MEMORANDUM

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GOVERNMENT CENSORING CHRISTIAN SPEECH

"Congress shall make no law . . . abridging the freedom of speech." U.S. Const., amend. I. While the right to free speech is seemingly sacrosanct in our society, the right of religious speech, especially for Christians, is often unconstitutionally restricted under the guise of separation of church and state. The ACLJ continues to defend the right to religious speech against government censorship.

CHRISTIAN SPEECH GENERALLY

The First Amendment to the United States Constitution prohibits the government from "abridging the freedom of speech." U.S. Const., amend. I. The right of "freedom of speech," also called "free speech," applies to state and local governments through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Lovell v. Griffin*, 303 U.S. 444, 450 (1938). The government may not suppress or exclude the speech of private parties for the sole reason that the speech is religious. *Shurtleff v. City of Bos.*, 142 S. Ct. 1583, 1593 (2022); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

As the Supreme Court has explained:

> [P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. . . . Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Pinette, 515 U.S. at 760. The "First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384 (1993) (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

The First Amendment's prohibition on viewpoint discrimination applies to government facilities and funds as well as to laws and ordinances. For example, the First Amendment prohibits the government from denying religious groups access to its facilities for expressive purposes due to the content of the group's message. *Lamb's Chapel*, 508 U.S. 384. As the Court noted, "the government violates the First Amendment when it denies access to a speaker *solely to suppress the point of view* he espouses . . . ." *Id.* at 394 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985)) (emphasis added).

Similarly, in *Rosenberger*, the Court held that the government may not deny funding to a religious group solely due to the viewpoint of its message. *Rosenberger*, 515 U.S. at 837. The Court noted that "[d]iscrimination against speech because of its message is presumed to be unconstitutional." *Id.* at 828. The Court also added, "the government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression." *Id.* The Court clearly stated that "ideologically driven attempts to *suppress a particular point of view are presumptively unconstitutional in funding*, as in other contexts." *Id.* at 830 (emphasis added). Moreover, the Court added, that the scarcity of public money "cannot justify [government] viewpoint discrimination among private speakers." *Id.* at 835. Likewise, the government may not exclude an otherwise eligible entity from a government program just because the entity is religious. *Trinity Lutheran Church v. Comer*, 582 U.S. ___, 137 S. Ct. 2012 (2017). *See also*, *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) ("A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.")

PERMITTED RESTRICTIONS

Streets, sidewalks and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). The ability of the state to censor expressive activity in these traditional public forum-streets, sidewalks, and public parks is "sharply circumscribed." *Perry Educ. Ass'n v.*

Perry Local Educator's Ass'n, 460 U.S. 37, 45 (1983). But not all public places are a traditional public forum. The government must control a traditional public forum. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019). So, for example, a privately owned shopping mall is not a traditional public forum. *Hudgens v. NLRB*, 424 U.S. 507 (1976).

However, religious and non-religious speech can still be restricted in a traditional public forum, if the restriction is reasonable as to the time, place, and manner. A three part test governs this inquiry:

> [E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided that the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

For example, a city may enforce a rule against obstructing passage on a public sidewalk or against excessive noise. The right to engage in expressive activities in public places is not an absolute right and "must be exercised in . . . peace and good order." *Hague* at 516.

The distribution of tracts has been held, unlike other activities such as oral solicitations for money or business, to be an unobtrusive form of communication. *United States v. Kokinda,* 497 U.S. 720, 733–34 (1990).Thus, even though Christians are free to witness and distribute Gospel tracts in public streets and parks, permits may sometimes be required for large crowd generating entertainment activities or where amplification is used.

However, because rights to freedom of speech, press, and assembly are supremely precious, even such laws as those barring obstructions or excessive noise are closely reviewed by courts to ensure that "in the guise of regulation" the government does not seek to "abridge or deny" such rights. *Id.* A restriction will be considered narrowly tailored only if it has "target[ed] and eliminate[d] no more than the exact source of the 'evil' it [sought] to remedy." *Frisby v. Schultz*, 487 U.S. 485 (1988). In other words, regulations must further a "substantial government interest that would be achieved less effectively absent the regulation," but it cannot "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799.

CHRISTIAN SPEECH AND THE ESTABLISHMENT CLAUSE

The Supreme Court has repeatedly held that the Establishment Clause neither requires nor allows government hostility toward religion. *Rosenberger*, 515 U.S. at 819; *Lamb's Chapel*, 508 U.S. at 395; *Widmar*, 454 U.S. at 263. The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) shows how the government must approach religious free speech rights. Kennedy was a high school football coach who prayed after every game. The School District forbade him to do so because, it rationalized, permitting him to do so would be a violation of the Establishment Clause. The Supreme Court rejected this argument:

> Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination.

Id. at 2433 (Coach Kennedy was an employee of the School District so the government had even more leeway than it would in a traditional public forum.)

Conclusion

In sum, witnessing activities, such as preaching, singing, etc. in traditional public forums, and Gospel tract distribution are protected First Amendment activities. Any restrictions on these activities must be content-neutral and reasonable as to the time, place, and manner. Furthermore, the Constitution demands that government accommodate religion and forbids government from being its adversary.

Previously, religious speech had often been given second class status in the name of avoiding an Establishment Clause violation. The Supreme Court has explicitly rejected both a second class status for religious speech and a duty to ferret it out in government controlled forums. Religious speech is now protected to the same degree as all speech is.

The ACLJ is in the vanguard of the fight against these distortions of one our most precious freedoms. ACLJ attorneys work constantly to ensure that the right to free speech remains secure even when the speech concerns currently disfavored viewpoints on subjects like religion and abortion.

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