Golden Gate University Law Review

Volume 37
Issue 3 *Ninth Circuit Survey*

Article 8

January 2007

Symbolic Speech and Equal Protection at the Las Vegas Fremont Street Experience: ACLU of Nevada v. City of Las Vegas

Christopher Donewald

Follow this and additional works at: http://digitalcommons.law.ggu.edu/ggulrev

 Part of the Constitutional Law Commons

Recommended Citation

Christopher Donewald, *Symbolic Speech and Equal Protection at the Las Vegas Fremont Street Experience: ACLU of Nevada v. City of Las Vegas*, 37 Golden Gate U. L. Rev. (2007).
http://digitalcommons.law.ggu.edu/ggulrev/vol37/iss3/8

This Note is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

CASE SUMMARY

SYMBOLIC SPEECH AND EQUAL PROTECTION AT THE LAS VEGAS FREMONT STREET EXPERIENCE

ACLU OF NEVADA v. CITY OF LAS VEGAS

INTRODUCTION

In *ACLU of Nevada v. City of Las Vegas*,[1] the Ninth Circuit held that a local "solicitation" ordinance enacted by the City of Las Vegas violated the plaintiffs' rights to expressive speech under the First Amendment.[2] Additionally, the Ninth Circuit held that a "tabling" ordinance, which provided a labor-related exception, violated the plaintiffs' right to equal protection guaranteed by the Fourteenth Amendment.[3] The court also decided an issue of first impression: whether the practice of erecting tables in a public forum for the purpose of disseminating information constitutes expressive activity and is therefore deserving of First Amendment protection.[4] The Ninth Circuit held that such expressive activity was protected by the First Amendment.[5]

---

[1] ACLU of Nev. v. City of Las Vegas, 466 F.3d 784 (9th Cir. 2006).
[2] *Id.* at 797, 800-01.
[3] *Id.* at 801.
[4] *Id.* at 798-99.
[5] *Id.* at 799.

Published by GGU Law Digital Commons, 2007

I. FACTS AND PROCEDURAL HISTORY

In the early 1990s, the City of Las Vegas, Nevada, contracted with a private entity, the Fremont Street Experience Limited Liability Corporation ("FSELLC"), in an effort to economically revive the downtown area known as Fremont Street.[6] Las Vegas city officials determined that the area was economically deteriorating and was no longer capable of competing with the more modern casino hotels on the Las Vegas Strip.[7] The street was turned into a pedestrian-friendly promenade and a large canopy featuring a light show was installed over parts of the street.[8]

Concurrently with Fremont Street's makeover, the city enacted two ordinances in an effort to preserve the comfortable entertainment environment it sought for its patrons. The first ordinance, known as "the solicitation ordinance," banned solicitation in the Fremont Street Experience area.[9] The second ordinance, known as "the tabling ordinance," prohibited activities solely in the Fremont Street Experience including, vending, tabling, and leafleting.[10] The tabling ordinance did, however, provide an exemption for labor-related activities in the area.[11]

In 1997, the American Civil Liberties Union of Nevada ("ACLU"), the Unitarian Universalist Social Justice Committee, the Shundahai

---

[6] *Id.* at 787.

[7] ACLU of Nev. v. City of Las Vegas, 466 F.3d 784, 787 (9th Cir. 2006).

[8] *Id.*

[9] *Id.* at 787-88; *see also* LAS VEGAS MUNICIPAL CODE § 10.44.030. The regulation defined solicitation as "to ask, beg, solicit or plead, whether orally, or in a written or printed manner, for the purpose of obtaining money, charity, business or patronage, or gifts or items of value for oneself or another person or organization." LAS VEGAS MUNICIPAL CODE § 10.44.010(A).

