for Jesus missionaries who were arrested for distributing free religious literature on the campus of Pierce College. They were not read their rights and plastic wrist restraints were administered in public and they were jailed. This is a damage suit resulting from the missionaries' deprivation of personal property, pain and suffering, mental pain, suffering, embarrassment and humiliation, among other reasons. Discovery is under way in this case.

17. Mitch Glaser:

This is another case involving the arrest of a missionary on a college campus in California. A damage suit is filed.

18. Maine case: Grace Bible Fellowship v. MSAD #5:

This case involves equal access for a local church that was denied the right to lease school facilities. A permanent injunction was obtained against the School Board. The School Board has now appealed to the U.S. Court of Appeals for the First Circuit. The brief is due April 1.

19. Minnesota church zoning case: Cornerstone Bible Church v. City of Hastings, Minnesota:

A suburb of St. Paul, Minnesota will not allow churches to locate in commercial areas of the city. We argued the appeal to the 8th Circuit in St. Paul on February 13.

20. Reno Equal Access: Wallace v. Washoe County School District:

We are aiding Larry Crain of the Rutherford Institute with the Summary Judgment brief and trial on a case involving a public school's refusal to rent its facilities to a church for its weekly service. We will participate in the trial on February 27, 1991.

21. Colorado Bible censorship: Roberts v. Madigan:

Currently we are preparing a cert. petition to the U.S. Supreme Court. The Roberts case involves a school district which removed two Christian books from a classroom library which contained over two hundred-thirty seven books. (Only two of two-hundred thirty seven books were Christian). The teacher was also ordered to remove a Bible from his desk.

22. Pinellas County:

We are dealing with the TRO which was filed in this student literature distribution case. The TRO is currently under recess and a School Board meeting was rescheduled for February 13, 1991.

23. Binghamton, N.Y.:

We are awaiting a decision by the 2nd Circuit in this equal access case (We won a permanent injunction at the trial court).

24. Long Island:

We are waiting for the district judge to rule on our Summary Judgment Motion for a Permanent Injunction in this equal access case.

25. Judge Constangy amicus brief:

We are working on writing an amicus brief to the 4th Circuit

Court of Appeals concerning Judge William Constangy opening his courtroom with a prayer. The North Carolina Civil Liberties Union filed suit against the Judge and the U.S. District Court issued a permanent injunction against him.

26. Fernandina Beach, Florida situation:

We are wrapping up a case which will allow the Bible to be used in schools. Comprehensive guidelines are being drafted for the School Board by our offices.

27. Red Lion:

This case involves a suit wherein a teacher brought a tort action against a group of Christian parents. The parents and students complained about the girl swimming in the nude.

28. Colorado pastor:

We are defending a pastor accused of disorderly conduct for counseling a member of his Church. This is a case of real religious bigotry.

29. Albuquerque Public Schools:

Students Anna Cortez and Christine Hans were not allowed to raise funds with their Christian club. We have written a demand letter to Dr. Jack Bobroff (1-9-91). Jim has been in contact with their attorney, Art Melindrez. According to Mr. Melindrez, the students will be allowed to have fundraisers. He is sending us a letter confirming this position. One of the senior partners died suddenly. Therefore, the process has been slowed. The Board of Education is allegedly drawing up guidelines to reflect this policy change.

30. Anaheim Union High School District:

Student Darrin Godin was not allowed to form a Bible Club. We wrote the school attorney, Lee Kellogg, a demand letter. He called Jay on January 31, 1991, to confirm that the school would be allowing Darrin to start a Bible Club. The School Board meets on February 14, 1991, to affect this change in school policy. Dr. Kellogg will inform us of the outcome of that meeting the following day.

31. Jason Kergosien, Houston:

Jason has not been allowed to distribute a Christian newspaper on his high school campus. Jason is a senior who only wants to use the campus for distribution. The paper will be produced elsewhere. Jim has talked to Jason. Jim told him to produce the paper and then request permission to distribute the newspaper. We are awaiting a copy of the paper from Jason with the principal's response.

32. Victory Church, Westminister, Colorado:

Darrin Brumley is an Associate Pastor. He is currently helping students start Bible Clubs on their campuses. I am working with Darrin to get the names and testimonies of students who want to start the club. In the next few days, the students will be sending me a copy of their attempts to start a club. They will also send a parental consent form allowing us to represent them in court. The two girls involved are sisters. One is in the tenth grade and the other is in the eleventh grade.

33. Bucheit v. Louisville School System:

We are preparing for trial a Hatch Act case involving two issues. The first concerns opting out of books advocating witchcraft. The second issue concerns the freedom of speech rights of a student who withdrew a picture of the Cross at Easter. The picture was torn up by School officials.

C.A.S.E. Advisory Report

From: Jay Alan Sekulow-Chief Counsel C.A.S.E.