[10] *Id.* at 788-89; *see also* LAS VEGAS MUNICIPAL CODE §§ 11.68.100(B), (H), (I). Under the ordinance:

> The following are prohibited within the Pedestrian Mall:
>
> . . .
>
> (B) Mall vending, mall advertising, mall entertainment special events or other commercial activities unless conducted or authorized by The Fremont Street Experience Limited Liability Company;
>
> . . .
>
> (H) The placement of any table, rack, chair, box, cloth, stand, booth, container, structure or other object within the Pedestrian Mall except as necessary for emergency purposes, or the maintenance or repair of the Pedestrian Mall, or as authorized by The Fremont Street Experience Limited Liability Company for special events, mall advertising, mall entertainment or mall vending or other commercial and entertainment activities;
>
> (I) In-person distribution to passersby in a continuous or repetitive manner of any physical or tangible things and printed, written or graphic materials[.]

Id. at 789 n.4; *see also* LAS VEGAS MUNICIPAL CODE §§ 11.68.100(B), (H), (I).

[11] *ACLU of Nev.*, 466 F.3d at 789; *see also* LAS VEGAS MUNICIPAL CODE § 11.68.100.

Network, and three of their members filed for declaratory and injunctive relief in federal district court against the City of Las Vegas, the mayor of Las Vegas, the FSELLC, and the chief executive of FSELLC.[12] Plaintiffs, relying on 42 U.S.C. § 1983, "sought to enjoin [defendants] from enforcing several provisions of the Las Vegas Municipal Code."[13] Plaintiffs claimed that the provisions at issue unconstitutionally restricted their First Amendment right to free speech[14] and their Fourteenth Amendment right to equal protection of the laws.[15]

The United States District Court for the District of Nevada ruled that the Fremont Street Experience was a nonpublic forum.[16] This meant that the government could restrict free speech provided the restriction was reasonably related to a legitimate government interest.[17] The Ninth Circuit reversed, concluding that "[T]he Fremont Street Experience unmistakably possesse[d] the characteristics of a traditional public forum" and ordered the district court to reanalyze the solicitation and tabling ordinances in that light.[18] On remand, the district court found that the solicitation ordinance was a content-neutral time, place, and manner restriction on free speech.[19] The district court did, however, hold that the tabling ordinance was a violation of the plaintiffs' equal

---

[12] *ACLU of Nev.*, 466 F.3d at 786.

[13] ACLU of Nev. v. City of Las Vegas, 466 F.3d 784, 786 (9th Cir. 2006). The Shundahai Network and one if its members later dismissed their claims. *Id.* at 786 n.1.

[14] *Id.* at 788. *See also* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech.") "'Under the Fourteenth Amendment, city ordinances are within the scope of this limitation on governmental authority.'" *ACLU of Nev.*, 466 F.3d at 788 n.3 (quoting Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 792 n.2 (1984)).

[15] *ACLU of Nev.*, 466 F.3d at 786-87. In their amended complaint, plaintiffs asserted both that the solicitation and tabling ordinances violated their equal protection rights on their face, and as applied to them. *ACLU of Nev.*, 466 F.3d at 790. A "facial challenge" means that the law "always operates unconstitutionally." BLACK'S LAW DICTIONARY 92 (2d pocket ed. 2001). An "as-applied challenge" means that, although it may be constitutional on its face, the law operates unconstitutionally as to a particular case or particular facts. *Id.* The Ninth Circuit declined to hold that the tabling ordinance was facially unconstitutional, because "[o]n its face, the ordinance does not regulate expressive activity." *ACLU of Nev.*, 466 F.3d at 800. Regarding plaintiffs' equal protection claim for the solicitation ordinance, the Ninth Circuit did not address it after having found for plaintiffs on First Amendment grounds. *Id.* at 797 n.15.

[16] ACLU of Nev. v. City of Las Vegas, 13 F. Supp. 2d 1064, 1073-74 (D. Nev. 1998); *see also ACLU of Nev.*, 466 F.3d at 789.

[17] *See ACLU of Nev.*, 13 F. Supp. 2d at 1073-83. The district court permanently enjoined the defendants from enforcing the leafleting and vending ordinances. ACLU of Nev. v. City of Las Vegas, No. 97-1419, at 18 (D. Nev. Apr. 4, 2001) (unpublished order); *see also ACLU of Nev.*, 466 F.3d at 789.

[18] ACLU of Nev. v. City of Las Vegas (*ACLU I*), 333 F.3d 1092, 1094, 1108-09 (9th Cir. 2003); *see also ACLU of Nev.*, 466 F.3d at 789.

[19] ACLU of Nev. v. City of Las Vegas, No. 97-1419, at 5-8 (D. Nev. Mar. 4, 2005) (unpublished order); *see also ACLU of Nev.*, 466 F.3d at 790.

protection rights as applied to them.[20] The parties then cross-appealed to the Ninth Circuit for review.[21]

II. NINTH CIRCUIT ANALYSIS

The Ninth Circuit faced two issues in this case: first, whether the solicitation ordinance violated the plaintiffs' right to free speech under the First Amendment; and second, whether the tabling ordinance violated the plaintiffs' right to equal protection of the laws.[22] The court determined that the solicitation ordinance was a content-based restriction on the plaintiffs' right to free speech and that the regulation was not the least restrictive means of achieving a compelling government interest.[23] The court also held that the tabling ordinance was a violation of the plaintiffs' equal protection rights, but announced that the district court erred because it did not analyze whether erecting tables for purposes of disseminating information was worthy of First Amendment protection.[24] This was an issue of first impression, and the Ninth Circuit held that erecting tables for purposes of disseminating information was valid expressive conduct and that it must be analyzed with the First Amendment in mind.[25]

A. WHETHER THE SOLICITATION ORDINANCE VIOLATED THE PLAINTIFFS' FIRST AMENDMENT RIGHTS

The Ninth Circuit began its analysis by expressing its deep concern over the modern trend toward privatization of public places.[26] According to the court, it is essential to protect those places in society where traditional modes of speech and expression can take place.[27] With this concern in mind, the court discussed the permissible regulation of free speech within traditionally public forums.[28]

The court first distinguished those regulations that are permissible in a public forum and those that are not. Reasonable time, place, and manner regulations are acceptable provided they can be justified without

---

[20] ACLU of Nev. v. City of Las Vegas, No. 97-1419, at 9-10 (D. Nev. Mar. 4, 2005) (unpublished order); *see also ACLU of Nev.*, 466 F.3d at 790.

[21] ACLU of Nev. v. City of Las Vegas, 466 F.3d 784, 790 (9th Cir. 2006).

[22] *Id.* at 791-92, 797-98.

[23] *Id.* at 797.

[24] *Id.* at 798-99.

[25] *Id.* at 799.

[26] *Id.* at 791.

[27] ACLU of Nev. v. City of Las Vegas, 466 F.3d 784, 791 (9th Cir. 2006).

[28] *Id.* at 791-97.

reference to the speech's content (content-neutral).[29] These must be "narrowly tailored to serve a significant government interest, leaving open ample alternative channels of expression."[30]

Content-based regulations, on the other hand, are directed at the subject matter of the speech and are subject to strict scrutiny.[31] These limitations "'pass constitutional muster only if they are the least restrictive means to further a compelling government interest.'"[32]

The Ninth Circuit determined that the solicitation ordinance was content-based.[33] Justice Kennedy's concurring opinion in *International Society for Krishna Consciousness, Inc. v. Lee* ("*ISKCON*") guided the court in its analysis.[34] The Ninth Circuit, relying in part on Justice Kenney's concurrence, reasoned that "[b]ecause the regulation permitted 'the distribution of pre-addressed envelopes along with a plea to contribute money,' it limited only the 'manner' of expression, not the content."[35] If a "'solicitation regulation prohibited all speech that requested contribution of funds,'" however, it would be "'a direct, content-based restriction of free speech in clear violation of the First Amendment.'"[36] The Ninth Circuit concluded this was the case in *ACLU*.[37]

The court then analogized the ordinance to one involved in another Ninth Circuit case, *S.O.C., Inc. v. County of Clark*.[38] In *S.O.C.*, the Ninth

---

[29] *Id.* at 792.