Re: Public Forum Cases
New York-Coliseums and Airports

I. INTRODUCTION

This report will analyze two recent opinions from the United States Court of Appeals for the Second Circuit, both of which concern the distribution of religious literature in public places. One case dealt with sidewalks surrounding municipal coliseums. The other case dealt with airport terminals. Both cases relied on the Supreme Court case United States v. Kokinda, 110 S. Ct. 3115 (1990). C.A.S.E. presented the Kokinda case before the United States Supreme Court last year.

(a) Kokinda

At issue in Kokinda was a regulation which prohibited solicitation on an interior postal sidewalk. As originally interpreted, the distribution of free literature constituted solicitation pursuant to the regulation.

The Supreme Court in a divided opinion ruled as follows:

Four Justices (O'Connor, White, Rehnquist and Scalia) ruled that the sidewalk was a non-public forum for solicitation. Four Justices (Brennan, Marshall, Blackmun and Stevens) ruled that the sidewalk was a public forum for both solicitation and distribution. Justice Kennedy indicated that the sidewalk was a public forum but solicitation could be eliminated. "As society becomes more insular in character, it becomes essential to protect public places where traditional modes of speech and forms of expression can take place...Viewed in this light, the demand for recognition of heightened First Amendment protection has more force here..."

However, all nine Justices ruled that the distribution of free literature could not be banned on the postal sidewalk regardless of the nature of the forum. The Court drew a distinction between distribution and solicitation. For years municipalities lumped distribution into the solicitation regulations. These regulations placed improper restrictions on the distribution of free gospel tracts. From beaches, boardwalks, train stations and coliseums these "solicitation\distribution" regulations impeded the proclamation of the Gospel. In Kokinda a majority of the Court held that "it is not unreasonable to prohibit solicitation on the ground that it is unquestionably a particular form of speech that is disruptive of business...Solicitation impedes the normal flow of traffic."

"However, one need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand, but one must listen, comprehend, decide and act to respond to a solicitation." Kokinda.

Conclusion: The distribution of free gospel tracts on postal sidewalks is constitutionally appropriate. Furthermore, regulations of solicitations can not include distribution.

(b)

Paulsen, et al. v. County of Nassau,
Nassau Coliseum-Municipal Coliseum Sidewalks

On February 4, 1991, a unanimous three Judge panel of the Second Circuit Court of Appeals held that sidewalks surrounding the Nassau County Coliseum were public forums.

Facts: A group of Christians associated with Christian Joy Fellowship, distributed gospel tracts on the sidewalks surrounding the Nassau Coliseum during a rock concert. The plaintiff Paulsen was ordered by police to stop his distribution activities.

The Coliseum management company enforced a policy prohibiting solicitation which included distribution of free literature.

Holding: The distribution of religious literature is a protected activity and the sidewalks were public forums. "From the time of the founding of our nation, the distribution of written material has been an essential weapon in the defense of liberty. Throughout the years, the leaflet has retained its vitality as an effective and inexpensive means of disseminating religious and political thought...For those of moderate means, but deep conviction, freedom to circulate flyers implicates fundamental liberties..."

With regard to finding that the sidewalks were in fact public forums, the Court held that "Nassau County's intent in establishing and maintaining the Coliseum is the touchstone for determining whether a public forum has been created." The Coliseum's "bare assertion that Nassau County did not mean to permit noncommercial speech on Coliseum grounds is not conclusive." The Court evoked at the past practices of allowing free speech activity "and its compatability with expressive activity."

The Court looked to the Charter forming the Coliseum to determine the dedicated purpose. This was the same approach we used in the Oakland Coliseum case.

Relying on Justice Kennedy's concurrence in Kokinda, the Court held that although the government may seek to impose limitations on the utilization of the situs" if our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case... "In addition, the leaflets in this case are not likely to disturb seriously the audience attending an

event in the arena. Because one need not stop nor ponder the contents of a leaflet in order mechanically to take it out of someone's hand." Kokinda, 110 S. Ct. at 3122.

Conclusion: Coliseum sidewalks are open public forums for the distribution of gospel tracts.

(c)
ISKON (Krishna) v. Port Authority
Distribution of Religious Literature at Airports

Facts: The Port Authority of New York and New Jersey adopted a regulation banning the solicitation of money and distribution of literature within the terminals of three New York area airports.

Holding: A divided panel of the Second Circuit Court of Appeals held that the inside terminal areas were not public forums. However, the Court held that even in a non-public forum the prohibition of the distribution of literature was unconstitutional.

Again, the Court based its reasoning on Kokinda concerning the prohibition of solicitation. However, "with regard to the Port Authority ban on the distribution of literature, we read Kokinda as looking in a different direction." The Court noted that the four dissenters in Kokinda allowed distribution as did Justice Kennedy. Further the Court noted that the four vote plurality allowed distribution. "There was thus at least a majority, and perhaps more, that would allow the [distribution of literature]. We therefore hold that the Port Authority must provide reasonalbe access to the terminals for the distribution of literature."

Conclusion

The proclamation of the gospel by the distribution of gospel tracts will be protected even in non-public forum places. Thus, we believe the Courts will be inclined to avoid the forum issue and still uphold the First Amendment right to distribute free gospel tracts.

If you need additional information, please contact our office at (404) 633-2444.