[30] *Id.* (citing Clark v. Cmty. for Creative Non-Violence, 486 U.S. 288, 293 (1984)).

[31] *ACLU of Nev.*, 466 F.3d at 792 (citing Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 798-81 (1988); S.O.C., Inc. v. County of Clark, 152 F.3d 1136, 1145 (9th Cir. 1998)).

[32] *ACLU of Nev.*, 466 F.3d at 792 (quoting *S.O.C.*, 152 F.3d at 1145).

[33] ACLU of Nev. v. City of Las Vegas, 466 F.3d 784, 793-94, 796 (9th Cir. 2006). A regulation could also be content-based if the government enacted the ordinance because of its disapproval of certain messages, or had as its purpose shutting down certain messages simply because of their content. *See id.* at 793. The Ninth Circuit held that the record lacked sufficient evidence to show that the government had such a purpose in enacting the solicitation ordinance. *Id.* The plaintiffs failed to produce any evidence to support such an argument. *Id.*

[34] *Id.* at 795; *see also* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679, 683 (1992) (Kennedy, J., concurring) ("*ISKCON*").

[35] *ACLU of Nev.*, 466 F.3d at 795; *see also ISKCON*, 505 U.S. at 704-05 (Kennedy, J., concurring).

[36] *See ACLU of Nev.*, 466 F.3d at 795 (quoting *ISKCON*, 505 U.S. at 704 (Kennedy, J., concurring)).

[37] *ACLU of Nev.*, 466 F.3d at 795. The Ninth Circuit pointed out that, although there are numerous cases holding "that bans on the *act of solicitation* are content-neutral, [it could] not [find] any case holding that a regulation that separates out *words of solicitation* for differential treatment is content neutral." *Id.* at 794 (emphasis in original) (citations omitted).

[38] *Id.* at 795-96. *See generally* S.O.C., Inc. v. County of Clark, 152 F.3d 1136 (9th Cir. 1998).

Circuit held a local ordinance banning "off-premises canvassing"[39] was content-based because a law enforcement official would have to read the message to determine if it violated the ordinance.[40] The solicitation ordinance in *ACLU* banned not only the act of solicitation but also any message containing soliciting content.[41] Thus, the Ninth Circuit determined *S.O.C.* was the controlling case on the issue.[42] A law enforcement official would have to read the content of the solicitation to determine whether it violated the ordinance.[43] It was a content-based restriction on free speech and subject to strict scrutiny.[44]

A content-based restriction on free speech must be narrowly tailored to serve a compelling government interest.[45] The Ninth Circuit held that the solicitation ordinance was not the least restrictive means of protecting local visitors and merchants[46] because "[i]t prohibit[ed] even the peaceful, unobstructive distribution of handbills requesting future support of a charitable organization."[47] The Ninth Circuit then addressed the issue of the validity of the tabling ordinance under the First and Fourteenth Amendments.[48]

B. WHETHER THE TABLING ORDINANCE VIOLATED THE PLAINTIFFS' RIGHTS TO FREE SPEECH AND EQUAL PROTECTION

The district court did not address the issue of whether the First Amendment protected the erection of tables for the purpose of disseminating information.[49] The Ninth Circuit held this to be error, stating that "the level of scrutiny that we apply to an equal protection

---

[39] "Off-premises canvassing" refers to "the distribution of literature that advertised or promoted services or goods or otherwise proposed a commercial transaction" in public areas surrounding the Las Vegas Strip, including sidewalks along the Strip itself. *See* ACLU of Nev. v. City of Las Vegas, 466 F.3d 784, 795 (9th Cir. 2006) (citing *S.O.C.*, 152 F.3d at 1140 n.3).

[40] *S.O.C.*, 152 F.3d at 1145; *see also ACLU of Nev.*, 466 F.3d at 795-96.

[41] *ACLU of Nev.*, 466 F.3d at 796.

[42] *Id.*

[43] *Id.* at 795-96.

[44] *Id.* at 796.

[45] ACLU of Nev. v. City of Las Vegas, 466 F.3d 784, 797 (9th Cir. 2006).

[46] The court did not reach the issue of whether the city's proffered interests were compelling, but questioned whether the interest of "protecting the local merchant economy" could ever be compelling. *Id.* at 797. The court emphasized in a footnote that "'[e]conomic necessity, however, cannot provide the cover for government-supported infringements of speech.'" *Id.* at 797 n.14 (quoting Bock v. Westminster Mall Co., 819 P.2d 55, 61 (Colo. 1991).

[47] *ACLU of Nev.*, 466 F.3d at 797.

[48] *Id.* at 797-801.

[49] *Id.* 797.

claim varies depending on the nature of the right at issue."[50] If the use of tables was protected by the First Amendment, then the government's ordinance would violate the Equal Protection Clause unless the government could show that the distinctions drawn were "finely tailored to serve substantial [government] interests."[51]

The First Amendment issue was an issue of first impression for the Ninth Circuit.[52] Only the Eleventh Circuit had directly faced this issue.[53] In *International Caucus of Labor Committees v. City of Montgomery*, the Eleventh Circuit determined that a ban on tables from city sidewalks involved a policy regulating expressive activity.[54] Additionally, the Ninth Circuit analogized the facts of *ACLU* to a Ninth Circuit district court case in which the judge came to the same conclusion.[55] In *One World One Family Now, Inc. v. State of Nevada*, the district court held "that use of portable tables as a means of disseminating message-bearing T-shirts [was] entitled to First Amendment protection."[56] The district court analogized the use of tables for disseminating information to the use of news racks by newspaper publishers to disseminate protected speech to conclude that First Amendment protections applied.[57]

The Ninth Circuit agreed with the opinion in *One World One Family Now*, holding that "the erection of tables in a public forum is expressive activity protected by our Constitution to the extent that the tables facilitate the dissemination of First Amendment speech."[58] Because the ACLU erected tables to distribute petitions and hung an ACLU banner, the Ninth Circuit held that plaintiffs erected the tables to facilitate protected First Amendment speech.[59] The equal protection claim was analyzed with this finding as a guidepost.

Similar to the solicitation ordinance,[60] the limitations on the tabling

---

[50] *Id.* at 797-98.

[51] *Id.* at 798 (citing Carey v. Brown, 447 U.S. 455, 461-62 (1980); Perry v. Los Angeles Police Dep't, 121 F.3d 1365, 1368 (9th Cir. 1997)).

[52] ACLU of Nev. v. City of Las Vegas, 466 F.3d 784, 798 (9th Cir. 2006).

[53] *See generally* Int'l Caucus of Labor Comms. v. City of Montgomery, 111 F.3d 1548 (11th Cir. 1997); *see also ACLU of Nev.*, 466 F.3d at 798.

[54] *Int'l Caucus of Labor Comms.*, 111 F.3d at 1550.

[55] *See ACLU of Nev.*, 466 F.3d at 798-99; One World One Family Now, Inc. v. State of Nevada, 860 F. Supp. 1457 (D. Nev. 1994).

[56] *One World One Family Now*, 860 F. Supp. at 1462.

[57] *Id.* at 1462-63.

[58] ACLU of Nev. v. City of Las Vegas, 466 F. 3d 784, 799 (9th Cir. 2006).

[59] *Id.*

[60] The language used for the First Amendment analysis of the solicitation ordinance is slightly different than the language used for the Equal Protection analysis of the tabling ordinance. Other than the language used, there does not seem to be much of a notable distinction between the two.

ordinance would have to be "finely tailored to serve the substantial [government] interests" in order to pass constitutional muster.[61] The Ninth Circuit focused its analysis on a "labor-related" activities exception[62] to the tabling ordinance.[63] The court noted that ordinances with similar labor-related exceptions have been rejected by the United States Supreme Court.[64] In *Police Department of Chicago v. Mosley*, the Supreme Court held that a city ban on picketing near schools, which contained a labor-related exception, violated the plaintiffs' equal protection rights because "it describe[d] permissible picketing in terms of its subject matter."[65] In *Carey v. Brown*, the Supreme Court struck down a statute that banned the picketing of residences and also provided for a labor-related exception.[66] The central problem with the *Carey* statute was that it "'discriminate[d] between lawful and unlawful conduct based upon the content of the demonstrator's communication.'"[67] In *ACLU*, the Ninth Circuit stated that these two cases were "directly on point" and that the "tabling ordinance, as applied to [p]laintiffs, violate[d] the Equal Protection Clause" for the same reasons as the statutes in *Mosley* and *Carey*.[68]

III. IMPLICATIONS OF THE DECISION

The Ninth Circuit correctly held that the Fremont Street Experience continues to be a public forum, where free speech activities can only be restricted by the government with sufficient justification.[69] In a well-reasoned opinion, the court expressed its concern that more public fora traditionally associated with speech activities have been transformed into privately owned commercial centers.[70] The opinion is replete with examples of a nation wide trend toward the privatization of traditionally

---

[61] *ACLU of Nev.*, 466 F.3d at 799.

[62] LAS VEGAS MUNICIPAL CODE § 11.68.100 ("Any conduct 'arguably protected' by the National Labor Relations Act is not included in [section 11.68.100's] prohibitions until or unless such conduct is determined to be unprotected pursuant to a decision of the National Labor Relations Board.").

[63] *ACLU of Nev.*, 466 F.3d at 799-800.

[64] *Id.* at 800. *See generally* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972); Carey v. Brown, 447 U.S. 455 (1980).

[65] *Mosley*, 408 U.S. at 95.

[66] *Carey*, 447 U.S. at 460-61.

[67] ACLU of Nev. v. City of Las Vegas, 466 F.3d 784, 800 (9th Cir. 2006) (quoting *Carey*, 447 U.S. at 460-61).

[68] *ACLU of Nev.*, 466 F. 3d at 800.

[69] *Id.* at 789-90.

[70] *Id.* at 791.

public places.[71] Commercial development and revival may be good for the economic well-being of cities across the nation, but the key is also to preserve the First Amendment in places traditionally associated with free speech.

In announcing that the erection of tables may constitute expressive activity, the Ninth Circuit decided an issue of first impression.[72] It is interesting to note that the conflict between what constitutes "conduct" and "expressive activity" continues to work itself out in the circuit courts. In this case, the Ninth Circuit added to the discussion in holding that setting up tables in a public forum, provided they are so placed as a means of disseminating protected speech, constitutes expressive activity under the First Amendment.[73] In *ACLU*, the Ninth Circuit correctly decided that such expressive activity is deserving of First Amendment protection, an issue its sister circuits are sure to face in the future. The case presents a great opportunity to help preserve the First Amendment's protections in the public forum.

CHRISTOPHER DONEWALD*

---

[71] *Id.*

[72] *Id.* at 798-99.

[73] ACLU of Nev. v. City of Las Vegas, 466 F.3d 784, 799 (9th Cir. 2006).

* J.D. Candidate, 2007, Golden Gate University School of Law, San Francisco, CA; B.S. Justice Studies, 2003, Arizona State University, Tempe, AZ; B.A. History, 2003, Arizona State University, Tempe, AZ. Associate Editor, Golden Gate University Law Review. Dedicated to the memory of my grandmother, F. Eileen Donewald.